

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

) 2018-CP-26-06416

Julie Irving,

Plaintiff,

vs.

Jeanne Poafpybitty,
Personal Representative
Of The Estate Of Donald
M. Rothgeb,

AND

Jeanne Poafpybitty,
Donald Matthew Rothgeb,
And Steven Taylor
Rothgeb,

Defendants.

Transcript of Record

JANUARY 22, 2020

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SC Court of Appeals

B E F O R E:

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Clifford H. Tall, Esquire
Attorney for Plaintiff

Reese R. Boyd, III, Esquire
Bret H. Davis, Esquire
Attorneys for Defendant Poafpybitty and the Estate of Donald
M. Rothgeb

Sallie Beth Todd
Circuit Court Reporter

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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(THERE WERE NO WITNESSES CALLED DURING THIS HEARING.)

Certificate of Court Reporter 149

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>	<u>PAGE</u>
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(THERE WERE NO EXHIBITS MARKED DURING THIS HEARING.)

1 **THE COURT:** All right. Are we ready?

2 **MR. TALL:** Your Honor, if I may? A point of procedure --

3 -

4 **THE COURT:** Okay. First, let me go ahead and put this on
5 the record. This is case 2018-CP-26-6416, Jeanne Poafpybitty

6 ---

7 **MR. BOYD:** Poafpybitty, Your Honor.

8 **THE COURT:** Poafpybitty, Personal Representative of the
9 Estate of Donald M. Rothgeb, R-O-T-H-G-E-B, versus Julie
10 Irving. The matter is before the Court on an appeal from the
11 Probate Court. Please give the court reporter your names and
12 who you represent.

13 **MR. BOYD:** Your Honor, Reese Boyd along with Bret Davis.
14 Reese Boyd and Bret Davis representing the appellant, the
15 personal representative of the estate, Jeanne Poafpybitty.

16 **THE COURT:** All right.

17 **MR. TALL:** Clifford Tall representing Ms. Julie Irving.

18 **THE COURT:** All right. And the appellant is Jeanne
19 Poafpybitty; correct?

20 **MR. TALL:** Yes, Your Honor.

21 **MR. BOYD:** Yes, Your Honor.

22 **THE COURT:** All right. Anything preliminary before we
23 get started?

24 **MR. TALL:** Your Honor, we have a probate code that tells
25 us the appeal must be strictly on the basis of things that

1 were presented at trial. The brief made reference in three
2 situations to new material. I can bring it up now, or if Your
3 Honor prefers, when this is addressed by these gentlemen, I
4 can bring it up then.

5 **THE COURT:** Well, no I mean I think I agree with you. As
6 I look, basically my standard is if there are issues of law,
7 then I simply look to see if there is any evidence that
8 supports the Probate Judge's decision. If it is an issue of
9 equity, then I can make my own finding based upon a
10 preponderance of the evidence. But I think it is still
11 limited to what was presented in the Probate Court.

12 **MR. BOYD:** I agree.

13 **THE COURT:** All right.

14 **MR. TALL:** When it comes up or if it comes up, I can tell
15 you about them now or when it comes up, I would raise the
16 objection.

17 **THE COURT:** Well, which would you be easier?

18 **MR. TALL:** Talking about things as if they were new
19 evidence entered in ---

20 **THE COURT:** Okay. What is the evidentiary matters they
21 want to introduce?

22 **MR. TALL:** The Probate Court made reference to a filing
23 under oath at the Court. These gentlemen, after the trial,
24 want to tell us why that was a mistake and that someone made a
25 mistake wasn't presented in front of Judge Padgett.

1 **THE COURT:** What do you mean a filing?

2 **MR. TALL:** It was an accounting with the Court.

3 **THE COURT:** And it was not in front of the Probate Court
4 then?

5 **MR. TALL:** It was a Probate Court accounting that was
6 presented in front of Judge Padgett. Part of his ruling was
7 that Ms. Irving could look at the Probate Court filing, that
8 it wasn't the same as accountings that she was receiving.
9 We're talking about Ms. Irving having been the counterclaim
10 defendant and suggesting she had no reason to bring any of
11 these actions. So what we're having, not in front of the
12 Probate Court, but here on appeal, an explanation as to how
13 the Probate Court received an inaccurate accounting under
14 oath. If that was important it could have been presented at
15 trial. Why are we dealing with it at the present time?

16 **THE COURT:** So the ---

17 **MR. BOYD:** I'm not sure what he's referring to, Your
18 Honor.

19 **THE COURT:** He's saying that y'all are going to present
20 an accounting here that was not presented to the Probate
21 Judge.

22 **MR. BOYD:** We're not going to do that.

23 **MR. DAVIS:** We're not.

24 **MR. BOYD:** What is in the record is in the record, Your
25 Honor, we're not presenting anything new.

1 **MR. DAVIS:** I'm not sure what he's referring to.

2 **THE COURT:** Okay.

3 **MR. TALL:** And I can be specific and be happy to share
4 with you gentlemen.

5 **THE COURT:** Let's just wait and bring it up when they get
6 to it and then we'll ---

7 **MR. TALL:** Okay. And other situations there are
8 documents that have just been put into the record, they
9 weren't evidence at trial and they are all post-trial and
10 these gentlemen may want to rely on them as if they had been.
11 I've got the ---

12 **MR. DAVIS:** Are we talking about the Facebook posts?
13 Which ones are you referring to?

14 **THE COURT:** I think there's something about someone's
15 criminal record. There's something about an e-mail that took
16 place and something that you all claim is a Facebook post.

17 **MR. DAVIS:** Yes ---

18 **MR. TALL:** Judge Padgett has ruled that those are not
19 part of the record, they were not presented during trial.

20 **MR. DAVIS:** And we would bring that up before Your
21 Honor. Yes, we do have that issue to bring before Your Honor.

22 **THE COURT:** All right. Well go ahead and tell me what
23 allows you to present it now on appeal if it's not ---

24 **MR. DAVIS:** Well what we had, Your Honor, we had a trial
25 and then we had a ruling. And Mr. Tall's client posted

1 something on a public domain, on Facebook. And we contacted
2 the Probate Court, and the main elected Probate Judge, not the
3 Judge assigned to this case, who is an associate judge. The
4 main Probate Judge contacted all of the attorneys on her own
5 volition and asked to have a conference call based on this
6 very vulgar probate post -- or, or Facebook post that Mr.
7 Tall's client ---

8 **MR. TALL:** Allegedly posted.

9 **MR. DAVIS:** It's not allegedly. It's from her account.
10 It's clearly obvious that she posted it.

11 **MR. TALL:** Again, we don't have evidence of that. We
12 have Mr. Davis telling us it took place.

13 **MR. DAVIS:** The Probate -- the elected Probate Judge, on
14 her own volition, called a conference call, or requested a
15 conference call with the three of us, and -- to discuss this
16 Facebook post that was taking place. Mr. Tall forwarded the
17 e-mail ruling from Judge Padgett to his client. Judge Padgett
18 admonished him and said he should not have done that and then
19 the Judge ---

20 **THE COURT:** Wait a minute, he did what now?

21 **MR. DAVIS:** The Probate -- the associate Probate Judge
22 that ruled on this case, who is no longer a judge by the way,
23 sent an e-mail ruling, about a page long e-mail ruling. Mr.
24 Tall forwarded that to his client.

25 **THE COURT:** Okay.

1 **MR. DAVIS:** Verbatim. And then after she received that,
2 she posted a vulgar post about what happened on Facebook. We
3 brought that to the attention of the Probate Court. The
4 probate elected judge, Judge Ward ---

5 **MR. BOYD:** Chief Judge.

6 **MR. DAVIS:** Chief Judge stepped in and said I want to
7 take this back for a moment. She called for a conference call
8 between the three of us to discuss what was going on and we
9 talked at length. She had thought about at that time, and her
10 comment was maybe I will refer this to another county. It got
11 pretty gnarly, Your Honor. That post is a clear indication of
12 a few things that are very pertinent in this case, and that
13 was part of the Probate matter at that time and then it was
14 also part of our motion for reconsideration. And the other
15 part that he ---

16 **THE COURT:** So wait, so it was presented -- it went up on
17 a motion to reconsideration and then the Facebook post was
18 presented to the Judge on reconsideration?

19 **MR. DAVIS:** Prior to that, Your Honor. It was presented
20 to -- it was presented to the Court after the e-mail ruling,
21 but before the final written order.

22 **THE COURT:** Okay. And then after the written order there
23 was a motion for reconsideration.

24 **MR. DAVIS:** Yes, Your Honor. And it was discussed again
25 at length.

1 **THE COURT:** At length. And so the Judge that issued the
2 ruling had it in front of him or her; who was the Judge?

3 **MR. DAVIS:** Padgett.

4 **THE COURT:** Padgett.

5 **MR. DAVIS:** Yes, Your Honor.

6 **THE COURT:** Had it in front of him.

7 **MR. DAVIS:** Absolutely. And the main elected Judge.

8 **THE COURT:** And then denied the reconsideration.

9 **MR. DAVIS:** Yes, Your Honor.

10 **THE COURT:** Okay. Well if it was presented during a
11 reconsideration, why is it not available now?

12 **MR. DAVIS:** We believe it is, Your Honor.

13 **MR. TALL:** At the reconsideration that document, as well
14 as others that were just placed into the record by the motion
15 for reconsideration. There's no evidentiary presentation for
16 those matters. So we have an e-mail that was never presented
17 at trial attached to the motion for reconsideration.

18 **THE COURT:** Without being authenticated as evidence?

19 **MR. TALL:** That's right, Your Honor.

20 **MR. DAVIS:** Your Honor, that one was ---

21 **MR. TALL:** Wait, wait, wait. Hold on a moment. We're
22 having a conversation.

23 **MR. DAVIS:** --- are we doing them one at a time or are we
24 doing all three of them at one time?

25 **THE COURT:** Okay. If it was not authenticated and

1 admitted into evidence during the probate trial, then it's not
2 admissible on review.

3 **MR. DAVIS:** Okay. And I -- certainly, Your Honor, I
4 understand that.

5 **THE COURT:** All right.

6 **MR. DAVIS:** Let me tell you what was done, and you see if
7 this is -- I think it's consistent with what you're saying.
8 It was read during testimony. The e-mail was read during a
9 person's -- a sworn testimony during the trial.

10 **THE COURT:** During the trial of the case?

11 **MR. DAVIS:** During the trial of the case the e-mail was
12 read out loud during the trial.

13 **THE COURT:** Okay. Well if it was -- if it was admitted
14 into evidence as testimony, then you can recite what it says
15 unless there was an objection and the Probate Judge ruled that
16 it was inadmissible.

17 **MR. DAVIS:** There was no objection, just the paper itself
18 was not admitted, and he's correct. But the content was read
19 ---

20 **MR. TALL:** I don't have a problem if they want to refer
21 to testimony, Your Honor ---

22 **THE COURT:** Yeah.

23 **MR. TALL:** --- it's in the record. No authentication for
24 somebody that was convicted of a crime, that was thrown in
25 there.

1 **THE COURT:** Okay. That's fine. Yeah.

2 **MR. TALL:** And no authentication of anybody posting
3 something on Facebook.

4 **THE COURT:** Yeah. If it was not presented as evidence
5 before the Probate Judge and ruled upon by the Probate Judge,
6 then you can't get it here.

7 **MR. DAVIS:** So the e-mail I guess we would -- so you're
8 saying we would just rely on the transcript of the testimony -
9 --

10 **THE COURT:** Right.

11 **MR. DAVIS:** --- for the content of that e-mail.

12 **THE COURT:** That's correct.

13 **MR. DAVIS:** No problem, Your Honor. I understand that.

14 **THE COURT:** Yeah.

15 **MR. DAVIS:** The other item was during the trial it was
16 discussed at length that one of the beneficiaries had had a
17 long drug and criminal record. That's clearly in the --
18 multiple times in testimony.

19 **MR. TALL:** Again, I don't have a problem with talking
20 about testimony, Your Honor, but you take records that are not
21 authenticated that look as though they come from Horry
22 County, and you stuff it in without it being presented at
23 trial, I've got a problem with that.

24 **MR. DAVIS:** Well, let me tell you what we did, Your
25 Honor. We searched the Maryland records, public records, just

1 on the internet to get the criminal record of this individual,
2 and the Horry County Public Record Index.

3 **THE COURT:** This was subsequent to the ruling?

4 **MR. DAVIS:** This was part of our motion -- our memorandum
5 in support of our motion for reconsideration. We show --
6 during the trial it was pointed out by more than one witness
7 that this beneficiary had had a long criminal record.

8 **THE COURT:** Yeah.

9 **MR. DAVIS:** And what we did is we supplemented that with
10 a public record index.

11 **THE COURT:** If it's not authenticated and introduced into
12 evidence in the Probate Court, it's not ---

13 **MR. DAVIS:** Okay.

14 **THE COURT:** --- unless you're arguing -- unless you're
15 arguing that the Probate Judge denied it's admissibility when
16 it was admissible evidence.

17 **MR. DAVIS:** No. I mean, the -- I understand. The record
18 was clear. It was obvious that he had a long criminal record,
19 and that's fine. If the Court does not want to allow us to
20 have the actual public index search paper, that's fine.

21 **THE COURT:** Yeah. If that was -- if that search paper
22 was not introduced into evidence in a contested Probate Court
23 hearing and either admitted or denied admission as evidence,
24 you can't bring it up for the first time on this appeal.

25 **MR. DAVIS:** No problem, Your Honor. I completely

1 understand. We got the information in testimony so we're
2 comfortable with that. The Facebook post, that was something
3 that actually was brought up by the elected Probate Judge and
4 I think that's clear. That's a public domain. She brought it
5 up, it was part of the whole process. I don't see how we can
6 exclude that.

7 **THE COURT:** Well, are you appealing a decision she made?

8 **MR. DAVIS:** I'm appealing -- we're appealing the decision
9 that the associate Probate Judge made.

10 **THE COURT:** Okay. Well my review, as I understand my
11 standard of review is, I take what was presented to the Judge
12 that made the ruling.

13 **MR. TALL:** At trial, Your Honor.

14 **THE COURT:** At trial.

15 **MR. DAVIS:** Well that's a good point, Your Honor. I'm
16 sorry ---

17 **THE COURT:** And if what was presented to the Judge at
18 trial, if it's an issue of law and there's anything in there
19 that supports his decision then I have to affirm his decision.
20 If it's an issue of equity, I can view whatever was presented
21 to him at trial and draw my own conclusions by a preponderance
22 of the evidence. I can't consider anything that was not
23 presented to the Probate Judge.

24 **MR. DAVIS:** Well, let me help you here, Your Honor. Let
25 me help you. We have a -- as you'll see, this is a very

1 unusual case and you will understand why we have so many
2 hours, because we have a lot of yarn to untangle. It is
3 really bizarre as you will find out. We almost have, by
4 virtue of these orders, we almost have two cases. We have the
5 initial case, and we had a 45-page order from the initial
6 case. So we filed a motion -- we filed several extensive
7 communications between counsel and the Judge, prior to that we
8 also filed a formal motion for reconsideration. In that
9 motion for reconsideration the Judge -- he said, all motions
10 are denied. We're going to come back to that because Mr. Tall
11 assumed that his motion wasn't denied even though it says it
12 was. We actually sort of had another matter -- he came and
13 said in an e-mail all motions are denied. That ended up being
14 a 25-page order that Mr. Tall drafted. Twenty-five pages,
15 Your Honor, to say all motions are denied and we have -- what
16 happened is they went back and reverse engineered problems
17 with the trial, so we basically had two things. In our appeal
18 we mentioned both matters. We're appealing the initial order,
19 and we're appealing the later 25-page order on the motion for
20 reconsideration. The Facebook post was a very critical part,
21 essential part of the motion for reconsideration and it was
22 discussed at length during the motion for reconsideration. So
23 you have those ---

24 **THE COURT:** Presented to the Judge and shown to the Judge
25 and the Judge looked at it, at the Facebook post without

1 required -- so basically accepted that as part of the record?

2 **MR. DAVIS:** Yes. Yes. And the main elected Probate
3 judge did. So it is part of what we are appealing, Your
4 Honor. I understand about the public index search and about
5 the e-mail not being -- and that's fine, but the Facebook post
6 is incorporated and integrated into that second order.

7 **THE COURT:** So it's going to be ---

8 **MR. TALL:** In the second order the Judge said if this is.

9 **THE COURT:** Well let me look and see. We've got a very
10 voluminous record on appeal. Is it in that?

11 **MR. DAVIS:** Yes, Your Honor. It should -- oh, it's
12 definitely in there. And I -- I wish we didn't have to do it
13 but, Your Honor, I'm sorry we sent so much documents to you
14 but you will see as we go through this why we did it that way.

15 **THE COURT:** Well if it's on the record on appeal then I
16 can ---

17 **MR. BOYD:** Are you looking for the Facebook post, Your
18 Honor.

19 **THE COURT:** Yeah.

20 **MR. TALL:** Your Honor, it doesn't appear in the record
21 except for an e-mail that's forwarded to the Trial Court after
22 the trial took place by these gentlemen.

23 **THE COURT:** Wait a minute, let me -- who prepared the
24 record on appeal?

25 **MR. TALL:** The appellants.

1 **THE COURT:** Okay. Let me go back. Is it in the return
2 from the Probate Court?

3 **MR. DAVIS:** It should be, Your Honor. That ---

4 **THE COURT:** All right. Let me look.

5 **MR. DAVIS:** -- we can't speak with any authority because
6 we don't know exactly what they did, but I understand they
7 sent the whole case to you.

8 **THE COURT:** Well, let me look and see if it's in the
9 return from the Probate Court.

10 **MR. TALL:** Your Honor, it's in the return. It's the
11 Court saying this is what we received after trial by
12 appellant's counsel.

13 **THE COURT:** Well but still. You can still make the same
14 argument as you made at your motion for reconsideration, but
15 if it's in the record on appeal -- I mean, on the return from
16 the Probate Court, then I think I can consider it.

17 **MR. TALL:** Okay.

18 **THE COURT:** You can still argue that it shouldn't be
19 considered or whatever, but I can't rule as a matter of law
20 it's excluded if it's in this. And y'all are going to have to
21 wait, it's pretty voluminous. It's going to take me a pretty
22 good while.

23 **MR. BOYD:** It should be in here, Your Honor. If you will
24 bear with me, I will locate it.

25 **THE COURT:** Not on your record of appeal that you

1 prepared, but on the return form the Probate Court.

2 **MR. TALL:** Your Honor, if that's driven by dates, it
3 would have been in June of 2018.

4 **THE COURT:** Well see it was all filed, e-filed the same
5 date. So all I've got is that the return was all filed on
6 December 27th.

7 **MR. BOYD:** If it helps Your Honor, it was Exhibit J to
8 the personal representative's exhibits in support of the
9 memorandum or exhibits to the memorandum in support of the
10 motion for reconsideration.

11 **THE COURT:** See it's not set up this way. All I have got
12 is one, two, three, four, five, six, seven filings on December
13 27th, 2018 titled Return from Probate Court.

14 **MR. DAVIS:** If you see anything in there from us titled
15 Memorandum in support of our motion for reconsideration, it
16 should be attached to that document.

17 **THE COURT:** That doesn't matter.

18 **MR. DAVIS:** It doesn't matter.

19 **THE COURT:** No. It doesn't matter whether it appears in
20 anything that you produced as far as a record on appeal, a
21 memorandum, a motion to reconsider, anything like that. I am
22 limited to the return from the Probate Court as to what the
23 Probate Court considered.

24 **MR. DAVIS:** That's what I'm saying. As you scroll
25 through it, I'm saying it you ---

1 **THE COURT:** Oh, well this is thousands and thousands and
2 thousands of pages. So all I've seen now is some transcripts.

3 **MR. DAVIS:** If you -- in the -- what you've got in the
4 return, if you see our memorandum then that's where it will
5 be.

6 **MR. BOYD:** It should be in the last portion of the
7 record, Your Honor, the last portion of return would be my ---

8 **MR. DAVIS:** I'm not sure if your computer system will
9 allow you to search that document or not.

10 **THE COURT:** No. I'm having to scroll down and so far,
11 like this one filing here looks like to be a thousand and
12 something pages. Well I'm not going to be able to find
13 through this. It's going to take me hours just to go through
14 this. All right. So let's go ahead and get started. I'll
15 just make a decision when it comes up and I'll have to jot it
16 and then look back to see through whether it's on the record
17 on appeal -- I mean, not the record on appeal, but on the
18 return from the Probate Court. If it is not in the return
19 from the Probate Court, then I'm not going to consider it.
20 All right.

21 **MR. DAVIS:** Yes, Your Honor. That's an acceptable
22 course.

23 **THE COURT:** All right. So what do we want to do first?
24 Who wants to go for the appellant?

25 **MR. BOYD:** I'll start, Your Honor. If you'll bear with

1 me.

2 **MR. DAVIS:** One little matter of housekeeping, Your
3 Honor. Mr. Boyd has got all of the arguments except for one,
4 argument number seven, issue number seven, I've got that one.
5 I'm sorry, section four, issue four.

6 **THE COURT:** I don't under -- where are you -- what is
7 argument seven, section four?

8 **MR. BOYD:** Our brief is divided -- there's an appellant's
9 brief, Your Honor, it's got approximately nine sections in it
10 that are set forth and this is the appellant's brief dated
11 January 25, 2019, Your Honor.

12 **MR. DAVIS:** The fourth -- the fourth issue is the one
13 that I was going to ---

14 **THE COURT:** Appellant brief, got it right here. Well I
15 thought I had it. It looks like my computer has frozen up
16 again.

17 **MR. TALL:** I have a clean copy, Your Honor, if I could --
18 -

19 **THE COURT:** Let me try to bring it up one more time.

20 **MR. BOYD:** And I've got a ---

21 **THE CLERK:** The initial appellant brief?

22 **MR. BOYD:** Yes, ma'am. Yes, ma'am.

23 **THE COURT:** I've got it.

24 **THE CLERK:** You've got it.

25 **THE COURT:** I've got it right here. Initial brief of

1 respondent plaintiff.

2 **MR. BOYD:** That's correct, Your Honor. It should be
3 dated January 25.

4 **THE COURT:** Well let me go to the end and see the date.
5 When was it filed?

6 **MR. BOYD:** The file stamp on the right, Your Honor, is
7 January 25 and the document itself is dated -- the document
8 itself is also dated January 25, Your Honor.

9 **THE COURT:** Initial brief of appellant, Jeanne
10 Poafpybitty.

11 **MR. BOYD:** Poafpybitty, yes, Your Honor.

12 **THE COURT:** All right.

13 **MR. TALL:** Your Honor, would you consider a brief
14 argument from both sides, or do you just prefer the
15 appellant's move forward?

16 **THE COURT:** Well, ya'll know more about it. You tell me
17 what's the best way to do.

18 **MR. TALL:** I think I'm not going to be heard from for
19 about four hours, so if I can give three minutes of our
20 position in response to three minutes from these gentlemen, I
21 think that might be helpful.

