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SC Court of Appeals

The State of South Carolina
In The Court of Appeals

Appeal from Horry County Court of Common Pleas
Benjamin H. Culbertson, Circuit Court Judge

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Case No. 2020-001291

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**Julie Irving,**

**Respondent,**

**v.**

**Jeanne Poafpybitty, Donald Matthew Rothgeb, and Steven Taylor Rothgeb,**

**Defendants,**

**Of whom Jeanne Poafpybitty, Personal Representative of the Estate of Donald M. Rothgeb is the Appellant.**

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# BRIEF OF APPELLANT

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## INTRODUCTION

This is an appeal from the Horry County Probate Court concerning the estate of Donald M. Rothgeb who died in January of 2014. Donald Rothgeb's Last Will and Testament named his wife, Jeanne Poafpybitty (the Appellant), as his Personal Representative, and also named her as one of four equal beneficiaries, along with Donald's three adult children from a prior relationship (i.e., Jeanne's step-children), who are named Donald Matthew Rothgeb, Steven Rothgeb, and Julie Irving (of which Irving is the Respondent). Donald's Will instructs that Jeanne, as personal representative is to distribute the estate's property in her "sole discretion" so that the result is "approximately equal." (R1166)

In 2016 Irving brought this action against her step-mother which is styled as a "Complaint to Secure Fair and Prompt Closure of Estate Administration." In it, Irving claims that "what stands in the way of a timely Estate closure are only the personal differences between Jeanne" and her step-children. While personality was certainly a complicating factor in this matter, the dispute is largely over the means by which Jeanne was permitted to distribute the Estate's assets, which were mostly real estate. Specifically, the point of contention was whether the real property should be divided among the individual defendants (the approach pursued by the Personal Representative), or deeded to them jointly (the result ordered by the Probate Court). This was significant, considering that the estate owned more than a dozen parcels of real property, including the home Jeanne had shared with her husband for more than twenty years.

Although the plain language of the Will left the distribution of this property to Jeanne's "sole discretion," Irving alleged that Jeanne was not entitled to any discretion because Jeanne was also a beneficiary, which could create conflict. As a result, Irving argued Jeanne was required to simply deed out the property jointly. (R0417, R0418, R0436). Ultimately the personality differences seemed to cloud the issues, manifesting in a voluminous and confusing final order that never analyzes or even mentions the disputed portion of the Will. Instead, citing to the interpersonal discord among the parties, their counsel, and things as innocuous as discovery objections, the Probate Court concluded that Jeanne violated her duties to the Estate by defending Irving's lawsuit. (R0015, R0044, R0050, R0051). Among other errors, the Probate Court found Jeanne breached the fiduciary duties that a trustee owes to a trust under the South Carolina Trust Code—a portion of the statute which specifically provides "this article does not apply to . . . the administration of decedent's estates." S.C. Code Ann. § 62-7-102. Without ever finding Jeanne's conduct exceeded the broad discretion provided in the Will, the Probate Court fundamentally re-wrote the decedent's Will, without a legally sound basis for doing so.

Based on her purported breaches, the Probate Court ordered that Jeanne be removed as the personal representative of the Estate—relief that was never requested by Irving. To support this *sua sponte* relief, the Court makes the assertion that it "retains ... authority to review a personal representative's actions, and if necessary, take corrective action, for the protection of the Estate and the interested persons." (R0050) (referenced this as one of seven guiding legal principles important to this case).

However, the court provides no authority for this proposition, which appears to have been cut from whole cloth. While the Probate Code does afford a procedure (and standards) for a party to petition for the removal of a personal representative at Section 62-3-611, this Section is never mentioned in Irving's complaint, nor is it discussed in the Probate Court's Order.

The underlying purposes of the S.C. Probate Code include (1) to discover and make effective the intent of a decedent in the distribution of property and (2) to promote a speedy and efficient system for liquidating the Estate of the decedent and making distributions to his successors. S.C. Code Ann. § 62-1-102(b)(1) and (b)(2) (Thomson Supp. 2020). It is well settled that removal of a personal representative is itself a usurping of the decedent's intent and therefore "[t]he power to remove a personal representative should be exercised with great caution, and not at all, unless it is made to appear to be necessary for the protection of the estate, to prevent loss or injury to it from misappropriation, maladministration or fraud." Church v. McGee, 391 S.C. 334, 344, 705 S.E.2d 481, 486 (Ct. App. 2011).

In this case, there simply can be no basis for the removal of Jeanne as Personal Representative, or the exceptionally punitive consequences that accompany that removal, without the necessary perquisite finding that she acted outside the scope of the authority Donald intended her to have, or without proper notice of the filing of a petition for her removal, as required by S.C. Code Ann. 62-3-611.