22 **THE COURT:** All right. What is ---

23 **MR. DAVIS:** Your Honor, I think that would -- that would
24 -- I think that's going to prolong this matter. Some things
25 that we can kind of get some continuity in our argument that's

1 all kind of related to the same types of stuff instead of
2 jockeying back and forth on these things. If something comes
3 up that's objectionable, we'll certainly be, you know ---

4 **MR. BOYD:** I didn't prepare a mini opening, Your Honor,
5 and the appellant ---

6 **THE COURT:** Well if you want to get started, get started,
7 but I can tell you I have no idea what this case even
8 involves. So if you want to start your argument without even
9 letting the Court know what it involves.

10 **MR. BOYD:** I was going to give Your Honor a little bit of
11 a factual background.

12 **THE COURT:** Well that's what he's saying, a little bit of
13 a factual and let him respond and then we'll get into the
14 appeal.

15 **MR. BOYD:** Okay.

16 **THE COURT:** All right.

17 **MR. BOYD:** Good morning, Your Honor. May it please the
18 Court? Again, Your Honor, I'm Reese Boyd, along with Bret
19 Davis, we represent the appellant Jeanne Poafpybitty in this
20 matter. I will briefly address the factual background of the
21 case and I'm also going to address some of the high-level
22 legal arguments that we raise in our briefing, Your Honor.
23 Mr. Davis is going to address some of the more fact specific
24 concerns that are raised in section four of appellant's brief,
25 which is in front of you. Very briefly, Your Honor, this

1 matter is an appeal the Circuit -- to the Circuit Court from
2 the Horry County Probate Court. It involves the estate of
3 Donald Rothgeb. The appellant Jeanne Poafpybitty served as
4 the personal representative of the estate of Doctor Rothgeb,
5 which is her late husband. Ms. Poafpybitty was the second
6 wife of the decedent. Doctor Rothgeb brought three children
7 into the marriage and together our client, the PR, Ms.
8 Poafpybitty and the three children are four beneficiaries of
9 the estate. Each of the beneficiaries of the estate were to
10 receive in Doctor Rothgeb's will an approximately equal one-
11 quarter interest in the estate. In this case, Your Honor,
12 there was a dispute that arose between the PR, Jeanne
13 Poafpybitty, and the beneficiaries, and in particular one
14 disgruntled beneficiary, Julie Irving, the daughter of Doctor
15 Rothgeb. Ms. Irving is the plaintiff in the case below. She
16 brought the petition that brough rise to this litigation and
17 ultimately this appeal.

18 Your Honor briefly discussed earlier the standard of
19 review. I want to review with Your Honor briefly the
20 standard, I direct you to page four and five of our brief.
21 Essentially the claims at issue in this case primarily are

22 equitable in nature. We believe that this Court is free to
23 reach its own findings of fact consistent with your view of
24 the preponderance of the evidence. Your Honor, I think this
25 case as clearly as any case I've ever litigated, asks the

1 Court to determine if the testator's intent is to continue to
2 be a guidepost for estate administration in South Carolina.
3 Are we going to follow the testator's intent as it is set
4 forth in the will where we have a good valid will, which we do
5 in this case? Or alternatively, which I think are the
6 ramifications of this ruling from the Trial Court below,
7 alternatively are we going to treat each estate like a
8 democracy, where if a majority of beneficiaries vote to go a
9 particular way, then that becomes the rule of the case. I
10 don't think that's what the law implies. I don't think that's
11 a practical result. I don't think that is a realistic rule
12 that will further the interest of anyone. And in short, Your
13 Honor, it's not a workable standard, but that's the standard
14 that this Court has adopted. It's frankly a question, Your
15 Honor, do we allow the inmates to run the asylum or is there a
16 job for the personal representative to do? It is well settled
17 law in this county -- in this state, in South Carolina that
18 the guidepost of estate administration is the testator's
19 intent, Your Honor. Ascertaining the testator's intent in a
20 valid will and giving effect to that intent is the primary
21 objective of the personal representative. And this case
22 unfortunately, Your Honor, turns that rule on its head. If
23 this ruling stands, the ruling below of the Trial Court
24 directs beneficiaries to take charge, vote out the PR, and
25 vote out any provision of the will that they don't like. I

1 mean, that's the affective result.

2 As I mentioned, Your Honor, this case involves a family,
3 that like many families today is a blended family. This was a
4 second marriage and Doctor Rothgeb brought three children into
5 the marriage. They were married in 1989, so they were married
6 for 25-years by the time the decedent passed. But they had
7 been in a relationship, Your Honor, that dated all the way
8 back to 1978. So this was not a short-term relationship. The
9 three children that Doctor Rothgeb brough into the marriage,
10 by all testimony in the trial, Jeanne Poafpybitty helped to
11 raise those children as if they were own -- as if they were
12 her own. There's no testimony at trial that she was anything
13 other than a fine mother. In 2014 Doctor Rothgeb passed away
14 with the four heirs at law, his wife Jeanne Poafpybitty of
15 approximately 25- years, and the three children from the
16 previous marriage. As we noted, Doctor Rothgeb left his will
17 through an estate that left the estate to each of the four
18 beneficiaries in approximate equal shares, but he appointed
19 his wife to serve as the personal representative, Your Honor.
20 And while the will left the division of the estate in
21 approximate equal shares to the four beneficiaries, it left

22 the actual determination of that division, Your Honor, to the
23 discretion of the personal representative. Now, Your Honor, I
24 never had the opportunity ---

25 **THE COURT:** Wait a minute. What do you mean it said it

1 left it in her discretion?

2 **MR. BOYD:** I'll show Your Honor, in the record, Your
3 Honor, in 4 (E) in the record on appeal is the will. And the
4 will says that Item IV, I give, devise, bequeath to Donald
5 Matthew, Julie Kristin Irving, Steven Taylor, and Jeanne
6 Poafpybitty, the four beneficiaries, in approximately equal
7 shares, all the rest, residue and remainder of my property of
8 every kind and description, absolutely and fee simple;
9 provided, however, that my personal representative shall have
10 the sole discretion to designate, sole discretion to
11 designate, the real or personal property comprising the
12 respective shares so established, so long as the value thereof
13 is approximately equal, approximately equal. If any of the
14 foregoing beneficiaries shall predecease me leaving -- then I
15 direct that the children of such predeceased beneficiaries
16 shall take, per stirpes, the share their parent would have
17 taken had they etcetera, etcetera, Your Honor, the
18 survivorship language. But that's the key, Your Honor, that
19 in essence is the case.

20 **THE COURT:** So what did the Probate Judge order?

21 **MR. BOYD:** Well our position is that he, he ignored that
22 will. When we first met with the Probate Judge, Your Honor,
23 we met with him in chambers and he said --

24 **THE COURT:** But how did he ignore it? What did his order
25 say?

1 **MR. BOYD:** His order directed that the property be parted
2 out in kind to each of the beneficiaries as one-quarter owners
3 of the property each in question. And that's not necessarily
4 a -- well it is a bad result for lots of reasons, Your Honor.
5 But most importantly it's not what the will said. It's not
6 what Doctor Rothgeb wanted. And there was no statutory basis,
7 no basis at all for reforming the will here. And so the
8 Probate Court impermissibly has ignored the clear intent of
9 the testator, he intended -- and I think it was very wise,
10 Your Honor. Doctor Rothgeb, in my estimation, foresaw the
11 very dispute that arose in this case, and he foresaw that it
12 would likely be difficult to get these four individuals to
13 agree on anything. That historically has certainly meted out.
14 So he included -- this is not -- I don't see this provision
15 every day, Mr. Davis and I do a lot of this work, I don't see
16 this type of provision. We didn't draft this will, but I
17 don't see this type of provision routinely. I think there's a
18 reason the provision was there. I think Doctor Rothgeb
19 foresaw this very dispute, and I think he put that provision
20 in there. And frankly, Your Honor, we wouldn't be here today,
21 we wouldn't be having this discussion if the Probate Court had
22 just done its statutory obligation and given effect to the
23 clear and unambiguous terms of the will.

24 **THE COURT:** So in other words, Julie Irving just
25 disagreed with Ms. Poafpybitty's ---

1 **MR. BOYD:** That's exactly right.

2 **THE COURT:** --- split up.

3 **MR. BOYD:** That's exactly ---

4 **THE COURT:** And was that split up in approximately equal
5 values?

6 **MR. BOYD:** There was -- there was quibbling, Your Honor,
7 about there's a whole lot of stuff we can discuss about
8 appraised values and what was appraised. But in essence, Your
9 Honor, what this case amounted to is Julie Irving did not like
10 the fact that the PR had discretion to mete out the properties
11 as she saw fit.

12 **THE COURT:** As long as it's in approximate equal values.
13 If she's giving one child a \$15,000 diamond ring and giving
14 another child a \$5 fair token as a ring, that's not an
15 approximately equal value as that says. What caused the
16 argument? Was it one -- somebody getting more value wise?

17 **MR. BOYD:** At the very outset, Your Honor, there was a
18 disagreement over whether the PR prepared an inventory and
19 appraisement that was based upon the tax assessed values. The
20 estate -- the probate value of the estate was approximately \$1
21 million dollars and it consisted of approximately 12 rental
22 properties that were all in frankly, varying states of
23 disrepair. Many of them needed significant work in order to
24 be saleable. But the approximate value of the estate was
25 about a million dollars.

1 **THE COURT:** So each one was supposed to get approximately
2 \$250,000 in value.

3 **MR. BOYD:** Exactly.

4 **THE COURT:** And was -- was that the division?

5 **MR. BOYD:** It's our position, yes, Your Honor, there was.
6 The initial valuation was based on the tax assessed values of
7 the properties, which I think is very standard practice for
8 most probate practitioners. The first valuations that we
9 attempted to use were the tax assessed values. Then there was
10 discussion that resulted in some appraisals being done. The
11 beneficiaries retained counsel other than Mr. Tall. They
12 retained the initial counsel was Jack Scoville. Mr. Davis had
13 conversations with Mr. Scoville in ---

14 **MR. TALL:** Objection, Your Honor, this is all over the
15 place ---

16 **THE COURT:** That's all right. All right. Now, I've got
17 a hold of where we're going. Let me give Mr. Tall, if he
18 wants to make a brief statement.

19 **MR. DAVIS:** Can I make one supplemental thing there?

20 **THE COURT:** No. We're not going to have multiple
21 attorneys -- I'm just trying to get a hold of where we're

22 going from here.

23 All right. Mr. Tall, what is the position?

24 **MR. TALL:** Your Honor, I don't think you got an answer to
25 your question, what caused the argument. And the -- Judge

1 Padgett's order was criticized as not finding any bad faith,
2 not finding anything that Ms. Jeanne had done wrong. The
3 essence of this case is the personal representative using her
4 power and authority to sell deal, to improve her position.
5 Basically, we talk about a disgruntled beneficiary. There was
6 a time when there was a proposal for appraisals. I don't know
7 if the other side suggests that there was something
8 inappropriate about this, the appraisers went out, found Ms.
9 Jeanne's house to be worth \$95,000. Ms. Jeanne put together a
10 settlement proposal and put the \$95,000 -- you're going to
11 hear so much about how this was a great appraisal, how this
12 was the way that the case should have gone. This is what Ms.
13 Jeanne did with that appraisal. She spent \$27,000 of estate
14 money to improve and rehabilitate her residence and then tried
15 to receive it at the \$95,000 value. When Ms. Jeanne -- Ms.
16 Julie said, this doesn't make sense to me, we asked some
17 questions. Five weeks later we moved from \$95,000 to
18 \$118,000. Apparently, Ms. Jeanne was convinced that if she
19 spent estate money rehabilitating her residence, maybe that
20 ought to be part of her distribution. It went on further to
21 say, you know, we're all aware of this industry called house
22 flipping. You take a \$95,000 house, you put \$27 -- \$23,000
23 into it, and you get something a little larger in value. We
24 went to see Judge Padgett, went for a proposal to have a
25 mediation which was court ordered. It was canceled on very

1 spurious grounds. The whole idea was can you move from the
2 \$118 to what it actually is, court ordered we get an appraisal
3 at \$193. Mr. Davis tells the court, why don't we just have
4 the appraisers get into the courtroom and they can settle
5 this, bring their appraiser into court and low and behold we
6 find he wasn't asked to make an evaluation on the improved
7 property. Was at the residence to see that it was prepared,
8 was in court to testify. We have everybody anticipate that
9 maybe these two appraisers work everything out because
10 mediation was canceled that was court ordered, not by my
11 client. My client was coming down I-95 to participate from
12 Virginia when we heard we can't -- we're the ones that get to
13 call an impasse. We get an affidavit with double hearsay, my
14 lawyers says that they spoke to the mediator and the mediator
15 says that this will always be an impasse. So what we find is
16 that the court recognizing that Ms. Jeanne won't do her job,
17 one of the basic jobs to do is to value property ---

18 **THE COURT:** Okay. I've got the reason for the appeal
19 now. All right. Go ahead and present your case.

20 **MR. BOYD:** Thank you, Your Honor. And I would just point
21 out, you know, Mr. Tall in his brief summary there said many
22 things that were contested at trial. Your Honor, the initial
23 appraisal that was done by Ms. Irving was based upon -- it was
24 a drive-by appraisal, Your Honor. The appraiser drove by the
25 property, looked at it from the street and he testified to

1 that effect.

2 But this, Your Honor, is in essence the case, there's a
3 couple of nutshell views of what has happened here. This is
4 the central, in my estimation, Your Honor, if the Court had
5 simply don't its job and given Ms. Poafpybitty the discretion
6 that the testator intended for her to have, the trial would
7 not have gone as it did, we wouldn't be having this appeal.
8 That was the central error of the Trial Court in my
9 estimation, Your Honor. What the Trial Court did was to
10 reform the will without any authority to do so. And the
11 result, the result speaks for itself, Your Honor. The
12 testator, smart man apparently, I think he saw this dispute
13 coming and he put this language in the will for a reason, and
14 if the Court had just followed it, Your Honor, we wouldn't be
15 having this discussion. There's a reason the South Carolina
16 law gives a strong preference for giving effect to the
17 testator's intent, Your Honor. The testator is best
18 positioned and best situated to provide these instructions and
19 directions for the administration of their own estate. And
20 why do we have all of these provisions in the code that
21 provide for these formalities of execution and allow testators
22 to produce these instructions if they're simply going to be
23 ignored. It's not our suggestion that the Probate Court's are
24 not ever allowed to reform a will under certain circumstances,
25 Your Honor. But if you look there's specific statutory

1 provision in the probate code at 62-2-601 and it says the
2 intention of the testator controls the legal effect of the
3 testator's dispositions unless there's -- and the rules of
4 construction express in the code control unless there is a
5 contrary intention indicated by the will.

6 **THE COURT:** But it was a clear -- you agree that the
7 clear intention of the testator was that his estate was
8 basically to be divided among the beneficiaries in four equal
9 shares.

10 **MR. BOYD:** That is correct, Your Honor.

11 **THE COURT:** And so if you have a beneficiary that is
12 saying the personal representative is not dividing these in
13 four equal shares, then what is that beneficiaries recourse?

14 **MR. BOYD:** Well, Your Honor, I think the beneficiary's
15 recourse is to do what this beneficiary did, to seek redress
16 with the Court. However, I don't think -- the Court failed to
17 give the proper significance to Item IV of the will by
18 allowing -- first of all, substituting its own -- its own
19 wisdom for lack of a better word, in place of the testator's
20 intent.

21 **THE COURT:** But I mean, for the sake of argument ---

22 **MR. BOYD:** Yes.

23 **THE COURT:** --- let's just throw out a hypothetical that
24 your client did not equally divide the estate and was giving
25 herself 90 percent of the estate, then the beneficiaries they

1 contest it in the Probate Court. What authority does the
2 Probate Judge have to correct that error?

3 **MR. BOYD:** Well, Your Honor, he does have the ability to
4 make a correction to the extent that there is a proposed
5 distribution of assets that departs from the testator's
6 intent.

7 **THE COURT:** How does he do that? I mean, how do you do -
8 - he says, okay I'm going to take this out of your column and
9 give it to them, or I'm going to take this ring from you and
10 give it to them? How does the order -- how does the Probate
11 Judge issue an order that corrects that error?

12 **MR. BOYD:** I think that the Court can look at the values
13 on a proposal for distribution, Your Honor, and demand that
14 the PR submit an alternate -- an alternate proposal. If the
15 Court wants to say that this proposal for distribution doesn't
16 reflect an approximately equal one-quarter share for each
17 beneficiary, then the Court can say go back to the drawing
18 boards.

19 **THE COURT:** Okay. And if the personal representative --
20 you just keep going over, and over, and over until the Court
21 is satisfied with the personal representative's division?

22 **MR. BOYD:** I think -- that didn't happen here, Your
23 Honor. The -- what happened here is in my estimation there
24 was frustration by this disgruntled beneficiary that she was
25 not in charge and she began to second guess and arm chair

1 quarterback this personal representative and became, I don't
2 want to say an eggshell plaintiff, Your Honor, but she became
3 a beneficiary that could not be satisfied.

4 **THE COURT:** Okay.

5 **MR. BOYD:** And it seems as though whatever -- and yes, we
6 went back and there was -- there's no evidence that the PR
7 attempted to defraud beneficiaries of a reasonable share of
8 the estate in keeping with the testator's intent. And perhaps
9 that's what the Court should have done, Your Honor, kept
10 telling, kept directing the PR to go back to the drawing
11 boards if that was what needed to be done. But what happened
12 here is the Court made sweeping findings that were extremely
13 punitive against this PR and not justified by any applicable
14 legal standard. Your Honor, what this -- this Court dragged
15 this personal representative out to the woodshed and beat her
16 within an inch of her life. And that's simply -- now, yes, at
17 some point if you have to keep going back to the drawing
18 boards, and back to the drawing boards, and back to the
19 drawing boards at some point that might be appropriate, but it
20 wasn't appropriate here, Your Honor.

21 **THE COURT:** But I mean, was this a case of where the
22 personal representative filed a final accounting or a final
23 distribution and then it was challenged and the Probate Judge
24 says no I'm not approving this, or ---

25 **MR. BOYD:** There were multiple -- there were multiple

1 appraisals that were done, Your Honor ---

2 **THE COURT:** When you say appraisals, I understand there
3 were appraisals, but what did they go -- what was contested in
4 the Probate Court? What did they say these were not accurate
5 appraisals or ---

6 **MR. BOYD:** There were multiple proposals for distribution
7 that were prepared, Your Honor. And of course, Ms. Irving
8 wanted the beneficiaries -- the PR's share, the estate assets
9 that she would be receiving to be valued as high as possible,
10 and I get that frankly. But we tried multiple approaches to
11 the problem. We even went back at one point and suggested
12 that Ms. Irving -- the PR became so frustrated at one point,
13 Your Honor, she just said you know what, I don't even -- she'd
14 lived in the house for 30 years and she came in to out office
15 and she said you know what I don't even care about living in
16 the house. I'll move out. I'll go live in one of Donald's
17 condos. I mean, he had some fairly raggedy condos, but she
18 said I'll go -- I'll move out of the house that's been the
19 marital residence for 30 years, give it away. So we suggested
20 Mr. Tall, let Ms. Irving have the marital residence at the
21 value that she's been advocating and suddenly we were public
22 enemy number one, Your Honor, because that wasn't going to fly
23 I can assure you.

24 **THE COURT:** I guess the problem I'm having is at what
25 juncture did the Probate Court issue the order that's on

1 appeal?

2 **MR. BOYD:** There was ---

3 **MR. TALL:** After a two day trial, Your Honor.

4 **MR. BOYD:** --- yeah, there was ---

5 **THE COURT:** But what was the trial over?

6 **MR. BOYD:** The trial was over ---

7 **THE COURT:** Over a final distribution?

8 **MR. BOYD:** I'll try to give Your Honor a brief procedural
9 background if I may, Your Honor. At about one year into the
10 proceeding the beneficiaries became -- you know, Mr. Davis
11 handled the administration of the estate, perhaps I should let
12 him speak to some of these issues, Your Honor. At about -- at
13 exactly the one year anniversary of the decedents passing,
14 Your Honor, I don't know if the beneficiaries read something
15 online or they got some legal advise from somebody, I don't
16 know, but at the one year anniversary what had theretofore
17 been, I would say garden variety estate administration, became
18 a basket of worms for the PR and the firm trying to assist her
19 in administering her estate. The beneficiaries suddenly
20 determined on the first anniversary of Doctor Rothgeb's
21 ~~passing that the estate should be immediately closed and they~~
22 wanted the distribution done in the manner that Ms. Irving was
23 advocating and they weren't -- they weren't easily satisfied -
24 --

25 **MR. TALL:** Is it silly for me to object because that's

1 not what's there. There is a very polite letter at the one-
2 year mark that says can you give us some information.

3 **THE COURT:** Now, I'm going to give you an opportunity to
4 respond but I want to know what --

5 **MR. BOYD:** So the ---

6 **THE COURT:** --- got you into a two-day trial in the
7 Probate Court? Was it a complaint filed with the Probate
8 Court?

9 **MR. BOYD:** Yes.

10 **THE COURT:** Was it an objection to a final distribution
11 or what?

12 **MR. BOYD:** I will share that with Your Honor. The
13 relations between beneficiaries and estate began to sour and
14 sour promptly and the first anniversary of the preceding, Your
15 Honor. And Mr. Davis can speak to this in a little more
16 detail, but the estate bent over backwards to attempt to
17 resolve any disagreements, misunderstandings, etcetera between
18 the beneficiaries and the estate. At one point, as I
19 mentioned, Mr. Scoville in Georgetown was representing Ms.
20 Irving and Mr. Davis had conversations with Mr. Scoville about
21 coming to terms of the open items of dispute within the
22 estate. Mr. Davis, I think, at some point believed that he
23 and Mr. Scoville worked out and there was a letter that
24 identified the open issues. Ultimately, and I can go into
25 greater detail, the issues apparently did not get worked out.

1 In April of 2016 Mr. Tall filed a complaint on behalf of Julie
2 Irving, which was a complaint to secure fair and prompt
3 closure of estate administration.

4 **THE COURT:** And that's what resulted in the two-day
5 hearing in the Probate Court. Okay.

6 **MR. BOYD:** And when that was done, Your Honor, and
7 obviously everything kind of ground to a halt dealing with Mr.
8 Tall's litigation.

9 **THE COURT:** Okay.

10 **MR. BOYD:** And that ultimately resulted in the two-day
11 trial that's been referenced, the order, the initial order,
12 the initial order was followed -- lots of things came up, Your
13 Honor. We felt that there were multiple things about the
14 trial that needed to be reconsidered. Also, the initial
15 order, the initial ruling of the Probate Judge in the case
16 relied -- the only case he cited in his initial e-mail ruling
17 was the Court of Appeals opinion in the Brown vs. -- *Sullivan*
18 *versus Brown and Moses* case. That was the Kay estate. Well
19 after that decision from our Trial Court, the Court of Appeals
20 was actually reversed by the Supreme Court, and so we pointed
21 that out to the Judge in our motion for reconsideration

22 because we think one of the holdings is based on a flawed
23 reading of *Sullivan versus Brown and Moses*, that's in our
24 brief, Your Honor. So ultimately there were two orders, there
25 was the order that was issued initially after the two-day

1 trial with the Probate Court. We requested a reconsideration,
2 then the Judge issued essentially the e-mail ruling that said
3 all e-mail motions are denied. Mr. Tall responded to that
4 with his 45-page order. And so our appeal applies to both of
5 those orders, Your Honor.

6 **THE COURT:** All right.

7 **MR. BOYD:** So the complaint, Your Honor, I think
8 significantly was for essentially, Your Honor, it was
9 basically saying you're not going fast enough and we don't
10 disagree with what you're doing. And I would note for the
11 Court that the complaint that Mr. Tall filed did not seek a
12 finding of bad faith. It did not seek removal of the PR. It
13 just said that the PR would promptly file updated accounting
14 in connection with the remaining assets, less resources
15 required for reasonable administrative expenses. The assets
16 will be equally distributed unto the four equal beneficiaries.
17 The third item is that the personal representative not be
18 permitted to use estate resources to negotiate on her own
19 behalf. That was the third item.

20 **MR. TALL:** Shocking.

21 **MR. BOYD:** The fourth item was that the co-beneficiaries
22 would be ordered to mediate -- requested mediation. The
23 personal representative would make interim financial
24 distributions, they wanted an interim financial distribution
25 out of the estate. And then the plaintiff be reimbursed for

1 her attorney's fees, Your Honor. And significantly, there was
2 no request in that document for a finding of bad faith, Your
3 Honor. And nor was it even requested that the personal
4 representative be removed from office or that a special
5 administrator be appointed. And there are just a couple of
6 things that I will point out, Your Honor, in this complaint
7 this is page one of Mr. Tall's complaint from April of 2016.
8 In this complaint plaintiff maintains there is no good reason
9 for the estate to remain open. Well, Your Honor, again, these
10 beneficiaries the relationship began to go south with these
11 beneficiaries, at approximately the one-year anniversary of the
12 decedent's passing. Well in my experience handling many
13 probate matters, the first anniversary of the decedent's
14 estate, excuse me, of the -- the first anniversary of the
15 decedent's passing is about the first opportunity that an
16 estate administrator can begin to consider the process of
17 closing the estate to begin with. The creditor claims period
18 runs one year from the date of death or eight months from the
19 date of publication. So theoretically, you don't even really
20 start to think about closing an estate until -- particularly
21 an estate like this one where there were multiple real estate
22 assets and multiple assets that were in disrepair and were in
23 need of significant remedial and protective work, Your Honor.
24 And I would note that Mr. Tall made issue with the fact that
25 the PR did certain work to the marital residence. Your Honor,

1 there was testimony at trial from the personal representative
2 that there was actually rain pouring down into the inside of
3 the house. That the house was in substantial disrepair and it
4 wasn't in anybody's interest not to undertake some immediate
5 remedial work to the residence.

6 The complaint, Your Honor, further notes that plaintiff
7 asserts that Jeanne Poafpybitty, this is on page three of the
8 complaint, Your Honor, when it ultimately came to this
9 litigation. Plaintiff asserts that Jeanne Poafpybitty is much
10 too personally involved and besides there is ample opportunity
11 for four equal beneficiaries to work out the details among
12 themselves. And the problem, Your Honor, is that that's just
13 not what the will said. The plaintiff believes, this is on
14 page five, plaintiff believes that Jeanne Poafpybitty as a
15 one-quarter beneficiary should have no more voice than any
16 other one-quarter beneficiary in deciding how remaining assets
17 will be specially -- it says specially, I guess it means
18 specially distributed, among the equal beneficiaries. Your
19 Honor, the will specifically said that the discretion to
20 determine the actual distribution of assets was specifically
21 given to the personal representative in her discretion, so
22 long, as Your Honor Honor and I have discussed, so long as the
23 ultimate result was that the estate was distributed in
24 approximately equal shares. And so there wasn't a claim for
25 bad faith, Your Honor. There wasn't a claim to appoint a

1 special administrator. There wasn't a claim to remove the
2 personal representative from her position. In essence, in our
3 estimation, Your Honor, the complaint was one that we just
4 don't like the job that you're doing. We don't like the speed
5 with which it's being done. And we don't like the fact that
6 you have the discretion to make the decision. And, Your
7 Honor, unfortunately that's the way Doctor Rothgeb wanted it.
8 That's what his will says, Your Honor. And in our estimation,
9 the Court made its most significant error in simply refusing
10 to follow that provision of the will.

11 I will point out, Your Honor, on page 11 of the brief,
12 I'll try to move this along, that we address the Court of
13 Appeals decision of *McGirt versus Nelson*. The cardinal rule
14 of will construction is that the testator's intent should be
15 ascertained and followed unless it violates a well-established
16 rule of law. In *McGirt* the Court of Appeals specifically
17 noted that in ascertaining the testator's intent, the effect
18 must be given to every part of the will and again, I think
19 that's the essence of the Trial Court's mishandling of the
20 case below, Your Honor. And that's the central issue of the
21 case. And as I said, Your Honor, I mentioned this earlier,

22 there were numerous rental properties that were in this
23 estate, many in disrepair. Initially when the PR sought to
24 prepare and file accountings to administer the estate, she
25 sought to use the tax appraised values for the inventory and

1 appraisalment for the estate's accounting. Ms. Irving
2 objected. There was a series of back and forth discussions.
3 The one-year anniversary marked the turnaround, it resulted in
4 this complaint. At one point, Julie Irving the plaintiff
5 below, Your Honor, had a conversation with Mr. Davis the
6 estate's counsel, who was simply trying to assist the PR in
7 administering the estate and trying to determine what would
8 satisfy Ms. Irving. Ms. Irving surreptitiously recorded the
9 conversation. That conversation, that recording was played at
10 trial. But Your Honor, I think there was just more than ample
11 evidence, Your Honor, that this personal representative had
12 her hands full with a disgruntled beneficiary that could not
13 be satisfied, Your Honor. The evidence to the Court
14 established that the PR and the estate bent over backwards to
15 find some type of resolution that would be acceptable and that
16 simply never could be achieved, Your Honor.

17 Again, no allegation of bad faith in the complaint that
18 was brought. The language in the complaint suggests that it
19 is a complaint about the fact that we simply don't like the
20 way that the decisions in the estate are being made. Not only
21 is the complaint devoid, Your Honor, and this becomes
22 significant, not only is the complaint devoid of any
23 allegation of bad faith, it wasn't alleged in trial. There
24 was no discussion at trial of that issue, nor was there any
25 discussion at trial of the appointment of a special

1 administrator, the idea of appointing a special administrator,
2 Your Honor, did not even come up during the trial in the
3 Probate Court.

4 And I'd like to briefly, Your Honor, draw the Court's
5 attention to page 16 and 17 of the brief. And again, Your
6 Honor, I think that there are -- there is more than ample
7 evidence and basis in the record to support the notion that at
8 the trial that the estate was doing a more than reasonable
9 effort to find an accommodation that would satisfy Ms. Irving.
10 Ultimately, this complaint resulted in a two-day trial, in
11 which in our estimation, Your Honor, the Trial Court got it
12 completely wrong. The final order in the case was extremely
13 punitive against this PR. Again, Your Honor, if the Court
14 wanted to say this proposed distribution does not represent a
15 division of this estate into approximately one-quarter equal
16 shares, Your Honor, if that was the Trial Court's opinion,
17 Your Honor, I think that would have been a reasonable
18 resolution, but that's not what happened. The order of March
19 2nd, 2018, Your Honor, ordered -- ordered the personal
20 representative to pay rent -- I'm on page 16 in the brief,
21 Your Honor. Ordered the personal representative to pay rent

22 on the marital residence even though other estate
23 beneficiaries had been residing in estate properties.

24 **MR. TALL:** Pardon me?

25 **MR. BOYD:** Other estate beneficiaries had resided in

1 estate properties without paying rent, Your Honor.

2 **THE COURT:** This is on page 16 of your brief?

3 **MR. BOYD:** I'm on page 16 of the brief, Your Honor.

4 **THE COURT:** Oh, I see it. I see it. Okay. Go ahead.

5 **MR. BOYD:** On page 16.

6 **THE COURT:** Yeah. Right.

7 **MR. BOYD:** Turning to page 17, Your Honor, the Court
8 further ordered that all legal fees incurred by the personal
9 representative, including those incurred for the
10 administration of the estate after May 25, 2016, were to be
11 paid by the personal representative individually, Your Honor,
12 either personally or from her share of the estate. Your
13 Honor, there's simply no basis under the controlling case law
14 dealing with the ability of a PR to receive compensation for
15 attorney's fees. There is nothing about that provision of the
16 order that can stand. The personal -- the Court further
17 ordered that personal representative's commission would be
18 reduced from approximately \$39,000 to \$10,000. When you take
19 that order in conjunction with the other adjustments that the
20 Court made to the accounting in connection with its order,
21 Your Honor, what that affectively -- what the affective result
22 of that ruling was that the Court virtually eliminated the PR
23 commission in full for this personal representative. The
24 estate was ordered to pay legal fees for Julie Irving,
25 estimated at the time of this writing to be approximately

1 \$110,000 from the proceeds of the estate. So the overall
2 impact, and again, that's all from the Court's March 2nd, 2018
3 order. The overall impact of the Court's ruling in the
4 matter, Your Honor, was to reduce the effective value of the
5 personal representative's inheritance from her husband from
6 approximately \$250,000, Your Honor, to approximately \$100,000.
7 And, Your Honor, it by and large hinged on this determination
8 that the personal representative had acted in bad faith, which
9 not only was it not proven at trial, wasn't even alleged, Your
10 Honor. And as Mr. -- as was pointed out at trial, and has
11 been pointed out many times in proceedings that have led up to
12 this appeal, Ms. Poafpybitty as the spouse of Doctor Rothgeb,
13 Your Honor, she was entitled to an elective share. She could
14 have said I don't want one-quarter of this estate, I want one-
15 third of this estate, but she didn't do that, Your Honor. She
16 declined to do so because she sought to promote family unity
17 and avoid hard feelings according to her testimony and that's
18 at the bottom of page 18 of our brief, Your Honor. Point
19 being, to hear Mr. Tall speak, you would conclude that this PR
20 sought to harm the interest of everybody else in -- in favor
21 ~~of her own and that's just not who she was, Your Honor. She~~
22 could have filed an elective share, but she didn't. And
23 that's just one example of how she acted, not just in an
24 absence of bad faith, Your Honor, but in good faith.

25 The Court improperly ordered, Your Honor, and I think I

1 will focus on the attorney fee issue for a moment. The Court
2 improperly ordered the persona; representative, this is on
3 page 21 of our brief, to bear all of the estate's legal fees
4 without a sufficient finding of bad faith. And, I'm just
5 going to say one thing real quick and then I'll move on, if
6 any personal representative or a person nominated as PR
7 defends, prosecutes any proceeding in good faith whether
8 successful or not, he is entitled to receive from the estate
9 necessary expenses including reasonable attorneys fees.
10 That's 62-3-720, Your Honor. And I would argue that, Your
11 Honor, none of that was present in this case.

12 Also, want to point out, Your Honor, if I may on page 42
13 of our brief, there was some reliance by the Trial Court on
14 this notion that the personal representative failed to
15 adequately communicate with the personal -- with the
16 beneficiaries, Your Honor. During the trial, and this came
17 up, this is on, this is at, this is in the trial transcript
18 beginning at page 26 and continuing through page 35 of the
19 transcript. There was a lengthy discussion, Your Honor, of a
20 binder, it was literally a 3-ring notebook of the
21 communications between the estate, and the personal
22 representative, and the beneficiaries. And we offered to
23 introduce the entire binder into evidence but noted that it
24 might contain some documents that could have been
25 attorney/client privilege. And we offered to let the Judge

1 take that binder into chambers and review it and then we would
2 decide what portions of it should be excluded or entered into
3 evidence. The Court declined to do that, Your Honor, but the
4 -- and in fact, Your Honor, suggested what was simply not
5 true, Your Honor, just the communications that are in the
6 record establish that the personal representative did in fact
7 communicate with these beneficiaries and did so adequately,
8 Your Honor.

9 The Court erred again in appointing a special
10 administrator, Your Honor. No special administrator was ever
11 even requested in the pleadings, nor was it ever even
12 discussed in the -- in the proceeding. You can review the
13 transcript; the word does not even appear in the transcript of
14 the proceeding.

15 Finally, Your Honor, I'll address this point, the Court
16 in our estimation relied on the Court of Appeals decision in
17 the case of *Sullivan versus Brown and Moses*. That was the
18 only -- that's the only opinion, Your Honor, that's cited in
19 the initial ruling -- e-mail ruling from the Court and of
20 course, the Court of Appeals was overturned in that case, Your
21 Honor. And the interesting thing that the Court did that we

22 think is inappropriate is it relied on the common fund
23 doctrine in awarding the \$110,000 in attorney's fees to Julie
24 Irving. Unfortunately, Your Honor, as the Supreme Court makes
25 clear, there was no relationship between Mr. Tall and the

1 other beneficiaries and the efforts of Julie Irving in this
2 case, Your Honor, did not accrete a benefit to anybody. And I
3 think that's extremely significant in this case, Your Honor.
4 She's now, by virtue of this Trial Court's ruling, imposed an
5 additional \$110,000 in attorney's fees on this estate in
6 addition to the attorney's fees that the estate had already
7 incurred including multiple appraisals and multiple attempts
8 at inventories and appraisements that were done at her
9 insistence. So expenses were already on the increase by
10 virtue of Ms. Irving's demands because the Trial Court has
11 ruled in the manner that it has done, the estate now must bear
12 a burden of an additional \$110,000 in attorney's fees incurred
13 by Mr. Tall. The ultimate result, Your Honor, the math is
14 simple. I would remind the Court that this was only an estate
15 that was worth approximately a million dollars. The end
16 result is because all of this, ultimately everybody gets less,
17 not more. There is no common fund that's been created by this
18 litigation. This litigation has harmed everybody including
19 Julie Irving. And I believe Mr. Davis has a few points he
20 wants to briefly make, Your Honor.

21 **THE COURT:** All right.

22 **MR. DAVIS:** Your Honor, if it may please you, may I go to
23 the podium?

24 **THE COURT:** That will be fine.

25 **MR. DAVIS:** I want to straighten out some things, Your

1 Honor. Mr. Tall absolutely did not reflect accurate the
2 information to this Court about what happened and I'm going to
3 bring that to light right now.

4 Let me give you a little more clear, well not that he
5 wasn't clear, but a little more information or supplement the
6 information about what actually happened in this case. One
7 year after the administration, well prior to the year we had
8 countless communications about the estate administration. One
9 year after it, Ms. Irving the plaintiff in the case, got
10 unsettled or whatever and she wanted immediate distribution of
11 all of the properties. We said, well we've got a number of
12 rental properties and we're doing our best to get them
13 rehabbed. We've got mortgages on those properties, some of
14 which may need to be paid off based on the terms of the will.
15 They didn't like that information and we talked to them and we
16 said alright well we're doing the best that we know how to do.
17 So, they went and they hired Jack Scoville, all four of them.
18 One little note for future reference is only Ms. Irving hired
19 Mr. Tall not the other two children. But they went to see Mr.
20 Scoville and he called me as we have in testimony. I won't go
21 over the communications because I understand we may have some
22 hearsay issues. Mr. Scoville and I worked out an agreement
23 which was reduced to a letter. He sent a letter and said they
24 want these properties, and your client can have these
25 properties, and we're like okay. The personal representative

1 filed the inventory based on tax assessed values. We were
2 going to make the distributions based on the tax assessed
3 values, alright. Ms. Irving and her brothers wanted the
4 properties to be appraised for distribution purposes, not Ms.
5 Poafpybitty, and that's a critical important issue, Your
6 Honor, or point. It was their insistence, their suggestion
7 that the properties be appraised. So, Scoville, Mr. Scoville
8 and I work out a mutually agreed upon appraiser.

9 **MR. TALL:** That is hearsay, Your Honor.

10 **MR. DAVIS:** No, it's not.

11 **MR. TALL:** It's not in the record.

12 **MR. DAVIS:** It is in the record.

13 **THE COURT:** Overruled, I'll allow it. Go ahead. Go
14 ahead.

15 **MR. DAVIS:** He's absolutely incorrect. It is in the
16 record multiple times, multiple times. It is established, it
17 is corroborated.

18 **MR. TALL:** It is not in Mr. Scoville's letter and Mr.
19 Scoville ---

20 **THE COURT:** Listen, there's a return on appeal, I'm
21 going to have to go through it. You're saying it's not there;
22 you're saying it is there. Whoever is misleading the Court is
23 probably going to lose the appeal, so we'll find out.

24 **MR. TALL:** Thank you, Your Honor.

25 **MR. DAVIS:** It's absolutely there.

1 **THE COURT:** Okay.

2 **MR. DAVIS:** It's in the record, but anyway, we have a
3 mutually agreed upon appraiser, positively 100 percent a
4 mutually agreed upon appraiser. I know personally he was
5 mutually agreed upon. That mutually agreed upon appraiser who
6 was present to Mr. Scoville, who he approved, I don't know
7 what Mr. Tall is talking about.

8 **MR. TALL:** Absolutely ---

9 **THE COURT:** I'll give you an opportunity later, Mr. Tall.
10 Don't say anything else until I tell you it's your turn to
11 talk.

12 **MR. TALL:** Thank you, Your Honor.

13 **THE COURT:** Alright. Go ahead.

14 **MR. DAVIS:** One hundred percent, Your Honor, 100 percent
15 positive mutually agreed upon, no question in this earth, 100
16 percent. I know from personal experience. So, that mutually
17 agreed upon appraiser who we submitted to Mr. Scoville, who he
18 approved, went out and appraised all of the properties, all of
19 them at one time, all of the properties. We said this is the
20 basket of properties, go appraise them. He had no direction
21 on how to appraise any property. No property, don't appraise

22 this one this way, don't appraise that one -- nothing,
23 nothing. And it's in his testimony, the appraiser's
24 testimony. He didn't even, did not even know who was going to
25 get which piece of property. So, the appraiser, the mutually

1 agreed upon appraiser that they insisted on, Your Honor, they
2 insisted on an appraiser. We have a mutually agreed upon
3 appraiser that they wanted, not our client, she didn't suggest
4 it. He came back with all of the appraisals, did not know who
5 was going to get which piece of property. The residence that
6 Ms. Poafpybitty lived in for over 20 years was one she was
7 going to get. That was her residence. Normally a husband and
8 wife would have in their deed that it goes to the other, here
9 it didn't. It was still in the decedent's name, but it was
10 her residence for 20 years. That property had holes in the
11 roof, water was coming in, it had mold, it had all kind of
12 issues. The appraiser appraised that property and decreased
13 the value substantially because of the damage. Let me tell
14 you an interesting thing that Mr. Tall fails to tell you. Let
15 me tell you something very, very, very interesting. That
16 property went down when we had the repairs, it went down about
17 39 percent. Well, guess what? The property that Ms. Irving
18 choose to get went down 29 percent. The only thing that they
19 wanted to have reappraised was the residence. We're in
20 chambers with the Probate Judge. I said, Judge, that's fine.
21 If you don't like the appraisal ---

22 **MR. TALL:** Your Honor, that was not in the record. How
23 can I be silent while this is going on?

24 **THE COURT:** Okay. I note your objection. Overruled. Go
25 ahead.

1 **MR. DAVIS:** I said Probate Judge, that's fine. You can't
2 cherry pick one property with a drive by appraisal, the
3 appraiser rides by and says it's worth that, drove by and
4 didn't even go in the property. I said Judge, sure if they've
5 got a problem with the appraisal, we're in the judge's
6 chambers before the trial, and I said Your Honor, that's fine.
7 If they don't like the appraisals, we think they're fine, they
8 insisted on them. Let's get all of the properties reappraised
9 with Mr. Tall's appraiser so everything is relative, and he
10 didn't want to do that. I'm like, okay, this make no sense to
11 me. Why do you not want to get all -- if you don't like the
12 value, this is what they agreed on, their appraiser, but if
13 you don't like these values, fine. Let's get them all
14 reappraised so it's all relative.

15 One other thing that just, just really bothers me, Your
16 Honor. Mr. Tall says that the personal representative made
17 repairs to this property with estate funds and it wasn't until
18 Ms. Irving insisted that they include those in her share that
19 she didn't -- that's wrong. That's just flat dead wrong that
20 Ms. Poafpybitty never intended not to have the cost of those
21 ~~repairs as part of what she was going to get.~~ Never. We, my
22 office sent that information to Ms. Irving. I don't know what
23 he's talking about. And that information was sent to Ms.
24 Irving before she hired him, so she had that information. Mr.
25 Tall is putting forth a picture that is not accurate. The

1 same thing he did at the Probate Court level. Painting this
2 big audacious picture of some crazy, mean, evil woman and the
3 Judge was like oh my gosh, she must have been some crazy,
4 mean, evil woman. But none of it is grounded in the facts or
5 the testimony.

6 So, we've got this property and we've got a suggestion by
7 their counsel, let's get the properties reappraised for
8 distribution purposes. So, we're like okay. We did it. Well
9 guess what happened, Your Honor? We get all of the appraisals
10 back for the property. When they came back, me and Mr.
11 Scoville had a rapport and what I believe, worked out the
12 whole estate administration. Guess what happened when the
13 appraisals came back? We get a call from Ms. Irving. I'm
14 like Ms. Irving, why are you communicating with us, you have
15 counsel? I fired him. I'm like, what? Okay. So, what am I
16 supposed -- I'm like, what do you mean you fired him? We
17 fired him, we fired Mr. Scoville. And we no longer want what
18 we agreed to. I want everything in equal four shares.

19 **MR. TALL:** You'll not find any of this in the record,
20 Your Honor. This is all adlib.

21 **THE COURT:** And I'll, I'll take that into consideration
22 when I look through the record to see if it's in there.
23 Alright. Go ahead.

24 **MR. DAVIS:** It's going to be in the transcript -- it's
25 going to be in this call transcript that's in the record that

1 was recorded during the trial. So, I'm like -- and it's in
2 the e-mails that Ms. Irving, Ms. Irving sent e-mails to me
3 that's in the record. So, what are you saying about that Mr.
4 Tall?

5 **THE COURT:** Nope. You make your argument.

6 **MR. DAVIS:** Okay. And we have -- so that's in the
7 record, the e-mails from Ms. Irving that corroborates what I'm
8 saying. The call that we had is in the record, it was
9 actually played for the Judge, so that corroborates what I
10 had. So, I completely disagree with Mr. Tall.

11 So, Ms. Irving said that she fired, that her and her
12 brothers have fired their attorney and she no longer wants the
13 properties that they agreed to. That now she wants, she Ms.
14 Irving, wants the PR to deed all four properties in equal 25
15 percent shares to the beneficiaries. Do you know why, Judge?
16 Because then she, with her brother's other 25 percent, could
17 control the estate. This was about Ms. Irving wanting to
18 control this estate. So, I'm like, okay, why would you deed
19 all four -- all 10 or 12 properties to the four beneficiaries
20 equally? Bear in mind, Ms. Poafpybitty one of them was her
21 residence. So, I'm like, so now she's going to own her

22 residence with three other beneficiaries, one of which she
23 clearly doesn't get along with. And not to mention that, the
24 will specifically doesn't say that; it says just the opposite.
25 Matthew Rothgeb was living in another estate property which is

1 his residence and he was going to get that. So, now we want
2 all four beneficiaries to own Matt's residence with him?

3 **THE COURT:** This has already been argued y co-counsel, so
4 go ahead. I mean, you don't need to reargue what he's already
5 argued.