It is well-settled in South Carolina that the "mere existence of conflict between a personal representative and a beneficiary is an inadequate reason for removal of the

personal representative. Without a showing of fault, the court will not remove a personal representative simply because the parties do not get along." Blackmon v. Weaver, 366 S.C. 245, 251-52, 621 S.E.2d 42, 45 (Ct. App. 2005). If the Probate Court's Order is permitted to stand, it will upend this long-settled standard of probate administration in South Carolina. Therefore, at the very least, this matter must be reversed and remanded to the Probate Court for determination of what Donald intended the scope of Jeanne's discretion to be, and whether there has been an actual violation of that discretion that would warrant her removal as Personal Representative, among the other punitive sanctions that the Probate Court ordered against Jeanne.

## STATEMENT OF ISSUES ON APPEAL

I. Did the Probate Court commit reversible error by failing to follow the Testator's Intent as set forth in his Last Will, and in finding Jeanne breached her duties owed to the estate without first making any finding that her conduct was inconsistent with the discretion Donald intended her to have by drafting a will that provided her with the "sole discretion" to distribute the property?

II. Did the Circuit Court commit reversible error by upholding a Probate Court Order that contravenes the S.C. Supreme Court's ruling in the case of *Sullivan v. Brown and Moses (In re Estate of Kay)*, 423 S.C. 476 (2018), which case is directly on point as to the facts of this case, and dispositive of the matters raised in this Appeal?

III. Did the Probate Court commit reversible error by incorrectly applying standards from the S.C. Trust Code on the Personal Representative, which explicitly by their terms do not apply to the Administration of Estates?

IV. Was it reversible error for the Probate and Circuit Court to award the Plaintiff legal fees from the Estate's funds under the "Common Fund" doctrine, when the result of the Plaintiff's action did not benefit all Estate beneficiaries, and the various Beneficiaries were adverse to one another?

V. Was it reversible error for the Probate Court and Circuit Court to remove the Personal Representative and appoint a Special Administrator, when no application by an interested person was made, no evidence was presented to support removal, and the appointment was not requested at trial?

VI. Was it reversible error for the Probate Court and the Circuit Court to hold the Personal Representative responsible for the legal fees for the defense of this action, and other of the Estate's legal fees, without a finding of Bad Faith as required by Section 62-3-720 of the S.C. Probate Code?

## STATEMENT OF THE CASE

This action arises from the administration of the Estate of Donald M. Rothgeb (the "Decedent"), who died in January 2014, in Horry County. He was survived by his wife of 35 years, Jeanne Poafpybitty, whom he named as his Personal Representative in his Last Will and Testament, and three children from a previous marriage: Julie Irving, Matthew Rothgeb, and Steven Rothgeb. In this appeal, the Decedent's wife Jeanne is the Appellant, and Julie Irving is the Respondent.

*Factual Background*

Decedent's Will named Jeanne Poafpybitty as his Personal Representative (herein, "PR"), and she was appointed as such by the Probate Court on March 7, 2014. The Will further provided that Jeanne Poafpybitty and the three children would each receive an equal 25% (one-quarter) interest in the Decedent's Estate.

Once appointed, Jeanne Poafpybitty set about attempting to administer her husband's Estate as the terms of his Last Will and Testament directed. Among other things, the Last Will and Testament delegated to the Personal Representative the power to determine the specific distribution of Estate assets to the four beneficiaries, so long as the results were "approximately equal." (R1166)

The estate consisted primarily of real property. This included the marital home Decedent shared with Jeanne for more than thirty-five years, as well as several rental properties. However, most, if not all, of the properties had been neglected by the Decedent during the last years of his life and were in need of substantial repairs at the time of Decedent's passing. (R0657, R0658) As a result, Jeanne had to determine the

most equitable means of accommodating each beneficiary and was attempting to sell as many of the properties as she could to pay off existing mortgages, and also to make it easier to divide the estate assets among the beneficiaries. (R.0272, R.0441, R.0453, R.0462, R.0465, R.0641, R.0655, R.0657, R.0671, R.0672, R.0680, R.0701, R.0702, R.0703) (R. 1165, also required the Personal Representative to pay off the mortgages).

Roughly a year after Decedent's death, Jeanne—as the PR—and the three children reached what the PR understood to be an understanding for the division of properties within the Estate. (R.1326, R.0258, R.0312, R.0313, R.0374, R.0546-0547, R.1203). It was agreed that the properties would be appraised by a jointly selected appraiser. (R.0258, R.0262, R,0320, R.0338, R.0340, R.0489, R.0538, R.1203). The PR negotiated with Irving's counsel in an effort to reach an agreed-upon distribution of Estate properties, even though the Last Will and Testament gave the Personal Representative the authority to make that determination.