6 **MR. DAVIS:** Well, I'll sum up. Thank you, Your Honor.
7 That was a terrible idea to deed it all that way, plus it was
8 not required in the terms of the will. Seeing that this train
9 was about to go off the rails, I can tell that because I'm
10 getting these e-mails or letters fired at me from Ms. Irving
11 building a case. She had -- and the call will point that out,
12 which is clearly in the record. So, I send out communications
13 to her. I said Mr. Irving, let's have a meeting. I want a
14 meeting with Ms. Poafpybitty. I want a meeting with Irving.
15 And I want a meeting with the other two boys, Steven and Matt,
16 and we're going to resolve this estate. I'm not going to have
17 this; we're going to resolve it. What properties you want,
18 values, we'll talk about whatever, let's resolve this estate.
19 So, I get communications back as in the records, as in the
20 telephone transcript rather. They didn't want a meeting for
21 some reason. So, I'm like well how are we going to resolve
22 this? And I said let's at least do a conference call. So, I
23 end up with a conference call with Ms. Irving, just me and Ms.
24 Irving. I've got my probate paralegal in the office with me.
25 So, I'm in my conference room and I'm like alright, I'm

1 thinking to myself, Judge, I've been doing this a long time
2 and I'm normally pretty easy to find some common ground and
3 just say alright. And I'm going to tell my client, listen
4 let's just get done with this thing, we don't want to fight
5 about this because nobody wins if you fight about it. So, I'm
6 thinking if I talk with Ms. Irving I can strike some common
7 ground and we can just resolve this thing. Because the e-mail
8 that was read at trial that I'm talking about was an e-amil
9 from Steven, the other beneficiary, who said that he wanted to
10 go through with the agreement. That's the part that Mr. Tall
11 doesn't want introduced and I understand his legal ---

12 **MR. TALL:** I'm happy with whatever's in the record, Your
13 Honor.

14 **MR. DAVIS:** But that's the e-mail that we're referring to
15 where Steven mentioned that he wanted that property that they
16 agreed to with Mr. Scoville. So, I arranged this conference
17 call, we arranged it, my office arranged a conference call
18 with Ms. Irving. We said, -- she called in or I called her, I
19 can't remember. I had her on speaker phone in my closed
20 conference room with my paralegal. I said Ms. Irving I've got
21 you on speaker phone with Becky in my office. Are you okay
22 with that? She said no, I'm not okay with that. I do not
23 want to be on speaker phone. Take me off of speaker phone. I
24 don't want to be on speaker phone. I said okay, no problem.
25 I said Becky's got a lot of file information and we may need

1 it and it's helpful, but anyway she insisted that we not be on
2 conference call. We went through the call and I said Julie,
3 and it's in the record, the call transcript, like what's the
4 problem? Why did you change your mind? Why did you fire Jack
5 Scoville? What properties do you want? It was a stonewall.
6 Brett, I want nothing other than all, all of the properties,
7 all of them in equal shares. And I'm like Julie, I mean, you
8 can probably imagine after all of that energy to get to that
9 point that I'm thinking what is she talking about. I'm like
10 what happened? What intervening thing happened between all of
11 the energy we spent to get to this point of resolution to
12 right now. She didn't have an answer.

13 Apparently, she went to talk to some lawyer, she's never
14 indicated who she'd talked to, but she did indicate she had
15 communicated with somebody. And they told her, Judge, that if
16 she -- if the PR distributed out the assets in equal shares
17 that she would have control over the estate. And that's what
18 she sought, Your Honor. In the actual call itself, as you'll
19 see in the call transcript, I said Julie, Ms. Irving, let's
20 make adjustments. If you don't like this, then let's make
21 adjustments. She had no part of it, Your Honor. No part. We
22 could not work out anything with this other than she wanted
23 everything in four equal shares, which made no sense and was
24 not required under the terms of the will.

1 So, then we give all of this information to Ms. Irving.
2 She doesn't have to hire Mr. Tall to get any information.
3 They had everything, bank statements, closing statements,
4 everything, everything. We provided anything and everything
5 in the estate. They had it all. If there's any indication
6 that she mentions, and I think he's raised this point before,
7 that they had to hire him to get this. That's completely
8 false. So, being disgruntled and unhappy she hires Mr. Tall
9 and sets out on some kind of extremely aggressive litigation
10 to get what she wanted, control of this estate. Looking and
11 searching for anything to hang their hat on. Brought this,
12 this really weak petition about we want you to speed things
13 up. Well, as soon as that happened, we set out on some
14 discovery, the likes that I just don't see very often, and I'm
15 thinking My Lord, what are they doing? Why are they driving
16 us crazy? What are they looking for? Well, they're looking
17 for anything, even though he didn't claim bad faith, didn't
18 seek to remove the personal representative.

19 So, we go through all kinds of stuff and then we end up
20 at trial and we've got this dog and pony show where they stand
21 up and all of this stuff and make my client look like some
22 kind evil person. And his client got up on the stand and
23 cried and the Judge was like oh my gosh. I'm like, I'm like
24 what's happening here? I mean let's go back to what we all
25 rely upon, which are the facts. Let's go back to the law,

1 case law, statutory law. And maybe the fact that we tried to
2 resolve things, that the will says this, maybe that will have
3 some impact on the Judge. Your Honor, early on in this case
4 the Trial Judge made up his mind what he wanted to do. He
5 didn't care and did not want to be bothered with what the
6 terms of the will said, with what the case law said, the
7 statutory law said, or the facts. He was not interested in
8 that. He had made up his mind early on how he wanted to rule
9 and that was it, Your Honor. And I'm thinking what? This is
10 just not appropriate.

11 So anyway, during the trial, and Mr. Tall was at the
12 trial, the Trial Judge before our case was even finished being
13 presented he's looking around, you gentlemen need to settle
14 this case, y'all need to settle this case, y'all need to
15 settle. Before we even finished our case, Your Honor. The
16 Trial Judge at one of our meetings that Mr. Tall requested, he
17 requested two meetings with the Judge ---

18 **MR. TALL:** Again, Your Honor, out of the record. Are we
19 going to have testimony out of the record?

20 **THE COURT:** I don't know whether it's in there or not.
21 He says it is, you're saying it's not.

22 **MR. TALL:** He'll tell you it was in chambers, no court
23 reporter.

1 **THE COURT:** Okay. Go ahead. If he says it's in the
2 record, he's going to have to back it up here shortly. Go
3 ahead.

4 **MR. DAVIS:** I've got it here in the back of this. The
5 Judge says page 49: Like I told y'all in chambers some time
6 back. This matter could have been resolved completely by
7 putting everything up and selling it and dividing the money
8 and it would have saved tremendous amount of equity.

9 What I said, Your Honor? We tried that. The Probate
10 Judge also suggested that we divide everything up equally in
11 four shares. Okay. We're like, okay, well what about idea
12 that the will doesn't say that. And what about the fact that
13 it's a terrible idea because Matthew Rothgeb has got all kind
14 of convictions and is a known drug user, which the testimony
15 of his own sister corroborated. Why would you have -- why
16 would you force someone to be an owner with a drug addict?
17 During Ms. Poafpybitty's testimony she indicated that she had
18 gone in there to try to make repairs to the house that
19 Matthew's living in and the people that were working on the
20 house wouldn't repair it because he had so much drug
21 paraphernalia on his coffee table. So, why would the Judge
22 require that the other party's own property together with a
23 known drug addict and someone with a long history of criminal
24 -- a long criminal record? I'm thinking that just does not
25 comport with common sense. Alright. So anyway, I'm not sure

1 if I'm more impressed with Mr. Tall's audacity or the Probate
2 Judge's inability to (inaudible). I'm equally -- I have equal
3 amount of energy on both of them and don't fully understand
4 them. But let me go to -- Your Honor, as you can tell I'm
5 quite energized by this case. Do you want me to work towards
6 some kind of ---

7 **THE COURT:** At 12:30 we're breaking for lunch. Go ahead.

8 **MR. DAVIS:** As you can tell, I am quite energized by this
9 case. I can tell you without question, Your Honor, I have not
10 ever experienced a treatment by a Probate Judge, or treatment
11 of any Judge anywhere, and I've tried cases in North Carolina
12 and South Carolina. I teach on Probate Law and CLE's. I'm an
13 estate planning attorney. I'm a CPA licensed in two states.
14 I do a lot of this kind of work. I have not ever seen
15 anything like this in my practice ever. I've never seen a
16 Judge disregard virtually everything and you'll see it as you
17 go through this brief what I'm talking about. I've never seen
18 that before. I've never seen something as egregious and as
19 flawed as what I've seen in this case, never. I'm not sure,
20 and I'll show you some examples, Your Honor. I'm not sure the
21 Judge fully grasped this case, as there's things in his e-mail
22 ruling. He says that the wife was not suited in her fiduciary
23 capacity, yet the Complaint itself says Jeanne Poafpybitty
24 comma personal representative of the Estate of Donald Rothgeb.
25 That is a very, very important point. Yet in his e-mail

1 ruling he said that she wasn't suited in her fiduciary
2 capacity. So, I'm like that's pretty important. The orders
3 that we have signed were virtually order sent verbatim from
4 Mr. Tall. I don't think -- I don't even know what changes, if
5 any, were made in the orders. I'm not sure, Your Honor, how
6 thoroughly, if at all, they were read by the Probate Judge.
7 And there's some errors in here that I want to point out to
8 you because I'm thinking if he read these orders he surely
9 would have picked up on those errors. So, I'm concerned that
10 the Trial Judge did not either -- I know the guy and I like
11 the guy, I've known him for a long time before he was a
12 Probate Judge. So, I don't think he's a bad guy, I really
13 don't, and I think he's competent. But I'm wondering how did
14 we get to this point? How did he miss so many critical points
15 that are set forth in the statute? How did he gloss over
16 virtually all of the facts presented by the personal
17 representative? I understand that you've got issues of
18 credibility. I understand that. I've been practicing a long
19 time. But we have multiple witnesses. We had a CPA involved.
20 We had an appraiser, both appraisers that testified. We had
21 the personal representative testify. We had Ms. Irving that
22 testified. How can he basically gloss over every -- I mean,
23 if one of them has a credibility issue, fine; but every one of
24 them? He had a decision in his mind, Your Honor, and he
25 didn't care about what anything else was in this case other

1 than he wanted to -- that was his decision. Alright. On page
2 21, and I may have to after lunch come back and finish this.

3 **THE COURT:** 21 of what?

4 **MR. DAVIS:** 21 of our brief, Your Honor.

5 **THE COURT:** Okay.

6 **MR. DAVIS:** So, at the end of this case what the Judge
7 did is he gave the personal representative the death penalty,
8 Your Honor, the death penalty. Do you remember back the SMU
9 football game, they had all of those violations? They got the
10 death penalty, it was substantial. Well, in this case he did
11 the equivalent of giving the personal representative the death
12 penalty. When first of all, she didn't do what was claimed
13 she did. And even if she did do what was claimed of her, it
14 wouldn't cause somebody to get the death penalty. In the
15 ruling the Judge says you get -- the estate will not pay for
16 the personal representative defense in this action. Alright.
17 So, there's got to be a pretty good reason why the estate
18 should not pay the legal fees of the personal representative.

19 **THE COURT:** But, I mean, your co-counsel has already
20 argued this.

21 **MR. DAVIS:** No, I stopped him, Your Honor, because I've
22 got several things that I want to show.

23 **THE COURT:** Okay. Alright.

24 **MR. DAVIS:** And I understand, but this is in much more
25 detail than what he did. 62-3-720, if you boil it down it

1 says the PR gets legal fees unless they have acted in bad
2 faith. Okay. I think that's pretty well established.

3 **MR. TALL:** Misreading of the statute, Your Honor.

4 **MR. DAVIS:** Alright. Well, let me read it verbatim.

5 **THE COURT:** You're going to get your opportunity to make
6 that argument. If I was you, I would jot a note on your pad
7 so that when you get up you can say alright, he argued this,
8 and this is why I disagree with it. You don't interject
9 during the middle of his argument. Now you've done that
10 several times, so let's don't do that anymore. Okay.

11 **MR. TALL:** Yes, Your Honor.

12 **THE COURT:** Alright. Go ahead continue.

13 **MR. DAVIS:** So, to satisfy Mr. Tall I'll just read it
14 verbatim. If any personal representative or person nominated
15 as personal representative defends or prosecutes any
16 proceeding in good faith, whether successful or not, he is
17 entitled to receive from the estate the necessary expenses and
18 disbursements including reasonable attorney's fees. Alright.
19 So, the first part there it says if any PR defends or
20 prosecutes any proceedings, the caption -- the caption, Your
21 Honor, states Jeanne Poafpybitty comma personal representative

22 of the Estate of Donald M. Rothgeb. So clearly, we have her
23 acting in her fiduciary capacity because she's named in her
24 fiduciary capacity. Alright. Then we say, let me go back to
25 the other part, it says whether successful or not. We know

1 that at the trial court level the personal representative was
2 not successful, but that's not required here. Alright. Then
3 it says he's entitled to the legal fees. It says that
4 prosecutes any proceeding in good faith, so that's what we
5 have left. Did the personal representative prosecute this
6 action in good faith? And I've got some cases listed here on
7 page 23, the Franklin case on when a PR would be entitled to
8 fees. But as I get to that, let me make sure that let me make
9 sure that the Court understands something very important, Your
10 Honor. Not only did the Probate Judge say that the personal
11 representative had to pay her legal fees in the defense of her
12 action, the Probate Judge made her pay for legal fees occurred
13 in the preparation of closing documents which is clearly
14 outside of any kind of realm of my understanding of how the
15 Probate Law works. So, we go through and we say, okay well
16 then, she had to have acted in bad faith or else the estate
17 should pay her legal fees, and this is just one of our many
18 concerns about the rulings. So, then I set out and I'm like
19 what does it mean in South Carolina to have acted in bad
20 faith? As you know, you're a very experienced Judge. Bad
21 faith is a big, big deal. If you find that somebody acted in
22 bad faith, they did some really bad stuff and had no basis for
23 what they did and I think that's well settled, especially
24 within Insurance Law. So, what did she do that resulted --
25 that would support a finding of bad faith? The initial e-mail

1 ruling does not mention bad faith anywhere, no mention of bad
2 faith. The order, the first order -- Your Honor, the lawsuit
3 said that the problem was it wasn't being done fast enough.
4 The e-mail came, it took five months to get a draft order,
5 five months. After five months of preparation of a draft
6 order, which was signed basically verbatim by the Probate
7 Judge, there is no finding of bad faith, no finding. There
8 was also relief in the draft order that was never plead and
9 never argued at the trial court. It was slipped in by Mr.
10 Tall with the draft order. The Probate Judge signed it.
11 We're like what in the world is going on. We were
12 flabbergasted. We're like what is happening. I don't know if
13 you remember that Steelers game where the guy flipped a coin
14 and they called heads and it was heads and the ref said you
15 called tails and all of America heard it live on TV. Anyway,
16 you may or may not remember, it was like that, what's
17 happening, you know? That's the kind of sensations we had,
18 like what, what is going on. We've got relief in here that
19 was never plead, never argued, never mentioned. What are we
20 missing? So anyway, the initial order has no finding of bad
21 ~~faith, so what do we do?~~ Well, you know we've got to file a
22 Motion for Reconsideration. So, we prepare a Motion for
23 Reconsideration and I go back to the Trial Judge and I'm like
24 Judge you cited the Kay case in your first e-mail. In the Kay
25 case it says you've got to have bad faith. I said by the way,

1 that case has been reversed since you first cited it,
2 hopefully that would have some impact on you at this motion to
3 reconsider. And I said your order has no finding of bad
4 faith, but yet you have kept the -- you've made the PR
5 personally pay all of her legal fees. And instead of
6 recognizing that he didn't have grounds to support his ruling,
7 he set off on a crusade to reverse engineer some finding of
8 bad faith. He said I deny all motions. I deny your motion
9 for reconsideration. That's a one-page order. We get back a
10 25-page draft order that has attempted on some crusade to
11 reverse engineer bad faith. I have gone through each instance
12 where they have said justifies a finding of bad faith and I
13 want to show them to you. I want to show you just how
14 nonsensical this is. And you'll see, you'll come to a place
15 and you'll say what happened in this case? Why is it so
16 bazar? I have been scratching my head, Your Honor, for about
17 two years now. I cannot reconcile what happened in this case,
18 I cannot. And I've talked to people who are very studied in
19 this area and I'm like what happened? How did this ruin take
20 place? They don't know either. So, let me go back through to
21 see what they did to reverse engineer a finding of bad faith,
22 which did not exist in his initial order? Before I do that,
23 let me go through what the definition of bad faith that I
24 found in South Carolina, and you may have a better, a better
25 definition. 62-8-1024 it says that good faith means honesty

1 and fact. We have no testimony, zero testimony corroborated,
2 zero corroborated testimony that the PR lied, none. None. We
3 have one instance where somebody said she told Matt that did
4 didn't sell some properties, which first of all is completely
5 false, completely uncorroborated. So, we have no established
6 evidence whatsoever that she was not honest. Okay. That's
7 the first problem. Okay. The *Delaney v CasePro, Inc.* the US
8 District Court for South Carolina Beaufort Division says
9 although the term bad faith is not defined in the Federal
10 Rules of Civil Procedures, courts have held that the term bad
11 faith connotes an action without any colorable legal or
12 factual basis. So, basically if you have nothing to support
13 what you did then we're going to consider that maybe bad
14 faith. But if it has any colorable legal or factual basis
15 then it's not bad faith. Black's Law Dictionary provides in
16 the 6th Edition that bad faith is the opposite of good faith,
17 generally implying or involving actual or constructive fraud,
18 or a design to mislead or deceive another, or a neglect or
19 refusal to fulfill some duty or some contractual obligation,
20 not prompted by an honest mistake as to one's rights or
21 duties, but by some interested or sinister motive. The term
22 bad faith in the *Staff v Williams*, bad faith is not simply bad
23 judgment or negligence, but rather it implies the conscious
24 doing of a wrong because of dishonest purpose or moral
25 obliquity. That means they are morally oblique. It is really

1 bad. It is a really a really high standard to say that
2 somebody acted in bad faith, that they are a really bad person
3 and they have really done something that cannot be supported
4 anywhere and they're terrible. It's the basic -- in Probate
5 Law it's the death penalty. Let me tell you another
6 interesting thing, Your Honor, so the Trial Judge is going
7 back and saying she acted in bad faith. But let me tell you
8 what's really interesting, his order, his first order goes on
9 to say, you know, if she was that bad, if she was that bad he
10 would have kicked her out of the courtroom and said get out of
11 here, you can't be a PR, you're terrible. But instead, he
12 says I find and so order that the PR and her counsel shall
13 file amended closing documents with the Court within 30 days.
14 The counsel for the PR shall be allowed reasonable
15 compensation for such services which shall obviously be shown
16 on the final accounting. So, if she is so bad, why would he
17 leave her in office and tell her to go fulfill more duties and
18 also say that her attorney -- that she can get attorney fees
19 for doing it? It doesn't make any sense. It is not
20 consistent. So, when I pointed out to the Trial Judge that
21 there is no finding of bad faith and he has to have a finding
22 of bad faith, he has to, these are the items that they set out
23 in their crusade to support a finding of bad faith in this
24 first order and second order. First of all, she met her
25 statutory requirements. The statutory requirement that's

1 established in the record that she has as the PR, what she has
2 to file, when she has to file it. She met those, Your Honor.
3 She met all of those and that's not -- I've got it listed here
4 on page 31. Let me ask you this, Your Honor? I've got 10
5 items that I've been able to identify that they have used to
6 try to establish, or to support, some finding of bad faith.
7 Would you like for me to go through those after lunch?

8 **THE COURT:** I'm going to let you argue -- yeah, let's go
9 ahead and break for lunch. It's 12:30, we'll take -- we'll be
10 back at 2:00 and resume it then.

11 **MR. BOYD:** Thank you, Your Honor.

12 **MR. DAVIS:** What time was that?

13 **THE COURT:** 2 o'clock.

14 **MR. DAVIS:** Thank you, Your Honor. Do we need to take
15 all of our -- are we going to lock the door?

16 **DEPUTY:** The door will be locked. You can leave it here.

17 **(COURT IS IN RECESS)**

18 **THE COURT:** Thank you very much. Please be seated.
19 Alright, Mr. Boyd, you can continue with your arguments.

20 **MR. DAVIS:** Thank you, Your Honor. It's Mr. Davis. Mr.
21 ~~Boyd is my law partner.~~

22 **THE COURT:** Oh, okay. I apologize.

23 **MR. DAVIS:** That's no problem. Your Honor, I will say I
24 definitely got excited earlier, I think with good reason, but
25 I will try to get right to it because I know you want to get

1 this matter resolved too. So, I want to get right to the
2 heart of these matters and get to the guts of it as quickly as
3 I can.

4 Alright, Your Honor, where I am is page 31 of the brief.
5 I've got some items to go through as I mentioned before we go
6 to lunch. I searched both orders to see if I could find how
7 the Court reverse engineered some form of bad faith or tried
8 to support some sort of bad faith in the orders. And in doing
9 that I've got these 10 items that I'll get through and go
10 through that.

11 The first one on page 31, and it goes without saying that
12 the Probate Judge has got to understand the probate law
13 especially when he applies it to a case. We have actually the
14 wrong standard that was applied in this case, Your Honor. And
15 what I think about is the preponderance of the evidence and
16 the beyond a reasonable doubt, you know if you try somebody in
17 Criminal Court you don't apply the wrong standard and send
18 them somewhere just based on something more likely than not
19 being the case. Well, we've got that here, Your Honor. We
20 have got the Probate Court applying the wrong standard. When
21 we have -- we have Probate Law that involves probate
22 administration -- do you want me to wait until you've got it?

23 **THE COURT:** I've got it right here. Go ahead.

24 **MR. DAVIS:** Okay. The probate administration includes a
25 number of things, guardians, conservatorships, trusts, it

1 includes the administration of estates. With regard to the
2 administration of an estate, when somebody has a will and it
3 goes through probate administration, we have a certain set of
4 rules in the probate code that deal with the administration of
5 estates. We have a separate article in the probate code that
6 deals with the administration of trusts, Your Honor. They're
7 different and let me tell you why they're different. The
8 probate code sets forth very specific requirements that a
9 personal representative must comply with. They have to follow
10 the will, they have to send notice to creditors, they have to
11 do an inventory, they have to do information to heirs and
12 devisees, they have to deal with creditor claims, they have to
13 do final estate closing documents. Whereas those items don't
14 exist, those requirements don't exist in the trust code
15 because they don't have -- it's a different arrangement, they
16 don't have the same things to do. With a trust often times it
17 would be an ongoing type of a relationship or a situation
18 where somebody may not have any idea what's going on, so they
19 need to advise them they need to do things or whatever. With
20 the administration of an estate we've got very specific
21 requirements that have to be done. We have two separate
22 sections of the probate code. What has happened here, and I
23 want to go through and explain it you because it's a little
24 hard to, hard to, hard to accept how off the ruling is. They
25 have applied the standard, first of all even if it did apply

1 the personal representative would have met all of it no
2 problem, but they've applied a standard that applies to
3 trustees and does not pertain to personal representatives.

4 Reese, can we go to that page? The first example I want
5 to show you in the order, an area that has caused great
6 consternation at first is the part -- boy I tell you my eyes
7 are getting bad on me. That other page that shows sections
8 21. So, Your Honor, on that page, on page 36 of the first
9 order.

10 **THE COURT:** The first order is which order?

11 **MR. DAVIS:** It should be the March 2nd, 2018.

12 **THE COURT:** March 2nd, 2018, okay. I've got it right
13 here.

14 **MR. DAVIS:** Alright. On page 30 -- on page 36, Your
15 Honor, bear in mind again, this is an order that took five
16 months to prepare and then it took another month or two for
17 the Judge to decide. So, we're talking an order that took
18 several, several months to finally get into final form.

19 On paragraph number 5 it says 62-3-20 and 62-3-21, those
20 sections don't exist in the probate code. I have been ---

21 **THE COURT:** Wait a minute. Where? What page are you on?

22 **MR. DAVIS:** Page 36.

23 **THE COURT:** Alright. Gothcha now. Go ahead.

24 **MR. DAVIS:** Alright. So, 62-3-20. Alright. In my -- I
25 looked in my probate code, I don't know if Mr. Tall's got an

1 older version, I don't know what he's got, but I have not been
2 able to locate those sections in my probate code. And maybe
3 there's somewhere that's not listed, if they are I certainly
4 would like to know that because it's not in the copy that I
5 have. So, we're applying provisions that I'm not sure exist
6 and if they do exist, I'm not sure exactly what they mean.

7 Alright. Let me, let me turn over then to in paragraph
8 two on page 35, if you go back to the previous page 35. This
9 one is particularly concerning, Your Honor. If you've got a
10 law book, I'll read it to you. If you look at paragraph two
11 right here, it says 62-7-804 of the South Carolina Probate
12 Code, right?

13 **THE COURT:** Alright.

14 **MR. DAVIS:** Alright. Let's read in the order, the
15 Judge's order, what he says that says. Let me, I hate to keep
16 moving but I can't see the screen. In this section right
17 here, 62-7-804, he says the personal representative regarding
18 affairs of decedents estate shall exercise the same reasonable
19 fiduciary care, skill, and caution as is required of trustees
20 in the South Carolina Trust Codes. Alright. That's not what
21 ~~it says, Your Honor. This is what the code section actually~~
22 says, it says, a trustee shall administer the trust as a
23 prudent person would by considering the purposes, terms,
24 distribution requirements and other circumstances of the
25 trust. In satisfying this standard the trustee shall exercise

1 reasonable care, skill, caution. That section not only is it
2 misquoted, I can handle a little misquoting if they paraphrase
3 it or something, but it has imposed something that does not
4 exist. Personal representatives are not held under that
5 standard. Again, even if they were, our client would have met
6 any of those standards. But here the Court imposed a standard
7 that does not exist as it's written and does not pertain to
8 personal representatives.

9 And let me take you to another section, Your Honor. So,
10 again, Article 7 in the South Carolina Probate Code so if we
11 go look at the beginning of Article 7 under 62-7-102 scope.
12 It says in the middle of that paragraph, that provision, this
13 article does not apply to constructive trusts, resulting
14 trust, conservatorships administered by conservators as
15 defined in section 62-1-2016 comma administration of decedents
16 estates. 62-7-102 specifically says that anything, Your
17 Honor, with a 7 in the middle, anything in the probate code
18 with a 7 in the middle does not apply. We have an estate
19 here, administration of an estate.

20 So what the Probate Judge did here, again as I mentioned
21 earlier I wasn't -- I'm not sure if the Probate Judge reviewed
22 this at all or if he did review it how carefully he reviewed
23 the draft orders or if he -- I don't know what happened, Your
24 Honor, but I do know that we handed up an order that is
25 substantially flawed. If we go on the other order, the later

1 order from our Motion for Reconsideration dated November 7th,
2 2018 on pages 4, 6, 18 -- 4, 6, 8, 14, and 17. Can we have
3 those Reese? There are again references to the South Carolina
4 Trust Code. And again, even if those standards were applied,
5 the personal representative would have met all of them, but
6 that's not here, that's not a matter for you to decide. I
7 think the matter, as you mentioned, the matter is equity and
8 matters of law. Here we clearly have a matter of law. If
9 you're at an Appellate Court level, and as I mentioned
10 earlier, if you have a death penalty case and they've applied
11 the preponderance of the evidence standard, that is as clear
12 as it can be, that clearly is going to be either a mistrial, a
13 reversal, a remand or something. In this case it's black and
14 white, we have the Probate Court applying a standard that does
15 not apply. The requirements of a personal representative
16 under the Probate Code are very specific and as the Brief
17 points out, the personal representative met all of those
18 required standards.

19 Also, Your Honor, as mentioned in the motion for
20 reconsideration, if you look in the brief on page 13 -- 33
21 ~~rather. During the argument there was reference to implicit~~
22 requirements. Your Honor, that is particularly disturbing for
23 a probate lawyer to have implicit requirements and they're
24 using implicit requirements to justify the death penalty for
25 our client. How can a personal representative do their job if

1 they don't even know what the standards are? So, the Judge,
2 again, made up his mind and was searching for some way to
3 substantiate his ruling, implicit standards.

4 And I also want to mention this, as you'll see in the
5 original trial transcript. Mr. Tall, who made a big deal out
6 of jeopardizing cases and doing all of this research, he came
7 up with a Tennessee case, Your Honor, as you'll see in the
8 trial transcript. If his case were so strong or if his case
9 was what it says it was, why would he have to rely on a
10 Tennessee case? I'm not sure the Tennessee case applied. But
11 why would we have implicit standards in a Tennessee case? The
12 reason is because he has a terrible case that can't be
13 supported by the facts or the law.

14 Alright. I'll move to number 2 and I want to keep a good
15 pace going because I know we want to all get moving. On page
16 33 number 2, manipulation of an asset. Their case basically,
17 Your Honor, was that the PR didn't communicate with the
18 beneficiaries, which is wrong. And then their chief concern,
19 Your Honor, was the manipulation of the primary residence.
20 That she was staying there and not paying rent to the estate
21 and that she in some weird way had some kind of mental
22 telepathy that caused the appraiser to appraise that house too
23 low and by doing that she manipulated the primary residence.
24 Well, first of all, the testimony of the appraiser makes it
25 clear that he didn't try -- he didn't who was going to get

1 which property. And also, he testified that the condition of
2 the property was terrible. Also, it has been established all
3 of the repair costs, all of them, were going to be charged to
4 the personal representative and that was known well in advance
5 of any final closing documents and it was known well in
6 advance of all parties before Ms. Irving hired Mr. Tall. So,
7 that was not a secret. And she didn't have to do -- Ms.
8 Irving didn't have to do anything to get that information.
9 Those repairs were continuous and that the total value of the
10 repairs would not have been known until later anyway.

11 I want to go back and also emphasize that testimony of
12 Ms. Poafpybitty indicated clearly that she knew that she had
13 an elective share, Your Honor, she knew she had an elective
14 share. It would have given her 1/3rd of the estate, Your
15 Honor, instead of a quarter interest. She knew that. She
16 knew that prior to the deadline when she had to file her
17 elective share claim. She did not file her elective share,
18 Your Honor. If she were trying to better her lot in the
19 estate, why in the world would she not file her elective
20 share? That's a no brainer. It's almost given; it's like a
21 give me. It's easier than a layup. If she was wanting to get
22 more, how can they establish that she was wanting to get more
23 when she consciously did not try to get more? Why would she
24 do some kind of circular crazy action with some appraiser or

1 something? It doesn't make any sense, Your Honor. It does
2 not make any sense.

3 Also, so they made a big deal that she was living in this
4 estate property rent free. Your Honor, this estate property
5 was her primary residence with the decedent for 20 years.

6 **THE COURT:** You've already -- we've already heard that
7 numerous times.

8 **MR. DAVIS:** In that house after the decedent died, the
9 decedent's son Steven lived in the house with her for 9
10 months. She didn't charge him any rent. In addition to that,
11 Matthew Rothgeb, a son, the other son, lived and continues to
12 live, to my knowledge, in an estate property without paying
13 rent. No rent. So, how -- and the order charges the personal
14 representative to go back and pay rent but does not do the
15 same for Matt and does not do that for Steven. But she didn't
16 ask for it, the personal representative didn't want it and
17 didn't ask for it. She's not looking for anybody to pay rent.
18 So, how can they -- how can that be done on one side and not
19 done on the other? The fact that they used that she didn't
20 pay rent and that the appraisals were done by a mutually
21 agreed upon appraiser. That is how they established
22 manipulation of an asset. That is not strong. Well, it goes
23 without saying.

24 Alright, number 3, unsubstantiated and uncorroborated
25 accusations. I've already been through that. Julie said that

1 Matt said something wasn't sold, that was completely
2 uncorroborated and false.

3 Alright. So, then we have this next one. The plaintiff
4 set out on a venture to make a big deal out of this provision,
5 on number 4 on page 34. This is the payment of debts from the
6 estate, Your Honor. That provision in the will states that I
7 direct that all of my legally enforceable debts, secured and
8 unsecured, be paid as soon as practicable after my death.
9 Some of the properties, Your Honor, had mortgages on the
10 properties, some of them didn't. The client was -- the
11 personal representative was getting the properties ready for
12 either distribution or a sale and trying to satisfy the
13 mortgages so that the properties would be in proper condition
14 and that they would be paid off and then she could make final
15 distributions and be done. Counsel for the plaintiff has used
16 the language at the bottom of this paragraph as grounds for a
17 finding to support a finding of bad faith. In the bottom
18 paragraph of the will it says if at any time of my death any
19 of the real property herein devised is subject to a mortgage I
20 direct the devisee taking such mortgaged property shall take
21 it subject to such mortgage and that he shall not be entitled
22 to have the obligation thereby paid out of my general estate.
23 Took that to mean that all properties she would devise out are
24 subject to mortgages. That provision, Your Honor, pertains to
25 specific devises of property. If you say Billy gets condo A

1 and Sue gets condo B. If they are subject to a mortgage,
2 those properties, they take them subject to a mortgage. Here
3 we have a residuary provision, we don't have specific devisees
4 of real estate. The first sentence says I direct that all
5 legally enforceable debts secured and unsecured. If we go
6 back to the definition of bad faith it says that you don't
7 have any colorable or legal grounds to do what you did, so
8 they're using that as a basis for bad faith. That she was
9 going sell estate properties to pay off estate mortgage. This
10 is clearly a colorable legal right or provision to support
11 what she was doing. It says I direct that all legally
12 enforceable debts, secured and unsecured, be paid as soon as
13 practical after my death. So, she clearly has reason to do
14 that. So, it can't be used as a ground for bad faith.

15 Okay. And again, and I'll have to confess Mr. Tall
16 really wound this thing up tight and really made it a mess,
17 Your Honor. He threw the facts in a blender and woo it was
18 something a trial. He really, he really doctored this thing
19 up. He really got it going. Well, let me unwind this a
20 little bit more. So, the plaintiff made an argument that the
21 only reason that the personal representative was selling
22 property was because the probate code says if you sale
23 property you get a commission for selling it and she was
24 trying to increase what she got as a commission from the
25 estate. Again, first of all, it's false. But why would the

1 personal representative not take her elective share if she
2 just wanted extra money? And how can you justify that as a
3 reason for bad faith when she clearly is directed by the
4 testator to pay off all of the debts, secured debts. It says
5 to pay all of the debts. In the will it says that so that
6 can't be used as a ground for the finding of bad faith.
7 Again, they have gone back on a crusade to reverse engineer
8 anything to support their finding that they didn't even have
9 in the first order.

10 Your Honor, again I'm going to try to tone from where I
11 was this morning a little bit this morning but this one gets
12 me particular excited and you'll see why. Reese, can you put
13 up the second e-mail ruling that we have from the Judge, the
14 Trial Judge? Your Honor, this is the second e-mail that we
15 got where they were going back and trying to reverse engineer
16 some findings for bad faith. In this e-mail, Your Honor, it
17 says the expenses, the estate expenses and attorney fees were
18 being lavishly expended, lavishly expended. So, they're using
19 grounds that the personal representative lavishly spent legal
20 fees and that's the grounds. Your Honor, check this out.

21 This is mind boggling. The legal fees that Mr. Tall generated
22 by himself were essentially the same amount of legal fees that
23 two lawyers and two paralegals generated at my firm, that were
24 granted completely without question to Mr. Tall. So how did
25 the legal fees generated by one person, the plaintiff, be

1 different than the legal fees generated by two lawyers and two
2 paralegals? How come the legal fees generated by them were
3 lavish, but the legal fees for the plaintiff were not lavish.
4 Also, bear in mind, these legal fees generated by the personal
5 representative in her fiduciary capacity were generated in a
6 defense. Mr. Tall drove this matter as hard as I think a
7 matter can be driven, depositions, depositions, depositions,
8 discovery, discovery, motion hearings, motion hearings,
9 meetings with the Judge. We responded to that; we didn't
10 generate that, he generated that. The plaintiff generated
11 that. So, how does the Trial Judge come back now and said
12 that the PR spent lavishly on legal fees? It makes your head
13 almost want to explode.

14 I sent a letter to Mr. Tall and I copied the Court and
15 I'm sure it's in there somewhere. I said Cliff what's going
16 on, slow down, this is getting out of hand. He sent a
17 deposition notice for me, he wanted to depose me. First time
18 in my career I've been deposed, I'm like whatever. I sent him
19 a letter, I'm like Cliff what's the story, what is the story?
20 Why do you want to take my deposition? I'll tell you
21 everything you want to know right here on the telephone. So,
22 we had this big ole dog and pony show. My deposition, along
23 with a whole bunch of other depositions. I'm like did you
24 learn anything from the deposition? Well, what I learned is
25 the legal fees have gone out of this world, not because of the

1 personal representative, because of the plaintiff. But yet in
2 the Trial Judge's ruling, he says that the PR acted in bad
3 faith because she spent legal fees lavishly. How do you
4 reconcile that, Judge? If can't be reconciled. As you can
5 tell I'm pretty excited about that. Alright. So, that was
6 one of the reasons that the Trial Judge said that we acted --
7 that the personal representative acted in bad faith.

8 Alright. Get a load of this, Your Honor. This -- again,
9 I'm going to tone it down because it is easy to get excited
10 about this. So, so when we have an estate administration, we
11 have beneficiaries who receive either some gains or some
12 losses from the estate. And if you do an estate tax return
13 and you include the beneficiaries in it then you either pass
14 that income down to them or you pass the losses down to them,
15 right? If you don't then you do everything under a 1041 in
16 the estate name and the estate pays the gains and losses and
17 gets all of right there. The CPA, we hired an outside CPA.
18 I'm a CPA, but we hired an outside CPA to do the accounting
19 for the estate. Ms. Irving, Mr. Tall's client, refused,
20 absolutely refused to provide her social security number to
21 the CPA. I didn't want it. Ms. Poafpybitty didn't want it.

22 The CPA needed it to file tax returns. The other two
23 beneficiaries and Ms. Poafpybitty gave him their social
24 security number, but Ms. Irving, just Ms. Irving wouldn't give
25 him her social security number. So, what do we have? We

1 could not pass losses from those rental properties down to the
2 beneficiaries, so we had to wait and take losses to estate
3 when they may or may not have been good or may have been
4 deferred. But we couldn't take them when we should have been
5 able to take them.

6 Check this out, Judge. You won't believe it; you will
7 not believe this. So, we get the tax returns prepared and we
8 have to pass them along to the beneficiaries from the estate.
9 We give Ms. Irving her tax return two weeks before April 15th,
10 two weeks before the deadline. Bear in mind that we're slowed
11 down because of Ms. Irving. Well, Ms. Irving sets out do I
12 need to amend my tax return that I filed early? I filed
13 earlier than is required by the IRS, not before the October
14 deadline, before the April 15th deadline. She had filed
15 early, and she is asking do I need to amend my return? Your
16 Honor, nobody refutes that a personal representative is not
17 obligated to give beneficiaries tax advice. Not only that,
18 they cannot give them tax advice because they don't even know
19 what's in their tax return. So, she set out saying how dare
20 you give me tax information from the estate when I've already
21 filed my tax returns. You may require me to amend my tax
22 returns.

23 Mr. Tall here -- this takes the cake, Your Honor, takes
24 the cake. Mr. Tall sets out on this venture during the trial
25 to make this huge deal to the witness, why didn't you tell her

1 she may have to amend her tax return? Why? Basically,
2 leading the Judge to believe that the PR had some obligation
3 to give tax advice to the beneficiaries. I'm like, Cliff, how
4 long have you been practicing law? You have a master's from
5 Georgetown. These things just make your head just explode.
6 So, as grounds for bad faith they're saying that the PR didn't
7 do something that they were supposed to do from a tax
8 standpoint. Alright. Well, that makes no sense.

9 Another part of the trial that they used was that the
10 personal representative never communicated with the
11 beneficiaries, never communicated, didn't tell them a thing.
12 Boy it was awful, which is completely false. Well, it's so
13 false, Your Honor, that in its very own order it contradicts
14 itself. In paragraph 3 and 4 on pages 5 and 6 of the order of
15 March 3rd, 2018. Let's see that order, Reese, if we can. On
16 pages 5 and 6, Your Honor, of that March 3rd, 2018 order.

17 **MR. BOYD:** I don't think we have 5 and 6.

18 **MR. DAVIS:** So well, I'll just -- I'll tell you what it
19 said then. So, they appear to make an issue, the plaintiff
20 appears to make an issue about whether and how the personal
21 representative responded to the plaintiff. During the trial
22 it was like oh, she never responded. The order sets forth in
23 paragraph 1, a position that refuted it. It says in
24 paragraphs 1 through 3 the trial court expresses concern, this
25 is a draft order from Mr. Tall, about a request for

1 information from the estate beneficiary. Okay. It says
2 requested information, didn't get information. Again, this is
3 a standard that doesn't apply, but even if it did apply in the
4 very order it says, the very next paragraph, it explains how
5 the personal representative responded in great detail about
6 that property, the estate properties. So, it makes a big --
7 much ado about no communication.

8 **MR. TALL:** Your Honor, may I? What page are we speaking
9 about?

10 **MR. DAVIS:** We're on page 5 and 6 of the March 3rd, 2018,
11 paragraphs 3 and 4.

12 **MR. TALL:** Thank you, sir.

13 **MR. DAVIS:** So, on its very order, Your Honor, it says
14 that we couldn't get information; oh, but we did get
15 information about all of the estate properties. But it wasn't
16 exactly what we wanted as far as the information. So, what is
17 it? Did they get a response, or did they not get a response?
18 Did they get communication or not get communication?

19 As Mr. Boyd pointed out earlier, we have a binder of
20 communications that the Judge would not let us enter into
21 evidence. We asked about it at trial; he didn't want to go
22 into chambers and look at it. At the Motion for
23 Reconsideration we brought that back up and we said Judge, you
24 made a big deal about these communications. You know, we have
25 this binder, can we show you that now? No. Can't see it,

1 don't want to see it. What? So we're like okay, you're the
2 Judge.

3 Okay. Another, another issue, Your Honor, in this great
4 reach of trying to find things that amount to bad faith.
5 Again, this one takes the cake. I mean, we need more cakes
6 because these things keep taking the case. So, the testimony,
7 my testimony, I'm on the stand, and Mr. Tall is asking me he
8 said how much did you spend in legal fees? And I said we
9 spent a certain amount; whatever we have in the documents
10 we've spend. He said how much are you going to spend in this
11 case? I said I don't have any idea how much I'm going to
12 spend in this case. I'm currently on the stand defending this
13 person and I charge an hourly rate. I don't know. I don't
14 know how much time it's going to be reviewing the order. I
15 don't know. I don't know. So, then he sets off on this beg
16 tirade, they don't even know how much it costs to represent
17 them. How can I possibly know what my legal fees are going to
18 be in the middle of a trial?

19 Alright. As far as number 7, the last part of that. The
20 delay in this case was caused by Ms. Irving. The PR was ready
21 ~~to distribute the estate out.~~ She's the one that kept this
22 open. And in the order, it says that the PR has kept this
23 open, which could not be any more false.

24 There was an issue also, early on when Mr. Scoville was
25 involved, he asked for an interim accounting. He said I want

1 to know all of the expenses or whatever and also all of the
2 bank statements and everything. During that time, we prepared
3 an interim accounting. By the time that was filed the legal
4 fees spent were a little more because we were in process than
5 what was shown on the interim accounting, a little bit more.
6 So, you know, reaching back Mr. -- the plaintiff is trying to
7 say that we misrepresented some information on purpose. The
8 same time we were preparing that interim account, which fees
9 were being generated the whole time, we had generated some
10 more fees. All of the bank statements, all of them, were
11 given to the plaintiff, and her brothers, and their attorney,
12 all of them, all of them. So, they wanted to see how any,
13 everything was being spent out of the estate account. So,
14 there's no way that any misrepresentation here would have been
15 intentional because things were moving all of the time.
16 They're reaching back and saying, oh, you didn't represent
17 this appropriately. Well, interim accountings are interim
18 accountings, they're not going to be exact, they're just not
19 because everything is moving along.

20 Another, another area where the later order reached back
21 and tried to reverse engineer some bad faith is they said the
22 personal representative when they go their appraisals in, they
23 were supposed to at that time file a supplemental inventory,
24 Your Honor. We were supposed to go back and file a

1 supplemental inventory and that should be grounds for some
2 finding of bad faith.

3 Your Honor, as mentioned before, the reason we got the
4 appraisals was for a distribution of the estate. When we were
5 going to distribute the estate and file the final closing
6 documents all of that would have been shown on the final
7 closing documents, completely unnecessary to file a
8 supplemental inventory, completely unnecessary. Little did we
9 know that this case would have been drug out like it has been,
10 but when we got those appraisals back it was completely
11 unnecessary to file supplemental appraisals -- inventory,
12 because we were going to distribute the assets, report all of
13 the new values on the closing statement, and close the estate.
14 So, that's what they used to go back and try to substantiate a
15 finding of bad faith. Again, it's not there.

16 Alright. The last one, Your Honor. So, as Mr. Boyd
17 mentioned, the personal representative was at her wits' end.
18 She did not know what to do, completely frustrated, couldn't
19 believe what's going on. We couldn't believe what was going
20 on. She finally said listen, I will move out of my residence;
21 I'll give it to them. The only property that they had

22 reappraised was the residence, that's the only property. And
23 they wanted to own things jointly. She said alright why don't
24 we do this, we talked why don't you do this; we'll give them -
25 - we'll give you the appraised values of these properties, 25

1 percent, same values, 25 percent of all of them. We'll give
2 you these and the rest of them we'll give equally to all three
3 beneficiaries because they wanted things jointly. And in the
4 part that goes to the three beneficiaries will be the
5 residence, she'll move out. Move out of her house for 20
6 years, she'll move out it. So, Ms. Irving and Mr. Tall, who
7 is committed, committed to that value of the residence based
8 on their new drive by appraisal. And he went back to the
9 property, but he had the same appraisal amount that he had
10 when he drove by. So, we say okay Ms. Irving we don't know
11 what to do with you, we don't know what to do with you. If
12 you think the house is worth that much, then you take it and
13 the PR will take other assets and move out of her house.
14 Well, guess what? This is the most telling of all, Judge.
15 She's like no, no, no that's not what I meant. No. You take
16 it at that value, I'm not taking it at that value. Well,
17 what's good for the goose is good for the gander. If she was
18 so committed to that value why wouldn't she take it at that
19 value? Because that wasn't what it was about; it was about
20 control. Remember the property that Ms. Irving was supposed
21 to get went down 29 percent. The property that was supposed
22 to -- the residence went down 38 percent. So why would Ms.
23 Irving want to insist that the PR take the house as the higher
24 value, but she herself would not accept it at the same value?
25 You know the old rule, the old rule when you've got brothers?