Unfortunately, just before Jeanne could distribute out the properties and close this Estate, Julie Irving withdrew her consent and brought a petition in the Horry County Probate captioned "Complaint to Secure Fair and Prompt Closure of Estate Administration" (the "Irving Petition"), which was filed April 25, 2016. This appeal arises from the rulings of the Probate Court on the Irving Petition.

The Irving Petition alleged, among other things, that there was "no good reason for the Estate to remain open." The Irving complaint requested, *inter alia*, an updated estate accounting, interim financial distributions, and distribution of all remaining real estate assets in the Estate as in-kind distributions, in equal one-quarter shares to the

Estate's four beneficiaries. The Irving Petition did not seek removal of the Personal Representative, nor did it allege that she had acted in bad faith. (Complaint Irving v. Poafpybitty, Personal Representative of the Estate of Donald Rothgeb, et al., Horry County Probate Court, Case No.: 2014-ES-26-00498)

*The Trial*

The matter came to trial before the Probate Court on February 17 and 24, 2017. At trial Jeanne testified that she understood her legal right to claim a 1/3 "elective share" interest in the Estate, instead of one-quarter (1/4) share she received under the Decedent's Will. (R.0519, R.0652, R.1166). However, in order to maintain harmony in the family and to honor what she understood the Decedent wanted; she chose not to claim an elective share. (R.0519, R.0652). These facts refute Irving's basic contention, which was that Jeanne used her role as Personal Representative to improve her interest in the Estate at the expense of the Estate's other beneficiaries.

Contrary to the plain instruction of the Decedent's Last Will and Testament, Irving insisted that all properties be deeded equally to all four of the Estate's beneficiaries. (R.0417-0418, R.0436-0437, R.1166) (stating that the PR had the "sole discretion" to determine the distribution of Estate properties, so long as the results were "approximately equal"). To explain this inconsistency, at trial Irving testified that she believed that such division would allow her to gain control of the Estate assets. (R.0570, R.0571, R.0723). Not only was Irving's contention inconsistent with the plain language of Decedent's Will, but it would also force Jeanne to own the marital residence with

three other beneficiaries, one of whom—Matthew Rothgeb—was known to have a substantial drug problem and extensive criminal record. (R.0449-0450, R.0637-0639).

*Probate Court's Order*

On May 26, 2017, the Probate Court sent the parties an e-mail indicating its intent to rule grant the relief Irving requested in her Petition:

> Counsellors [sic] - The task you assigned me in the above case has been a difficult and exhaustive one. In order to be certain about my decision, I wanted to review all evidence/documents submitted at trial and review my extensive notes over the several days of trial. I appreciate your patience in this matter. I will ask Mr. Tall to prepare me an Order consistent with this Email. It is clear to me that the deceased loved all 4 parties deeply. His clear intention was to treat all equally. Though he gave his wife as Personal Representative certain latitude with the division of his assets. That privilege is not absolute where the Court determines an abuse or obstruction to the Deceased's intent has occurred. See §62-2-601, et seq. I find in this case the P/R-wife has intentionally inhibited and delayed the closing of this estate and prolonged the division of the assets. Though this estate is substantial (over one million dollars), the Court finds it could and should have been settled much earlier. The Court finds the P/R to have withheld information pertinent to the beneficiaries and requested by them. In addition the P/R clearly used her position as P/R to manipulate at least one if not more assets to her advantage over her step children [sic], the remaining 75% devisees. Information had been requested by Julia K. Irving and others. What was provided was incomplete and/or confusing before retention and after retention of counsel. As a result of her actions as P/R, I find her P/R commissions should be reduced to a total of Ten Thousand Dollars ($10,000). The balance of the fee as shown in the latest accounting filed with the Court should be paid directly to the other 3 devisees equally share and share alike. This is to be above and beyond their 25% share as a devisee. I was not impressed with the sincerity nor credibility of the testimony of the P/R. Based on all the evidence and testimony, the Court finds the P/R wife and 25% beneficiary used her position to manipulate the estate assets to unjustly enrich herself at the expense of the other beneficiaries. Under the authority of §62-1-111, §62-3-701,et seq., 719, 720, 721, and others, I find that this litigation was not beneficial for the estate but, purely the wife-beneficiary seeking to improve her lot in the estate. The wife was not prosecuting nor defending an action for or against the estate. I find she was not acting reasonably for the benefit of all the devisees of the estate.