1 Both of them want cake, right? You've heard this a thousand
2 times. Okay. Billy Bob, you cut and cake and Little Jimmy,
3 you get to pick the piece. Right? We've heard that a
4 thousand time. Why didn't that work here? That is one of the
5 most telling parts of this case. It goes right to the
6 character and the spirit of what was going on, Your Honor.
7 The Trial Judge missed it completely, completely and I don't
8 know why. I still can't for the life of me figure it out.

9 But even assuming that everything that Mr. Tall portrayed
10 was accurate, which it wasn't, assume that. He still can't
11 rule that way he did based on the law, assuming the facts are
12 what they said they are. They still aren't correct when you
13 apply them to the law. The whole order, the whole ruling is
14 upside down. It's like he ruled the opposite of what he
15 should have ruled in each instance.

16 In that phone call that I made to Ms. Irving, she
17 recorded it. They didn't tell me; they didn't tell me at all
18 that they are recording the phone conversation. I'm like, you
19 know, we get in this thing and through discovery we find out
20 that she's recorded this phone call. I'm like well that's
21 nice... So, we played it for the Court and we still have it and
22 will be happy to play it for Your Honor or you can read the
23 transcript of that call. And you can see in that call that I
24 bent over backwards to try to accommodate Ms. Irving. She had

1 one thing and she wanted all of the properties in four equal
2 shares because she wanted control.

3 Mr. Tall set out on a venture to create this monster of a
4 person, the PR, and the Trial Judge bought it almost from day
5 one and never looked back despite what the facts said, despite
6 what the case law and everything else said. You've got, I'm
7 mean, you know what your options are, so I don't want to tell
8 you what your job it. You're obviously a very good Judge.
9 But the way I see it I believe every bit of it should be
10 reversed, every bit of it. I think Ms. Irving should be
11 charged legal fees for the damage that she's caused. If it's
12 not something you see to be completely reversed, in the very
13 least, Your Honor, it should be remanded for a new trial based
14 on the appropriate standard. As I pointed out, the probate
15 code, the trust code in our probate code specifically says
16 that the trust code does not apply to the administration of
17 estates. This is the administration of an estate. That alone
18 is a matter of law sufficient to reverse this case.

19 Let me go back to where this all started if that's not
20 enough, which I believe that would be enough, will be enough
21 for you. The item that we hold most resolute, Your Honor, in
22 Probate Law, the single item, number one, number uno above
23 everything is the intent of the testator, everything. Every
24 single thing stems from the intent of the testator. All of us
25 here that have assets, the law provides, protects our right to

1 determine where those go when we die, that's the testator's
2 intent. In the provision in there where it says all assets go
3 equally to the four beneficiaries in approximately equal
4 shares, not exactly, it says approximately. It goes on to say
5 -- can you put that back up, Reese? This is so important. It
6 goes back to say, it goes back to say provided however -- now,
7 Your Honor, I've been doing this since 1996 in two states. I
8 do estate planning in two states and that's why you don't see
9 me in court very often because I'm drafting documents all of
10 the time. That's what I do; I'm an estate tax attorney. I
11 don't put this language in wills. In my form bank I don't
12 have this language. This is extra language, extra, more. It
13 says semicolon provided however that my personal
14 representative shall have the sole discretion to designate the
15 real or personal property comprising the respective shares so
16 established so long as the value thereof if approximately
17 equal. So, in the very least we have to reverse this case
18 based on the testator's intent as clearly stated in the will.
19 In that statute section where the Judge can reform a will, it
20 says if there is a mistake of fact or law or some other reason
21 and its A and B. Neither one of those reasons, mistake of
22 fact or law express the contrary intention as indicated by a
23 will. If there's a confusion in a will or intent where -- by
24 mistake of fact or law. Neither one of those A or B were

1 plead. Neither one of them were plead. Neither one of them
2 discussed at trial. And none of that is in the ruling.

3 The Kay case that was referenced in the initial e-mail
4 ruling from the Judge was -- had already been reversed in part
5 at the Court of Appeals. That's why he cited it; it just
6 came out. From the time he cited that case until the time of
7 our Motion for Reconsideration it had further been reversed
8 almost completely reversed by the Supreme Court. What
9 happened in that case, Your Honor, is what I want to avoid in
10 this case. The Circuit Court just kind of pushed it aside and
11 I think they should have given it more attention. It then had
12 to go to the Court of Appeals, then it had to go to the
13 Supreme Court. Your Honor, you well know you have the
14 authority to take care of this matter. And I will say without
15 question that I've got more faith in this Court than in the
16 lower court for the reasons that I've pointed out here. As
17 respectfully as I can ask you, Your Honor, I don't come before
18 you very often. I've looked at your bio and you're a very
19 studied man. You've got a fantastic background, so I have a
20 lot of respect for you just based on that alone. Anybody that
21 can finish the Citadel, I believe you went to the Citadel,
22 correct?

23 **THE COURT:** Yes.

24 **MR. DAVIS:** Is a man in my eyes. I say this
25 respectfully, Your Honor. Please take the time to look at the

1 facts carefully. Now, Mr. Tall has done his lawyer job and
2 twisted them up like you've never seen. Please try to take
3 the time and see through what the real facts are corroborated
4 by the testimony. Please read the terms of the will carefully
5 and I'm not saying that disrespectfully. Please read the
6 statutory law that we've got cited in our brief. And please
7 read the pertinent cases and make a thoughtful and informed
8 decision. This is the most egregious error that I have ever
9 been involved in, ever in my entire career and there's not
10 even a close second. And I ask you to please take the time
11 necessary to correct this matter. Thank you, Your Honor.

12 **THE COURT:** Alright. Alright. Mr. Tall.

13 **MR. BOYD:** Your Honor, may I request a brief, a brief
14 recess?

15 **THE COURT:** Okay. Let's take a 5-minute recess.

16 **MR. BOYD:** I'm sorry. Just a brief recess, Your Honor.

17 **THE COURT:** 5 minutes and then we'll come back.

18 **MR. BOYD:** Thank you.

19 **(COURT IS IN RECESS)**

20 **MR. TALL:** May it please the Court? I'm here in support
21 of the findings of the resolution of the Trial Court in this
22 matter. The Appellate Court should be made aware, and has
23 been made aware that the Trial Court findings express concern
24 about repeated breach of fiduciary duty, but also about the
25 way in which the personal representative defended her actions.

1 So in this matter that's gotten heated, I'll try to be as
2 peaceful as I can about it, and it's not a pleasant thing to
3 make presentations and see the Court find according to that
4 statute 62-3-720, that the requirements of good faith,
5 necessary and reasonable are met in connection with an award
6 of attorney's fees.

7 There can be in a case, Your Honor, disagreements among
8 parties without everybody becoming a villain. The suggestion
9 here is that Ms. Irving is only interested in control and I
10 think you'll find reference in some of the record alleging
11 that she sought vengeance against Ms. Jeanne. The appellant's
12 team suggested to the Court that the first year of estate
13 administration there was chaos. What took place at the first
14 anniversary of estate administration was a polite letter
15 written by Steven Rothgeb. Imagine if you will, Your Honor, a
16 beneficiary who's lost his father and understands however that
17 father left behind a sizeable estate. With all of the
18 billionaires we talk about these days, I guess a million
19 dollars these days isn't such a large amount, but for these
20 folks it was. And Steven expresses appreciation for what Ms.
21 Jeanne was doing. You can see in the record of testimony
22 there's affection between Jeanne and Steven. And at some
23 point in this letter he does ask, there's been a lack of
24 communication regarding the things that have been done since
25 dad passed. What he asks for is information about what has

1 happened to the estate. I don't think that Judge Padgett was
2 inappropriate to interpret this letter as a request for things
3 such as income, expenses, expectations. This is a copy of a
4 letter in the record of a response which presumably went to
5 Steven by carbon copy but was sent directly to Julie Irving.
6 In the first letter it says I got Steven's e-mail and it says
7 in parenthesis, with your input, suggestion perhaps that Ms.
8 Jeanne thought that this letter of Steven was in part written
9 by Ms. Julie. Makes a commitment to provide tables of
10 information and then says the reason I have not given you any
11 details recently is because there are no details to give.
12 When it's convenient in administration we'll hear from
13 appellant's team about how the properties were in disrepair,
14 how he had any number of tenants. We're collecting income,
15 we're making repairs, we're trying to do what's necessary in
16 estate administration. Not exactly fair to say there's
17 nothing to report. But Ms. Jeanne herself says if you give me
18 time, I'll get it to you. She talks about what's happening in
19 her life and how there's difficulty. She adds on page two of
20 this letter by putting in capital letters to Ms. Julie, you
21 ~~are never going to talk to him again and that if anything~~
22 happened to him he didn't want anything. A suggestion that
23 how is it that you as a beneficiary are now so interested in
24 your dad's estate, when you essentially at one time abandoned
25 him. We have Probate Court statute 62-3 -- excuse me, Your

1 Honor -- 703 (A), which describes a personal representative as
2 a fiduciary. And we can go round and round talking about how,
3 I've spoken about how people involved in this case from
4 appellant's point of view are villains. Perhaps they'll
5 suggest that the state legislature is also because the state
6 legislature in 702 -- 703 (A) says that you will be a
7 fiduciary to the same extent as trustees are in 62-7-804. How
8 do you have the Probate Code dealing with personal
9 representatives to the Trust Code, and as Mr. Davis points
10 out, the first part of the Trust Code says this applies to
11 trusts and not to personal representatives and estates, seems
12 like a conundrum. Is it an excuse however for not being a
13 fiduciary? To recognize that when you're in control, when you
14 have the resources, yes you have the responsibilities also,
15 they're burdens, but you have a duty to keep informed the
16 beneficiaries who don't have any control over what's going on.
17 It's unfair and inappropriate, it wasn't accurate for
18 appellant's team to suggest that at the first anniversary
19 there was nothing but demands. Steven's letter was
20 appropriate. Judge Padgett's order recognizes it as polite.
21 Aside from making some comments in her response, everybody is
22 glad to see that Ms. Jeanne is putting together some
23 information.

24 What Ms. Jeanne puts together however, is something that
25 she could have recognized would start trouble. Here are

1 beneficiaries at the one-year mark, the record will show that
2 they've gotten a \$5,000 distribution in the course of a year
3 from a million-dollar estate. And Ms. Jeanne who is asked for
4 information sends this out, it talks about how many bedrooms
5 certain properties have. It talks about whether something is
6 leased or not leased and what might be a commission, a ten
7 percent commission. It talks about what the HOA dues are. It
8 talks about what taxes have been. Together with suggesting
9 that Ms. Julie has done something wrong to get Steven to send
10 her a letter and bother her about these matters and to mock
11 Ms. Julie about even asking because she's had such a bad
12 relationship with her father. She is by the way listed as the
13 successor personal representative in the will, when the father
14 wrote his will he wasn't in the mood to disinherit or express
15 consternation against Ms. Julie, his daughter. But when you
16 roll that together with this limited information that was
17 provided you could have known that interested beneficiaries
18 would feel slighted. They hired Jack Scoville who also wrote
19 a reasonable letter in April of 2015, asked questions about
20 what's happening in the estate. Pointed to the part, I recall
21 appellant's team saying that we all have to pay attention to
22 all of the language in a decedent's will, and at this point
23 I'll say it's not appropriate to suggest that Judge Padgett
24 did not himself say in a number of places, call it my word, I
25 guess I drafted it. It's adopted by the Court. The concept

1 of the intention of the testator is recognized by the Probate
2 Court and the Probate Judge in this case. So Mr. Scoville
3 points to the part inside the will that says mortgaged
4 properties can be devised with the devisee taking the
5 properties subject to the mortgage. Appellant's team says
6 there's only one interpretation, that that has to be for a
7 specific devise. That language specific is not in the
8 language there, Mr. Scoville very quickly was able to get the
9 appellant's team to agree maybe that's a reasonable thing,
10 instead of having properties that have to be sold and you
11 accumulate enough to pay off the mortgage and nobody gets
12 anything until then. In this reply in the cover letter that
13 sends the tables, Ms. Jeanne repeats what she thinks ought to
14 be the standard and says y'all need to get a grip, there's not
15 any money today and there's not going to be any tomorrow. If
16 you're a fiduciary, that's not language that you really ought
17 to be thinking about and you can anticipate particularly that
18 you think you don't get along with very well, although she
19 says she gets along well with Steven.

20 Mr. Scoville's hired. Not a nickel, the record will show
21 not a nickel has Julie Irving or her brothers asked for from
22 the estate for the money they spent with Jack Scoville to
23 cobble out from the personal representative and her team an
24 accounting and an agreement to move forward with closing the
25 estate without need of having to sell properties to generate

1 funds to pay off mortgages before anyone could get anything.
2 In a polite letter in October of 2015 Mr. Scoville suggests
3 that the properties be appraised, and they were.

4 Ms. Julie has advised the Court that she felt Mr.
5 Scoville did what he should do and there's no need for having
6 another lawyer at that time. A suggestion from appellant's
7 team is that she did something wrong by firing Mr. Scoville at
8 a certain point, or she and her brothers. The expense to hire
9 an attorney, she felt that she had secured what she felt was
10 going to be a reasonable resolution. Appraise the properties,
11 arrange for a final accounting, get the estate closed.

12 Do you all have this? I think I only have my copy.

13 **MR. BOYD:** What is it?

14 **MR. DAVIS:** Your Honor, my only objection here is there
15 were two spreadsheets provided and they were not -- this is
16 before Mr. Tall got involved so if he's just going to provide
17 this, he needs to provide the other one because it's not a
18 fair representation of what actually happened.

19 **THE COURT:** All right. You can address that on reply.

20 **MR. DAVIS:** These are all preliminary ---

21 **MR. TALL:** If I may, let me make my arguments and then --

22 -

23 **THE COURT:** Overruled. I'll give you a brief reply.

24 **MR. TALL:** So we have when Ms. Julie asks questions,
25 she's a trouble maker from the beginning. Here is a December

1 2015 proposal for distributions. Ms. Jeanne is on record with
2 the Probate Court of appraising the property at \$191 - \$200,
3 000 and if you look through this spreadsheet it shows the
4 figure of \$95,000. If you are a fiduciary and are required to
5 act with prudence and you want to do what appellant's team say
6 Ms. Jeanne has always done, tried to comply, tried to
7 communicate, tried to avoid conflict how about this letter
8 which says here is a spreadsheet, send us your approval. I'll
9 give it that it says the word proposal, but Ms. Jeanne -- Ms.
10 Julie appears to be a troublemaker when she asks questions and
11 we have a \$95,000 figure for this property with no explanation
12 that that property's been improved. We have a whole lot of
13 talk about how we got to a certain appraiser and about how
14 everyone appreciated that appraiser and how he was fair and
15 unbiased. But at the time in December of 2015 this property
16 was not the deplorable property described in Mr. Cromartie's
17 appraisal. Through discovery we're able to get copies of
18 receipts showing that there was repairs done, and in face in
19 January Mr. Davis has mentioned, there's another distribution
20 proposal. I apologize, Your Honor. Showing now over \$20,000
21 to rehabilitate this property, money that came from the estate
22 in the control of Ms. Jeanne. So the outset, and we're
23 thinking of Ms. Julie being the counterclaim defendant of
24 having done things that are just troublemaking and frivolous.

1 Within a five-week time we get a new distribution
2 schedule and Ms. Jeanne is taking responsibility for those
3 expenditures by the estate and she's disclosing them. Again,
4 we find the actual receipts at a later time. If you add up
5 the repair bills and the \$95,000 appraisal and the record we
6 have in the trial has Ms. Jeanne wanting to acquire the
7 property at \$118,000. Ms. Julie says to herself; I know the
8 house and certainly if it's been repaired -- by the way, this
9 house, I think the sheet shows Your Honor has \$129,000
10 mortgage on it. Ms. Jeanne's trying to acquire the property
11 for less than the mortgage amount. Ms. Julie says to herself;
12 this is not the right number and she writes to the estate
13 asking. Mr. Davis only tells half of the story. Can we have
14 this property distributed in quarter shares and we'll all work
15 this out, and what we really have is close to a settlement and
16 we've got these properties that are supposed to be divided in
17 equal portions. What am I to do when the personal
18 representative who is in charge says if anybody's insisting on
19 anything, I'm taking this property which has \$129,000
20 mortgage, I'm taking it at the value of \$118,000? And Ms.
21 Julie, who's a businessperson says, I know how people make
22 their living with real estate sometime. They find a \$95,000
23 property, you put \$20,000 into it and you come up with
24 something that's much more valuable than the old deplorable
25 price and the amount that you used to rehabilitate it. So, in

1 our case we have so much the Trial Judge said why is there
2 repeated references to the deplorable unrepaired state of this
3 property coming from a fiduciary.

4 The trial in this case was in February of 2017, as late
5 as October 2016 in affidavit Ms. Jeanne is telling the Court
6 that she's just not understood because this property was in
7 terrible shape. It was not in terrible shape in December of
8 2015, or January of 2016, or October of 2016 when references
9 to its problems are highlighted by the fiduciary. What's the
10 purpose of doing that? The Judge at a temporary restraining
11 order motion hearing in May of 2016 ---

12 **MR. DAVIS:** Your Honor, I object. I don't know if that's
13 in the record or not. He's brought up some things that were
14 ruled on and discarded, discounted by the Court and he wants
15 to cloud the issues here. I would caution the Court not to be
16 persuaded by that. It's not relevant at all. He had some
17 stuff he brought up, he threw at the Court, the Court shot it
18 down. He's trying to show you that -- anyway, I just ask you
19 to caution him on this. And I object to him bringing up
20 things about his TRO and about any of that because it was all
21 cashiered out of the way by the Probate Court.

22 **THE COURT:** All right. Overruled, go ahead.

23 **MR. TALL:** At the temporary restraining order the Court
24 said what we see is an estate about to close, but you've got
25 property divisions and this part of the will, which the Court

1 wants to give relevance to, wants to honor, and says I'm going
2 to order mediation and everyone is going to pay their own
3 expenses for mediators. Judge Padgett saw this at this point
4 in the administration of individuals attempting to secure
5 their best value and the personal representative stuck on a
6 number of 2 -- excuse me, \$118,000. The Court ordered, and
7 the appellant's team complied with filing an accounting for a
8 proposal for distribution using that \$118,000 value for a
9 property that had been repaired, for a property that had a
10 \$129,000 mortgage on it, for a property that the personal
11 representative had sworn twice in inventories was worth
12 \$191.

13 . By the way, there's not in any agreement, which if you
14 look at two letters from Mr. Scoville, Mr. Scoville spoke
15 because there's two letters in the records and there's nothing
16 in those two letters which say after properties are appraised
17 no one get's to make comment about the appraisals. No one
18 gets to -- everyone is bound by the appraisals. And certainly
19 the agreement doesn't say the personal representative who's
20 the fiduciary can take estate funds, rehab the property, and
21 ~~then put it in her pocket at the value which the appraiser saw~~
22 when it was in disrepair. That's certainly not part of the
23 agreement. The Trial Judge highlighted this because he saw
24 hostility on the part of appellant's team and the appellant
25 brief continues it to say Ms. Julie turned her back on the

1 agreement. She didn't want to do what her lawyer had said
2 would be the case. The Judge in his order makes plain that
3 it's a breach of fiduciary duty to try and paint Ms. Julie as
4 someone who is reneging on an agreement when there is no such
5 agreement that says we'll be bound by appraisals, no one gets
6 a chance to make any argument about it. And as an interested
7 person somehow she's tarred and feathered by saying aren't we
8 dealing with a property that's now in repair, can we stop
9 talking about the disrepair, can we focus on the fact that
10 this property has \$129,000 mortgage. It doesn't make sense to
11 me and my brothers, so the proposal to the estate in letters
12 pinned by Ms. Julie are why don't we distribute the properties
13 in equal shares. Do you have an objection? Letter two, do
14 you have an objection? Letter three, I haven't heard an
15 objection from the estate as to whether you have a problem
16 with distribution the property in four equal shares. And if
17 you don't like that, says Ms. Julie before she gets involved
18 with any litigation, how about this for some fairness? My
19 brothers and I have had next to no distributions from the
20 estate. Personal representative is being represented by the
21 Davis and Boyd law firm. Can you make some financial
22 distributions to the three of us, the three other
23 beneficiaries so we can participate in the discussion about
24 how we distribute these real properties because your view of
25 \$118,000 for a property that is repaired and has a \$129,000

1 mortgage doesn't seem fair. We don't get a positive response.
2 She doesn't get a positive response to that alternative
3 proposal.

4 The appellant's brief says it's Ms. Irving's way or the
5 highway. Consider anyone who is an interested party in an
6 estate and says this isn't fair and I want to do something
7 about it. Your Honor was talking about that earlier in the
8 hearing today. That person necessarily has to be labeled a
9 troublemaker. What about Ms. Jeanne's fiduciary duty to say
10 you know what if I was in her shoes and I saw somebody trying
11 to take a property with \$129,000 mortgage for only the price
12 of \$118 I'd probably be suspicious too. Actually, that phrase
13 suspicious too was spoke by Mr. Davis as the hearing for
14 reconsideration. We're not -- we shouldn't be blaming Ms.
15 Julie for these kinds of things.

16 There's a conversation between Ms. Julie and Mr. Davis
17 over the telephone, Mr. Davis says looks like we're not
18 working anything out. From her point of view, the estate
19 lawyers had a conflict of interest. She was being invited to
20 participate in something akin to a mediation, which was going
21 to be chaired by people that had Ms. Jeanne's view in mind and
22 we're being paid three-quarters by Ms. Julie and her two
23 brothers. So the third thing that she asked, if we can get
24 some money so we can have our own counsel and we can have a
25 mediation. The third thing is and the estate lawyers stay out

1 of it because I don't want to be negotiating, remember Ms.
2 Jeanne's a fiduciary, according to the Probate Code not in
3 Article 7 and we've got that conundrum. I think we ought to
4 call up Alan Medlin and say you've got a part that deals with
5 personal representatives that behave like a trustee. And what
6 does it say? It says be prudent. Is Mr. Davis' solution that
7 Article 7 doesn't apply in spite of the fact that the statute
8 for personal representative says it does. But it shouldn't
9 apply, personal representatives shouldn't be prudent, personal
10 representatives shouldn't exercise loyalty, personal
11 representatives shouldn't keep people reasonably informed? No
12 that's only in the Trust Code and you're trying to read things
13 in. I don't think we have a definition in our Probate Code of
14 the word fiduciary. But curiously we look in Black's Law
15 Dictionary, it says act like a trustee.

16 So from Ms. Julie's point of view, and I understand the
17 attorneys for appellant's team to say we really tried to work
18 this out, at somepoint you don't try to work it out. You
19 have a conflict of interest and you back away. If you insist
20 that according to the will only the personal representative is
21 the one that's going to divide up the values and the
22 properties in spite of the fact that at the first objection
23 from Ms. Julie they changed the number from \$95,000 to
24 \$118,000, still not a reasonable thing. If someone takes \$100
25 from me and says I'll give you \$70 back, I'm happier than I

1 was before I heard about the \$70, but how about some fairness,
2 the whole thing. Can we work this thing out and can we work
3 it out without generating a bill that my brothers and I are
4 paying 75 percent of? That's how that telephone conversation
5 ended. It also ended with a commitment in February of 2016 to
6 have something of a final distribution plan. Read that
7 transcript, listen to the telephone conversation, that's what
8 appellant's team said would happen.

9 In April of 2016 Ms. Julie filed her action. An ugly
10 action, we find appellant's team criticizing the Judge because
11 can't find anywhere where it talks about bad faith. It makes
12 the suggestion that the case is being brought to prevent what
13 Ms. Julie couldn't do on her own, to get a commitment to
14 prevent the personal representative from using her resources
15 and her authority to secure a personal bargain. It's the
16 essence of what Judge Padgett found at trial and that's the
17 bad faith that's there. There is in the rehearing transcript
18 a curious debate between Mr. Davis and the Judge. Judge
19 Padgett has said he found the personal representative using
20 her authority to get personal gain at the expense of other
21 beneficiaries. And Mr. Davis says, I don't see the word bad
22 faith in your order. And that's where the word implicit comes
23 from, Judge Padgett says you don't think the actions that I
24 described are implicitly in bad faith, intentionally using her

1 authority for personal gain at the expense of other
2 beneficiaries contrary to fiduciary duty.

3 Prior to trial at the hearing in May of 2016, the Court
4 ordered mediation. In connection with mediation appellant's
5 team asked for and received from my office a position that the
6 respondents were going to take, that Ms. Irving was going to
7 take in dealing with the upcoming, the upcoming mediation.

8 **MR. BOYD:** Your Honor, I don't recall, I would just
9 appreciate it if Mr. Tall would give us a cite to the return
10 or to the record. As a settlement discussion leading up to a
11 mediation, this would have been an inadmissible settlement
12 discussion is what it sounds like.

13 **THE COURT:** Well y'all got into, y'all were talking about
14 what your client offered and what she was willing to do, she
15 was going to give up the residence that she had lived in for
16 20 years and had offered that to them ---

17 **MR. BOYD:** Your Honor, that ---

18 **THE COURT:** --- so I'm going to allow him to go ahead.

19 **MR. DAVIS:** Hold on, if I can ---

20 **THE COURT:** No. I've ruled. Go ahead.

21 **MR. BOYD:** Understood. Thank you, Your Honor.

22 **MR. TALL:** Mediation is canceled the day before as my
23 client is traveling down I-95. And following the mediation
24 cancellation and another part of the order in May, it's a June
25 2016 order, a property was about to sell and the Judge --

1 Trial Judge said at that time, let's let the proceeds of the
2 sale of that one property go into four portions so everyone
3 will have some funds to participate in mediation. As it
4 happened, that property did not sell. There was not a
5 distribution to all four of the beneficiaries and a motion was
6 filed to get some financial benefit to the beneficiaries
7 because -- the motion is in the record -- because, Your Honor,
8 the property didn't sell, the beneficiaries didn't have funds,
9 we're going to participate in something to get this settled.
10 So there's a motion to quash filed by appellant's team, and in
11 that motion to quash is an exhibit, which is a redacted
12 portion -- it is a redacted portion of my settlement proposal
13 prior to mediation. What takes place in connection with the
14 motion to quash is an affidavit in October of 2016 by Ms.
15 Jeanne. And while you're looking at a blank page there, Ms.
16 Jeanne is quoting me in her affidavit talking about how it
17 seems unfair that I would ask for such terrible things in a
18 proposal for mediation. Your Honor, my apologies once again.

19 In June of 2016, Your Honor ---

20 **MR. BOYD:** Excuse me, Your Honor. I'm sorry to interrupt
21 but can you just -- can I just briefly inquire what the

22 document that Mr. Tall -- I don't even know what document he's
23 passed up.

24 **THE COURT:** This is a letter dated June 27th, 2016 to
25 Judge Padgett.

1 **MR. BOYD:** He's given me a copy of those two documents,
2 Your Honor, but the one he handed up previously, it looked to
3 be a mostly blank page, Your Honor.

4 **THE COURT:** It was an e-mail from Mr. Tall to y'all's
5 firm.

6 **MR. BOYD:** Okay.

7 **THE COURT:** Dated October 11th, 2016 at 10:36 a.m. It
8 says this e-mail is forwarded only for purposes of settlement
9 negotiation and cannot be used for any other purpose.

10 **MR. TALL:** It's Exhibit O to your motion to quash.

11 **MR. BOYD:** Thank you.

12 **MR. TALL:** So what we have is mediation canceled for a
13 couple of reasons: one, is surprise that we talk about such
14 things as attorney's fees and personal representative
15 compensation, although it was forwarded to everyone in July of
16 2016. Then the other concern of appellant's team is they find
17 a Facebook post, which claims to come from Ms. Julie saying,
18 Cliff has told me not to expect too much at mediation, the
19 last part of that sentence is, but I have to try. How many
20 mediators would like to hear animated parties say I'd like to
21 try? Court ordered mediation canceled and we have a reference
22 to conversations with the mediator from appellant's team, he
23 agrees we have an impasse. Again, we're talking about someone
24 with fiduciary responsibility.

1 This is followed, Your Honor, in something that's only
2 part of the record because in connection with this hearing I
3 filed a motion to supplement the record on appeal. Both
4 parties had designated the appellant's team answer to this
5 complaint which contained a counterclaim. Both parties made
6 this a part of their designated matter on appeal. Appellant's
7 team responsible for assembling the record on appeal, didn't
8 put it in. After hours on the eve of the hearing in front of
9 Judge Hyman to hear the supplemental motion to expand the
10 record to include what, what both parties had put, we get
11 something from appellant's team that says that this was
12 inadvertent. The absence of appellant's team answer is
13 inadvertent. The Trial Judge in looking at what took place
14 with Ms. Irving trying to get -- Ms. Julie trying to get some
15 fairness from someone who appeared to her, and according to
16 the Judge appeared to the Judge, appeared to the Judge of
17 using the position of personal representative for personal
18 gain. The Trial Judge described that counterclaim as a waste
19 of fiduciary power. And had we not filed a motion to
20 supplement the record, I wouldn't be able to talk to you about
21 it because appellant's team, they say inadvertently, left that
22 out.

23 There are about 98 other pages that were inadvertently
24 left out and I'll highlight a few of them which are helpful to
25 respondent's case. How difficult is it to look at what both

1 parties have designated as matters for appeal and if you have
2 the job -- what we have here is everyone needs to be a
3 partisan. At some point, stop being a partisan and be an
4 administrator. If there are things that both parties
5 including your opponent that you just don't have a good
6 opinion of has said should be part of the record, put it in
7 the record. If Ms. Julie says I don't understand how someone
8 takes a property that's been repaired and has a mortgage
9 larger than the fair market value you want to pay for it, stop
10 and think well you know maybe we ought to address that. If
11 you have this distribution proposal that says that 191 (sic)
12 property is now worth 95, please send us your agreement. Can
13 you think that maybe that's going to start fireworks? That's
14 what fiduciaries do, they're able to detach from their own
15 personal view of what's important to them and say well wait a
16 minute I have another job. And this happens if we want to
17 talk about setting a precedent, which the appellant's team
18 speak of, let's set that precedent because all the time we
19 have four children where one of them is the personal
20 representative. In this case we have the stepmother who is
21 the personal representative and three other beneficiaries.
22 And by goodness if you're a fiduciary you better be able to
23 balance this. When someone's expecting to get some
24 information -- how about this, I'll digress for a moment.
25 Appellant's team is invited to a motion hearing in February of

1 2017. They bring no affidavit. They bring no response to the
2 motion, but say to the Court, you may want to look at these
3 500 pages, I don't know if it means anything to put it in the
4 record. That's not a proffer of documents that the out of
5 touch Judge refused to consider. There's nothing in the
6 record that shows what in the world these gentlemen wanted the
7 Trial Judge to see or how they presented it to him in any
8 reasonable fashion. And I don't think we're going to find in
9 the record where he says I'm sorry gentlemen I'm not going to
10 consider that. What we have is Your Honor can we get your
11 attention on this -- come to Court prepared. If you have
12 something in the 500 page folder that you think is so
13 important, don't ask the Judge to peer through it, you select
14 the 9, the 12, the 35, the 85 pages that you think of the 500
15 that are relevant. That's your job. And if you don't do it,
16 don't blame the Trial Judge because he didn't get interest
17 when he said Your Honor I have 500 pages they might be
18 helpful. That's not how it's done.

19 So when you're a fiduciary and you realize the people on
20 the other side, they have their own feelings about things as
21 well, this is a case where the Judge heard appellant's team
22 and appellant's say repeatedly I tried to do my very best.
23 She started firecrackers. What is it about telling
24 beneficiaries, who for a year have let you peaceful manage
25 assets and Steven's polite letter gets a response that says,

1 y'all need to get a grip? And appellant's team in their brief
2 say, Steven didn't even ask for information about income,
3 maybe he didn't use the word income or expenses, he asked I
4 want to know what's happened since the lawyers have become
5 involved and somehow that gets interpreted as well these
6 properties have certain bedrooms, and these properties have
7 certain HOA's. If the personal representative wants to say if
8 you're looking for an accounting it's a little too early I
9 haven't got the time to do it yet but I understand what you're
10 looking for, suggesting that this is annoyance on the part of
11 three beneficiaries, once of whom she says she has a great
12 relationship with, is stepping away from fiduciary duty and
13 sliding into where you say my personal interests are
14 important.

15 In our timeframe we go further, Your Honor, to the trial.
16 But prior to that, why did we hear today that all that we had
17 from respondent's team was a drive-by appraisal when the
18 appellant's team know full well that with a court order
19 Russell Burgess was permitted to do what the appellant's team
20 said was essential, come look at the inside of this property.
21 So he inspected it and we have the appellant's appraiser, Mr.
22 Cromartie, appellant's team asking that he be present during
23 that inspection and he was present during that inspection. An
24 appraisal was done of a repaired residence and only one
25 appraisal was done of that property.

1 Mr. Davis talks about how in 2017 he reached out to the
2 Court because he considered it to be out of line, the only
3 time in his career he's been deposed. He writes to the Judge
4 complaining that respondent's team is proposing the outrageous
5 thing of taking the deposition of a witness in a \$100,000
6 counterclaim. Think about that for a moment, Your Honor.
7 These gentlemen are suggesting that appellant's -- that
8 respondent's counsel commit malpractice, go to Court where
9 your client is being accused of responsibility for \$100,000
10 and not take the deposition of a key witness. I'm sorry, our
11 offices are a block and a half from each other, I don't want
12 this icy relationship but both of us have obligation to
13 clients. I think we're both trying to do it the best way we
14 know how.

15 We go back to James Cromartie, the appraiser, present
16 when Russell Burgess inspects the property in and out and
17 gives his appraiser. Called to testify in Court. Why in the
18 world since December of 2015 when the property is
19 rehabilitated with estate resources are we continuing to talk
20 about the properties disrepair and how good Mr. Cromartie was
21 and how fair his \$95,000 appraisal of the deplorable property
22 was? Why is he in Court? According to this letter to the
23 Probate Judge, which tries to suggest this is a small matter,
24 let's put two appraisers on the stand and they'll work it out.
25 This is a letter in January of 2017 just before trial. Mr.

1 Cromartie takes the stand, and we ask him, you were present
2 when Russell Burgess did the appraisal? Yes, sir. And you
3 saw the property in its repaired state? Yes, sir. What is
4 your opinion? Isn't that what Mr. Davis is telling the Court
5 ought to happen, put a couple of appraisers on the stand. Mr.
6 Cromartie says I was not engaged to give an appraisal of the
7 property in its repaired state. This is a Probate Judge who
8 is looking at that statute 3-720, necessary, reasonable, and
9 good faith in a defense and you compare what Mr. Cromartie
10 said on the stand that he was not engaged to give an opinion.
11 Isn't that the central issue of our case that one party who is
12 the fiduciary and is trying to get a property for what looks
13 like, according to Ms. Julie, bargain hunting. Do it as a
14 person, not as a personal representative. Bargain hunt all
15 you want, just don't use the estate resources for it. That's
16 the central issue that's separating these parties. And the
17 appraiser said no one has hired me to give my opinion of the
18 value of the property now that it's been repaired. Hearing
19 transcript at the motion for reconsideration, Mr. Boyd tells
20 the Trial Judge we were trying to save money and that's the
21 reason why we didn't ask Mr. Cromartie to give his opinion of
22 value of the property in its repaired state. Had him make
23 sure that he was there when respondent's appraiser inspected
24 the property, called him to trial. The Judge has described
25 that comment as neither reasonable or credible that the estate

1 is attempting to save money while they have the man there at
2 the inspection, have his as a witness but he is handcuffed
3 because he hasn't been engaged to give his opinion of value.

4 If you would just listen to appellant's presentation you
5 would say perhaps we're dealing with a Probate Judge who's not
6 being fair to everyone, not paying attention to what's going
7 on. He paid attention to what Mr. Cromartie didn't say and
8 the reasons why he didn't say it.

9 Some responses to other things that were raised by
10 appellant's team, a concern that the *Kay, Brown, Sullivan* case
11 was misapplied by the Probate Judge. The case confirmed the
12 discretionary position of the personal representative and in
13 its latest state recognized that in the common fund doctrine,
14 common fund doctrine is basically saying that if you've got
15 people that are similarly situated, if you've got some folks
16 who are benefited by what's going on and they had a
17 relationship with the attorney that was prosecuting the case
18 on behalf of one of the parties then it's not inappropriate to
19 have the attorney's fees borne by those other people who had
20 benefits. In our case the standing to make the *Kay, Sullivan,*
21 *Brown* case is Steven Rothgeb and Matt Rothgeb. Those are

22 folks who have not appealed this case. The suggestion from
23 appellant's team is Jeanne Poafpybitty got no benefit out of
24 what Mr. Tall did, please don't have some of his fees put upon
25 her shoulders, that's not what the *Kay* case is all about. Ms.

1 Poafpybitty is being assessed costs associated with Statutory
2 Law in the Probate Code. You don't need the *Kay* case and the
3 *Kay* case is not appropriate to her. In Judge Padgett's order
4 he said that by applying the *Kay* case and spreading the costs
5 to other beneficiaries, what Ms. Julie asked for is 100
6 percent of her fees against the personal representative, much
7 lighter 25 percent. So the suggestion that *Kay* is out of
8 bounds, the Probate Court has the ability of saying there were
9 things that took place in this administration that didn't need
10 to take place if the personal representative was properly
11 acting as a fiduciary and that's why she's assessed costs.
12 It's to the appellant's advantage, Your Honor, to highlight
13 this case as an attempt by one of three beneficiaries to
14 hijack control away from a personal representative. I think
15 Johnny Cochran wouldn't have earned his fee if he didn't turn
16 his attention to the prosecutor's and the police in the O.J.
17 Simpson case. Almost everyone who comes to authorities and
18 says there's something wrong here I need to get it set right
19 better be prepared for anyone who's going to be harmed or anyone
20 who's going to be affected by that correction to say wait a
21 minute what about that accuser, what's that accuser got to do,
22 so it's a balance. The Court can focus on was this just
23 somebody who could not be satisfied, Julie Irving, or is this
24 a repeated attempt, these gentlemen say no allegation of bad
25 faith. Is this a repeated attempt of someone who's in

1 authority as personal representative trying to use that
2 authority to get a personal advantage. That's what the Judge
3 saw. Agree or disagree with it, but don't suggest that the
4 Judge had nothing to say.

5 There is one place in the trial transcript, pardon me, in
6 the court order, the first court order after the trial where
7 the Judge did use the term bad faith.

8 **THE COURT:** Are you talking about the March 2nd order?

9 **MR. TALL:** Yes, Your Honor.

10 **THE COURT:** All right.

11 **MR. TALL:** In December of 2016 we're headed to trial in
12 February, Mr. Burgess appraisal at \$193,000 and change has
13 been shared with the parties and a request for admission is
14 sent to appellant's team. In order to find out as we're
15 headed for trial did Mr. Burgess appraisal have any effect on
16 the appellant's team, are y'all still using \$118,000; do we
17 have a contest? This is the response in the Judge's order
18 says the response to Paragraph 6, pardon me, Paragraph 7
19 represents bad faith. The \$118,000 value was listed, is the
20 term I used, in a June 2016 filing by the appellant's team and
21 the request for admission says that the defendant still has a

22 vision of value associated with what was listed in June of
23 2016 and Mr. Boyd takes question/objection to the term listed,
24 it's ambiguous. At trial the Trial Judge said I understand
25 what was being asked. Y'all still hold on to that \$118,000

1 value? And the Trial Judge in his order on March 2018 says
2 hard for Ms. Irving and her team to prepare if you get that
3 kind of response in a request for admissions. Mr. Clinton had
4 a problem with the word is; appellant's team had a problem
5 with the word listed. The meaning wasn't that difficult and
6 that's one place in the Judge's order where bad faith is
7 described.

8 **MR. DAVIS:** Your Honor, I'm not exactly sure. He's
9 mentioned that the Trial Court had a finding of bad faith,
10 that's not what that is. There was a mention of bad faith --
11 what is he saying there's a mention of bad faith or ---

12 **MR. TALL:** I'll read from the transcript if you'd like.

13 **MR. BOYD:** What page of the order are you referring to?

14 **MR. TALL:** I'll be happy to get it.

15 **MR. DAVIS:** Are we saying that it's in the transcript or
16 it's in the order?

17 **THE COURT:** He's looking. He's getting ready to tell
18 you. He's answering your question right now.

19 **MR. TALL:** It's page 31 of the March 2018 order, Your
20 Honor. No matter what the contesting issues are, it is an
21 exercise of bad faith for the estate to refuse direct and
22 transparent replies to basic estate administration questions,
23 especially when as here Ms. Poafpybitty and her team argue
24 that property value and distribution authority lie solely with
25 Ms. Poafpybitty's discretion. We want to know in December of

1 2016 do we still have a contest over values, and we deal with
2 an objection because I've used the word listed in my request
3 for admission.

4 **MR. DAVIS:** One quick thing, Judge, and I know you want
5 to get done with this. Your Honor, again this is not a
6 finding of bad faith. Is he saying that this -- the Court has
7 found bad faith because this is not a finding of bad faith?
8 There is the words mentioned in here bad faith, but there is
9 not finding of bad faith in this order.

10 **THE COURT:** Well I don't know. It says ---

11 **MR. DAVIS:** Because he has a section where he has his
12 findings in that order.

13 **THE COURT:** It says it is an exercise of bad faith for
14 the estate to refuse direct and transparent replies to basic
15 estate administration questions going back to the request for
16 admissions.

17 **MR. DAVIS:** And we -- and we did -- they knew -- they all
18 knew very well exactly what the value was.

19 **THE COURT:** Not from this answer. On this answer he said
20 defendant's -- he's asking you to admit or deny that the
21 defendant's current distribution proposal includes

22 distributions of property listed in its June 2016 final
23 accounting at values listed in said final accounting. You
24 objected to that. It said personal representative objects to

1 this request on the grounds that it is unclear, ambiguous, and
2 open to multiple interpretations.

3 **MR. DAVIS:** It was, Your Honor, that was the issue of the
4 trial.

5 **THE COURT:** Well according, according to the Judge he's
6 saying that you refused to answer it and he found that to be
7 and faith.

8 All right. Go ahead.

9 **MR. TALL:** And I'm prepared, Your Honor, to say ---

10 **MR. DAVIS:** That's not what he -- but that's not what he
11 found, Your Honor.

12 **THE COURT:** You'll get an opportunity to respond.
13 Go ahead, Mr. Tall.

14 **MR. TALL:** I'm prepared at this point to say that might
15 have been an overreaction on the part of Judge Padgett, but to
16 claim that there's nothing in his order that talks about bad
17 faith.

18 Your Honor, I have pages 93 and 94 from the June 2018
19 reconsideration hearing and pages 37 and 38 of the June's
20 March 2018 order. And this is the kind of exchange that you
21 actually just observed. There's a special definition, there's
22 a special way you have to say bad faith. This is the Judge
23 and Mr. Davis, and this is where the term implicit comes up.
24 Mr. Davis says there's no way to understand what to do,
25 there's no guideline. The word implicit is so nonspecific.

1 And the Judge in his order finds that someone of authority is
2 using her authority to gain personal advantage and Mr. Davis
3 says we need to find that in the court order, or he's saying
4 that if you don't actually speak the words bad faith, you
5 haven't described bad faith. It describes a bit of what Ms.
6 Julie has had to deal with in trying to secure some fairness
7 for herself and for her brothers.

8 By the way, the letter that we showed you, Your Honor,
9 from Mr. Davis to the Court resisting the giving of his
10 deposition was among the documents inadvertently omitted from
11 the record on appeal and something that we had to secure by
12 filing a motion. Why not take some responsibility for stuff
13 that just happens? Appellant's team complained to the Court
14 after they thought that there was a Facebook post which was
15 unflattering. It was like an obscene end zone dance and some
16 football -- you don't take the six points away; you might give
17 somebody a fine if you can prove that it's the case. The
18 Judge said if that's her posting, it's inappropriate. Took
19 two months from the May e-mail from the Court to have a
20 hearing, to have a phone conference and e-mail communications
21 ~~between the Court and the parties~~ describing how the Judge
22 wanted to handle that the day after it was brought to the
23 Court's attention in June had to take place in the middle of
24 July because one of the two parties, one of the two lawyers
25 representing the appellant's team wasn't available. I don't

1 mind this, but if you want to barbeque somebody and say that
2 person took five months, two months of it belonged to these
3 gentlemen.

4 **MR. DAVIS:** No it didn't. I'm sorry.

5 **THE COURT:** I don't know whether it did or didn't.

6 You're saying it didn't; he's saying it did.

7 **MR. DAVIS:** Okay.

8 **THE COURT:** So I, I don't know. Go ahead.

9 **MR. TALL:** Well and the record of this is something that
10 was inadvertently omitted from the record on appeal even
11 though we highlighted it. Y'all can help me by telling the
12 Judge it took place. We weren't meeting with the Court on the
13 phone until July of 2017, excuse me 2018, '17.

14 Your Honor, I may be doing something inappropriate next.
15 I read in the appellant brief that there are grounds that
16 haven't been raised by appellant's team in their argument
17 today but perhaps they'll want a chance at it, it remains
18 inside their brief. From my position, my client, who's an
19 emotional lady, has exercised remarkable restraint but she did
20 a very foolish thing. And that is after the trial she e-
21 mailed the Trial Court directly. We all received
22 communications from the Trial Court that says this highly
23 inappropriate communication from a party was intercepted
24 before the Trial Judge read it. While letting you know that
25 it took place, it's not going to affect what the Trial Court's

1 going to do, but we're putting it to your attention. This
2 episode is cited, not argued today, again maybe I'm doing the
3 wring thing. Maybe they abandoned the argument, but it
4 remains in the appellant brief that if this took place, we
5 need a mistrial even though the Trial Court took appropriate
6 steps. But the whole idea of painting this case as something
7 where someone with clear fiduciary capabilities, Ms. Jeanne,
8 was forever put upon by someone who was difficult, difficult,
9 difficult is helpful to their case. The Trial Judge was able
10 to see testimony, evaluate demeanor, with respect to Ms.
11 Jeanne he called her neither sincere nor credible. And the
12 issue is, you wouldn't even think the issue existed if you'd
13 listen to just what appellant's team -- how about do what I
14 just did, my client made a mistake and I've given you an
15 explanation for it. I'm not going to pretend that that didn't
16 take place. I'm not going to pretend that there was something
17 sent out that says that property at its deplorable \$95,000
18 value is how I want to take it at a time when it was repaired.
19 And the people who don't have the information and aren't in
20 the know are put at the burden of learning those things. If
21 ~~you are shocked at how Ms. Jeanne is treated by the Trial~~
22 Judge, he's laid these things out in his Trial Court orders
23 and in the order -- why in the world did the Judge take 25
24 pages to give in a reconsideration? Because of episodes like
25 what we've just handed up between the Judge and Mr. Davis. I

1 can't find bad faith anywhere, we've got problems in this
2 case, you didn't consider all of our defenses and our
3 counterclaims. They were considered and the Judge went to
4 length to lay them out.

5 Your Honor, it was a rather difficult case, the parties
6 at sometimes they got along, but the idea of one trying to
7 take financial advantage when you have fiduciary duty you have
8 a higher duty to take a hold of and Ms. Jeanne either didn't
9 or couldn't. And the whole idea of us going to trial to think
10 that, like Mr. Davis said in January of 2017, a couple of
11 appraisers are going to help us figure out what the values are
12 because the court ordered mediation didn't happen, we've got
13 to do something, or one party just has to cave in to the
14 other. We come to Court there's contest, there's one
15 valuation of a repaired residence.

16 What about what Mr. Davis has suggested was an overriding
17 exercise of good faith on the part of the personal
18 representative, she'll move out of her house. If you all want
19 the property, we'll give you the values. What is the personal
20 representative saying? This property is worth one thing if
21 I'm taking it, it's worth another thing if you're taking it.
22 The filing before the Trial Court, the Trial Judge said no
23 later than 10 days before the trial. It was submitted two
24 days before the trial, not much time to prepare, or gave me
25 another week of preparing for things that maybe I shouldn't

1 have been preparing for because I didn't see what the Judge
2 said should be in my hands ten days before the trial, and it
3 has the value of \$193,000 and change. On the stand Ms.
4 Poafpybitty was asked do you believe that property is worth
5 \$193,000, the answer is no. That filing with \$193,000 was
6 filed with the Court, oftentimes our documents require this,
7 under oath. Under oath the personal representative allowed a
8 filing on behalf of her side of the case using numbers that
9 she didn't believe in. That's the kind of level of animosity,
10 the kind of justification when someone says it's my way or the
11 highway and tries to apply that to Julie Irving I think
12 otherwise. There's someone who says that was my husband, my
13 name was not on that deed, I let him get away with that.
14 Maybe that's a feeling as to why she felt entitled, don't
15 know. But when it comes to the end of the day and someone
16 says that's a value only if you take it, and it's not a value
17 I think in spite of her filings that the Court asked her to
18 prepare prior to the Court trial. We'll have an understanding
19 of what it is that Judge Padgett looked at and the motivations
20 for him to find, yes, there was bad faith exercising fiduciary
21 duty. Thank you, Your Honor.

22 **THE COURT:** All right. I'll allow one of you to reply
23 very briefly.

24 **MR. BOYD:** Very briefly, Your Honor.

25 **THE COURT:** Hold for a second.

1 **MR. DAVIS:** And can I just share with him some thoughts
2 that I had?

3 **THE COURT:** Go ahead and get it because only one of you
4 is going to be able to reply.

5 **MR. BOYD:** Your Honor, very briefly in rebuttal, and we
6 appreciate the Court's -- the Court's indulgence here today.
7 Your Honor, that little bit that Your Honor just heard about
8 the \$193,000 crystalizes in a nutshell the very problems that
9 have been created by the manner in which this case has been
10 litigated, Your Honor. Yes, there were multiple -- there were
11 multiple valuations that were created and proposed, multiple
12 accountings and proposal for distributions that were put
13 together and proposed in an effort to resolve this matter,
14 Your HOnor. Ms. Poafpybitty is on record throughout the case,
15 multiple times throughout the transcript saying no she didn't
16 think the house was worth \$193,000. Your Honor, the process
17 beat this poor woman to a pulp. By the time -- by the time we
18 were in the home stretch of this litigation she was prepared
19 to do anything, sign anything, just to -- just to get beyond
20 this brutal process, Your Honor. She was very clear she
21 didn't think the house was worth \$193,000. By the way, Your
22 Honor, and again it's just a proposal for distribution. Now,
23 Mr. Tall after beating the poor woman to death almost
24 literally in an effort to, you know, convince her that she was
25 attempting to steal the house from the estate in affect, which

1 is -- that's what he's alleging. That it couldn't have
2 possibly been worth as little as \$95,000 or even \$118,000.
3 Finally, beats the PR into submitting a proposal for
4 distribution that says the value was \$193,000 and change and
5 wants to suggest to you that she's lying under oath. Your
6 Honor, it's absurd, it's categorically absurd. We shouldn't
7 treat personal representatives this way. If this case is the
8 law of the land I wouldn't in good conscience encourage
9 anybody to be a personal representative. There's nothing that
10 would be worth enduring what this woman has endured, Your
11 Honor, nothing. And by the way, Your Honor, put the appraiser
12 on the stand, the insurance appraiser, Ms. Irving's appraiser,
13 and I asked him would you buy this house for \$190,000? He
14 said no. Your Honor, nobody in their right mind would buy the
15 house on Crooked Pine Drive for \$190,000.

16 And by the way one last point, Mr. Tall wants to make
17 much hay out of the fact that, the proposed valuation was less
18 than the mortgage amount. Your Honor, we see that all the
19 time, particularly from houses that were acquired or purchased
20 into a -- into a testator's life between say 2000 and 2005 or
21 between 1995 and 2005. We see estate valuations and
22 proposals, or excuse me, inventories/appraisements where the
23 properties were over mortgaged at some point because of a high
24 valuation and now the values are much more realistic. It's
25 just one more number, Your Honor, but there've been multiple

1 proposals for distribution that were prepared, and multiple
2 attempts that were made to satisfy what Ms. Irving was looking
3 for.

4 Very briefly, Your Honor, I want to correct one thing Mr.
5 Davis said. I don't believe the Facebook post in question
6 that were discussed at the outset today, I don't actually
7 believe that those Facebook posts are in the Court's return to
8 this Court on appeal. I just want to note that for the
9 record. Mr. Tall said that our presentation to the Court was
10 that there was chaos as of the first anniversary of the
11 decedent's death. I did not say that, Your Honor. What I
12 said was beginning on the first anniversary of this decedent's
13 death that the relationship between the mother -- between
14 Jeanne Poafpybitty, the personal representative, and the
15 beneficiary rather quickly began to deteriorate, Your Honor,
16 and I think that is true. I think the record bears that out.
17 The e-mail the Mr. Tall just handed up to Your Honor, which is
18 captioned with the Bates No. JPPR00624, is an e-mail from
19 Jeanne Poafpybitty dated March 19, 2015. And it says in this
20 e-mail I know y'all thought the one-year time period was
21 etched in stone, but I'm sorry to say that it isn't. There's
22 a very -- it's very clear. The testimony to the effect of
23 this at trial was significant that the beneficiaries had an
24 expectation that at the one-year mark this should be wrapped
25 up. I know Mr. Tall says it really was just a nice letter,

1 but the fact is they had an expectation, Your Honor, if had
2 been a year, it was time to wrap things up. And as Your Honor
3 knows, as I discussed, it is not always -- it's not always
4 realistic to think that.

5 Mr. Tall suggested in his argument it is somehow a breach
6 of fiduciary duty, that it was wrong for the personal
7 representative to suggest that Julie Irving had gone back on
8 her agreement. I don't even -- I don't even know what to do
9 with that remark, Your Honor. All the personal representative
10 has attempted to do, and all her team has attempted to do in
11 this is simply defend her actions and explain to this Court
12 what has happened. It is our testimony that at one point,
13 yes, we thought there was -- we thought there was an agreement
14 that resolved the outstanding issues in the estate. It's also
15 virtually uncontroverted in the record that subsequently for
16 some record -- for some reason Ms. Irving decided that that
17 was not an agreement. But that's -- that is what it is, Your
18 Honor, but I see no basis for Mr. Tall's statement that it is
19 somehow a breach of fiduciary duty to suggest that Ms. Irving
20 went back on an agreement. Certainly, a fiduciary, like
21 anyone else, is free to defend themselves, Your Honor.

22 I suppose that this case would likely stand for the
23 proposition that a fiduciary and personal representative is
24 very nearly not able to defend themselves, but certainly that

1 should not be the rule, Your Honor, that should not be the
2 rule.

3 There was reference in Mr. Tall's argument to a 500-page
4 notebook from a motion hearing, which he alleged that we came
5 to court unprepared for. I'm not sure what those kinds of
6 aspersions mean in the context of this hearing, Your Honor,
7 but let me just say when I was talking about the notebook, I
8 was referring to what happened in trial and I referenced to
9 the trial transcript I mentioned here today and it's also
10 mentioned in the brief. So I don't know what motion hearing
11 Mr. Tall refers to. There were several emergency hearings
12 courtesy of Mr. Tall that we had to respond to on very short
13 notice, but I don't think the specific details that he was
14 referencing are before you in the record. I don't -- there
15 was no testimony to that that I'm aware of to that affect at
16 the trial.

17 As far as the record on appeal, Your Honor, I want to
18 respond to Mr. Tall's comments very briefly. I can say to
19 this Court without any -- unequivocally, Your Honor, there is
20 no effort on my part or anyone's part in my office to exclude
21 any item from the record on appeal. It has been my position
22 in this case that the more information that we have for this
23 Court to look at, the better because I have, as Mr. Davis has
24 said, seen in this case an absolute lack of any sort of sound
25 basis for the Trial Court's ruling. And it has always been my

1 impression that the more information we can put in the record
2 for Your Honor to consider, the better. And as Your Honor has
3 noted today, you're looking at several thousands of pages of a
4 record before you on your system. And so, but I can assure
5 you that we've not made any effort to exclude anything from
6 the record on appeal. If there are exclusions, Your Honor,
7 there was the document that was inadvertently excluded. It
8 was inadvertently excluded. I thought we had that resolved.
9 If there are other issues, Mr. Tall referenced 88 pages, if
10 there are 88 pages that should have been in the record that
11 are not in the record, I would think Mr. Tall would have
12 raised that with me in a motion or with somebody in a motion.
13 I don't think bringing it up as a point of debate in the
14 substantive hearing of this case is the appropriate time to
15 bring that up.

16 **THE COURT:** Well I mean, he said he had to file a motion
17 to supplement the record on appeal, that y'all wouldn't do
18 that.

19 **MR. TALL:** In Judge Hyman's order.

20 **MR. BOYD:** And we -- but we -- I thought we had that
21 resolved, Your Honor.

22 **THE COURT:** Prior to him filing the motion?

23 **MR. BOYD:** Well, no, we -- we resolved it with the help
24 of -- once I saw the motion, I saw what he was talking about.

1 **THE COURT:** So you're saying he didn't contact you prior
2 to filing the motion.

3 **MR. BOYD:** Your Honor, he may have contacted my office,
4 he may have contacted me. I don't recall -- I don't recall
5 any discussion with Mr. Tall about it, but once I saw the
6 motion, yes, I understood what he was talking about.

7 **THE COURT:** Well that's what he's -- his argument was
8 that you left it out, he contacted you said you left it out,
9 y'all didn't respond so he was forced to file a motion.

10 **MR. BOYD:** But we did -- we did put -- we did add it back
11 to the record, Your Honor.

12 **THE COURT:** After he filed a motion ---

13 **MR. BOYD:** That is correct.

14 **THE COURT:** --- that you would not do it voluntarily. He
15 had to file a motion to get a court order to go for a hearing
16 in front of Judge Hyman to get Judge Hyman to order you to put
17 it in there because he called and said you left it out and you
18 didn't put it in.

19 **THE COURT:** Well but, Your Honor, prior to that hearing
20 we had contacted -- I had contacted him and Mr. Tall is right,
21 he did file the motion. I missed -- if he sent me an e-mail,
22 I missed it, Your Honor. But we did attempt to resolve it ---

23 **MR. BOYD:** Well I mean, when you got the motion why
24 didn't you just call him up and say you're right, this should
25 be in here? We've got the motion resolved; we don't need to

1 go in front of Judge Hyman. I'll go ahead and supplement the
2 record.

3 **MR. BOYD:** Well and I did contact him before the hearing,
4 Your Honor.

5 **THE COURT:** And you told him we don't need to go in front
6 of Judge Hyman, we'll contact him and tell him that we've got
7 it resolved. I'll go ahead and add it into the record.

8 **MR. BOYD:** It was not -- it was not intentional, Your
9 Honor. I would have -- I did not intentionally seek to
10 exclude that document from the record.

11 **THE COURT:** So why did y'all have to go in front of Judge
12 Hyman?

13 **MR. BOYD:** Well that is a good question, Your Honor. I
14 contacted Mr. Tall in an effort to avoid the hearing.

15 **THE COURT:** And you said we'll put it in the record on
16 appeal.

17 **MR. BOYD:** Yes, Your Honor.

18 **THE COURT:** And he said no we've already got a motion
19 hearing we're going -- I'm going to get Judge Hyman to order
20 it even though you're agreeing to do it.

21 **MR. BOYD:** That is my recollection, Your Honor. I don't
22 have the e-mail in front of me, but that's my recollection.

23 **THE COURT:** Okay. Go ahead.

24 **MR. BOYD:** And, Your Honor, the matter of legal fees, and
25 I'll address this briefly. This isn't a matter of a PR being

1 assessed with Julie Irving's legal fees solely as Mr. Tall
2 illuded. The PR -- the PR has been assessed to pay not only
3 her fees, but a portion of the estate's legal fees personally
4 either from her personal funds or from her share of the
5 estate, Julie Irving's fees under the -- and this is in
6 reliance on the Kay case and the common fund doctrine has been
7 assessed to be paid by the estate. But as the Kay case makes
8 clear, Your Honor, the parties must not be adverse, and again,
9 there was no benefit conferred. The -- the end result of all
10 of this litigation is that the parties are going to get less,
11 Your Honor, not more. So there's been no benefit conferred to
12 anybody and certainly least of all the PR, but also not to
13 Julie Irving.

14 And I don't even -- I want to address the response to the
15 request to admit, Your Honor. Even Mr. Tall said, and this
16 was an example, Your Honor, of us getting an order that was
17 prepared by Mr. Tall, submitted to us, and without really much
18 opportunity at that point practically to impact what was going
19 to be in there. That's the reality of it. When we responded
20 -- when I responded to the request to admit to -- with regard
21 to the valuation in question, that discovery response, Your
22 Honor, was based on the fact that the request to admit was
23 ambiguous. It's -- it's a request to admit that could be
24 interpreted in multiple manners.

1 **THE COURT:** Such as. Give me -- give me several
2 different interpretations.

3 **MR. BOYD:** I don't even have it in front of me, Your
4 Honor.

5 **THE COURT:** All right. The request to admit -- all
6 right. Defendant's current distribution proposal includes
7 distributions of properties listed in its June 2016 final
8 accounting at values listed in said final accounting.

9 **MR. BOYD:** May I approach, Your Honor.

10 **THE COURT:** Yeah.

11 **MR. BOYD:** Defendant's current distribution proposal
12 includes distributions of properties listed in its June 2016
13 final accounting at values listed -- Your Honor, as I sit here
14 and read it today it's hard to decipher exactly what it means.
15 Defendants --

16 **THE COURT:** All he's asking you, look are you relying on
17 what your 2016 final accounting values are.

18 **MR. BOYD:** Well, Your Honor, first of all we did -- I did
19 object because I felt that the request to admit was
20 ambiguously worded. Defendant's current distribution proposal
21 includes distribution of properties listed in the June 2016
22 final accounting at values listed in said final accounting.
23 Further --

24 **THE COURT:** I mean to me it --

1 **MR. BOYD:** -- further, further answering, I mean, I would
2 argue to the Court if I may that (A) it was not an artfully --
3 it is unclear. But what the PR actually said was, yes, we did
4 raise the objection but without waiving the objection we say
5 that the documents will speak for themselves; and then we say
6 further answering this request to admit the personal
7 representative would state that the final accounting includes
8 both the original valuations for the real estate assets
9 obtained for the inventory and appraisal along with
10 adjustments subsequently made to those valuations based on the
11 appraisals for those assets obtained by the personal
12 representative at the request of the plaintiff.

13 **THE COURT:** See that's what he's doing. He's saying what
14 are y'all saying this property is worth.

15 **MR. BOYD:** As such the proposal for distribution contains
16 values from the accounting that are both listed and adjusted
17 in the final accounting.

18 **THE COURT:** I don't see how that answers his question as
19 to what are you saying the property is worth. He's saying
20 I've got this 2016 final distribution. You're saying the
21 property is worth X amount of dollars. Are you still saying
22 it's worth that and you're objecting to it?

23 **THE COURT:** Your Honor, I think that particular -- and,
24 Your Honor, what this answer says is it's not that simple and
25 I think that's a -- you can argue whether or not it should be

1 that simple or not, but it is unfair to suggest that that's a
2 basis for the personal representative acting in bad faith.

3 **THE COURT:** Well let me ask you this: how did you put the
4 plaintiff on notice that when you got to trial this is what
5 the personal representative was going to say the property was
6 worth? That's what the purpose of discovery is, is so that
7 they know how your client is going to testify, you know how
8 their client is going to testify. So how did you let them
9 know that the personal representative was going to say the
10 property is worth this amount?

11 **MR. BOYD:** That was, Your Honor, those proposals were
12 prepared at court order and so the personal representative
13 wasn't -- the personal representative was doing various things
14 in an effort to appease both what the Court had ordered and
15 what Mr. Tall had been requesting.

16 **MR. DAVIS:** We had multiple values, Your Honor ---

17 **THE COURT:** One. We're not going to double team here.
18 All right. Go ahead.

19 **MR. BOYD:** So there were multiple values involved, Your
20 Honor, but to suggest -- and let me also say, Your Honor, that
21 that's a request to admit. That is a legal exercise that the

22 personal representative wouldn't have known how to answer that
23 request to admit in any case. So that's a request to admit
24 that I would have prepared, that perhaps Mr. Davis would have
25 had some input into, but that the personal representative

1 would have nothing to do with the drafting of that response to
2 the request to admit. And if Mr. Tall had wanted a more
3 definitive restatement, he could have always come back to me
4 and said I object, I want a more definitive restatement to
5 that request to admit. But instead he wants to take our
6 effort to answer the question and input to the personal
7 representative bad faith and that's simply -- that's simply
8 not fair, Your Honor. It's not consistent with any sense of
9 fair play and justice that I'm aware of. And even Mr. Tall
10 frankly in his admission, or in his argument to you said he
11 thought the Judge might have overreacted in that verbiage.
12 And again, I would remind the Court this is verbiage that Mr.
13 Tall has actually drafted and submitted to the Court for
14 purposes of the proposed order.

15 And in that same vain, Your Honor, Mr. Tall made an
16 argument about how do we get from a one-page e-mail to a 25
17 page draft order. Your Honor, that's -- that is a reflection
18 of the manner in which Mr. Tall, with all due respect,
19 litigated this case at every juncture. You see one-page and
20 two-page e-mails being expanded into 25 and 50-page proposed
21 orders, which the Court, as Mr. Davis has indicated or
22 discussed with the Court, the Judge signed with very little to
23 no changes.

24 And so I think, Your Honor, what this case comes down to
25 is this, obviously a lot of information -- and one last thing,

1 Your Honor, I'd like to just remind the Court that as it
2 relates to the complaint, there was never even an allegation
3 in the complain that there was bad faith on the part of the
4 PR. But early on today, Your Honor, we were having a
5 discussion about what the Court could have done, what the
6 Court should have done. There was a lot of discussion about
7 how many times could the Court go back to the PR and say no I
8 disagree with this proposed distribution of assets. And
9 again, Your Honor, there was back and forth here because we
10 were attempting to reach a resolution, to reach a proposal of
11 these estate assets in a manner that would be acceptable to
12 Mr. Tall, and to his client, and to everybody, Your Honor.
13 But I would submit to you that again, the Court overlooked
14 what is supposed to be a guidepost in estate administration.
15 The Court overlooked the clear instructions of the testator in
16 its resolution of this case and if the Court had simply said
17 we don't like this proposal for distribution, we're going to
18 go back and make you do it again then that would have
19 continued to honor both the testator's intent as clearly set
20 forth in the will and would ultimately have allowed the case
21 to be sorted out in due course with a proposed distribution
22 that was acceptable to everybody, Your Honor. But that's not
23 what happened, because the Court applied the wrong standard,
24 held the PR to an applicable standard, overlooked, ignored the
25 testator's clear intent as set forth in the will and essential

1 applied as we've discussed the death penalty on this PR, and
2 has treated her more harshly than any PR I've ever seen
3 receive such treatment at this Probate Court, Your Honor. And
4 there's just -- even if we -- even if what Mr. Tall alleged
5 were true, Your Honor, there's no basis in the law for doing,
6 and in the applicable standards and the applicable case law,
7 for doing to this personal representative what this Trial
8 Judge did to Jeanne Poafpybitty. And that's why we have this
9 appeal, Your Honor, and that's why this Court should take what
10 steps it can take to right that and rectify that wrong. Thank
11 you, Your Honor.

12 **THE COURT:** All right. I'm going to obviously have to
13 take the matter under advisement. I've got to look at a bunch
14 of stuff. To assist me with that I'm going to have both
15 parties submit proposed orders within ten days. Be sure to
16 cite in your proposed orders if you're referencing a factual
17 issue, cite in the record on appeal where it was supported at
18 the trial of this case. If you cite an actin of law be sure
19 to cite the statute or cite the case that supports your
20 holding. Okay.

21 **MR. DAVIS:** Do you want to nail down a date, Your Honor,
22 do you want to give us a date that we have to give this back
23 to you?

24 **THE COURT:** Well y'all have been dealing with this long
25 enough so you should pretty much have everything. Today is

1 January 22nd, get it to me by a week from Friday, January
2 31st.

3 **MR. DAVIS:** Thank you, Your Honor.

4 **THE COURT:** All right.

5 **MR. TALL:** Thank you, Your Honor.

6 **MR. BOYD:** Thank you, Your Honor.

7 **THE COURT:** Thank you.

8 (COURT IS ADJOURNED.)

9

C E R T I F I C A T E

I, the undersigned, Sallie Beth Todd, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the Transcript of Record of the hearing held in the interest of Julie Irving versus Jeanne Poafpybitty, Personal Representative of the Estate of Donalf M. Rothgeb and Jeanne Poafpybitty, Donald Matthew Rothgeb and Steven Taylor Rothgeb held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on January 22, 2020.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Sallie Beth Todd, CVR

Official Reporter

November 29, 2020.