> §62-3-715(20). As such the Court finds all attorney fees incurred after the May 25th, 2016 [sic] up to the execution of this Order shall be paid by the wife, Jeanne Poafpybitty, personally and shall not be charged against nor paid by the estate. Also all fees and costs incurred by the Petitioner, Julie K. Irving, shall be paid by the estate. Said bill and expenses shall be filed with this Order if not filed already. See appropriate Probate Court sections and IN THE MATTER of the Estate of Marion M. Kay(Edward D. Sullivan -v- Martha Brown et al.) Opinion # 5414 filed 6/15/16 and refiled 11/2/2016. There was raised an issue about rental to be paid by wife-P/R to the estate. I find no reimbursement is appropriate and, therefore, deny any adjustment or repayment from the P/R-wife. I find all remaining property both real and personal and deeds required shall be issued in the names of all 4 beneficiaries equally. I find and so order that the P/R and her counsel shall file amended closing documents with the Court within 30 days of the service of this Order on Counsel for the P/R. The counsel for the P/R shall be allowed reasonable compensation for such services which shall obviously be shown on the final accounting etc. All other matters if any are denied. Mr. Tall please prepare me an Order citing the appropriate testimony, evidence, code sections, and case law. All attorney fees previously submitted by both parties are approved subject to the above indicating whom or what entity is to make payment.
>
> Respectfully,
>
> Carroll D. Padgett, Jr.
> Chief Associate Probate Judge

(R.1863-1865). The Court's e-mail ruling directed counsel for Irving to prepare a proposed order accordingly. Over five months later, Irving's counsel submitted a proposed order that expanded the probate court's one-paragraph e-mail into a rambling 45-page document that included all the relief granted at trial and specified in the Court's e-mail of May 26, but that also included relief that Irving never requested on issues that she never raised, and which were never argued or discussed at trial. This included the removal of Jeanne Poafpybitty as Personal Representative, and the appointment of a Special Administrator. (R.0057-0058). This additional relief was included by Irving's counsel, even though the e-mail ruling of May 26, 2017, specifically

stated that, "[a]ll other matters, if any are denied." Id. The Probate Court nonetheless issued its Order on March 2, 2018 that adopted language submitted by Irving's counsel without any substantive changes from the document proposed by Irving's counsel. (R.1919-1945).

Significantly, the Probate Court's Order of March 2, 2018 is a lengthy, rambling and confusing document that relied in its "Argument" section on seven guiding legal principles. Of these seven principles, however, two of them - Nos. 2 and 4 - apply to trusts and not to estates, and were found by the Circuit Court to be inapplicable. (R.0035, R.0100-0101). One of the seven principles, No. 3, has subsequently been reversed by the S.C. Supreme Court in the Estate of Kay case, discussed herein below. (R.0048). One of the seven principles, No. 5 on page 36 of the Order, doesn't exist, and another of the seven principles - *see* No. 7 on page 36 of the Order - is a proposition consisting of case law, such as the Blackmon v. Weaver and Church v. McGee cases, which actually support the arguments advanced by the Appellant Personal Representative in this case.

The Probate Court's Order virtually eliminated the Personal Representative's commission, required the Personal Representative to personally pay all of the Estate's attorneys' fees incurred after the Probate Court's e-mail ruling of May 25, 2016, required the Estate to pay Irving's attorneys' fees and costs, ordered the real estate assets of the Estate be divided in equal one-quarter shares as tenants in common and transferred to the beneficiaries in-kind. (R.0056, R. 0057). It ordered the Estate to immediately file

closing documents, and as noted above, it removed Jeanne Poafpybitty as the Personal Representative and ordered the appointment of a Special Administrator. (R.0057).

*The Personal Representative's Rule 59 Motions for Reconsideration*

The Personal Representative timely filed a Rule 59(e) Motion which alleged the Probate Court had improperly reformed the Decedent's last will, that the court acted arbitrarily and capriciously and in a manner unsupported by the evidence, and that because of various practical limitations, the ruling of the Probate Court could not be implemented, even if the Personal Representative agreed with it, which she did not. (R.1334-1347, R.1348-1379) The Personal Representative's Rule 59(e) Motion further argued that the Probate Court's ruling exceeded the relief that was requested by Julie Irving, and that it lacked the requisite finding of "bad faith" necessary to support the relief provided to the Petitioner. In her Rule 59 Motion, the Personal Representative noted that the Petitioner never alleged the PR acted in bad faith, the question was never argued or briefed at trial, and the term "bad faith" never appears in the trial transcript. (R.1334-1347, R.0072, R.0074, R.0080)

*Probate Court's Order on Rule 59 Motions*

On September 6, 2018, the Probate Court issued the following e-mail ruling on the pending Rule 59 Motions:

> Counsellors [sic] – In the above matter, I have reached a decision on the Rule 59(e) Motion(s) filed by the parties. I want to thank each counsel for his zealous and sincere presentation of his respective client(s) positions. I took substantial time to review the testimony and evidence and the testimony, arguments of counsel, and evidence presented at the extensive Motion hearing. After careful consideration, I find my original Order to be correct and appropriate. Therefore, I deny all Motion(s). During the Motion hearing it became clear to me counsel(s) for the

> Personal Representative did not feel that my previous Order made a finding of bad faith / self-dealing by the Personal Representative. I want to make it clear based on my view of the evidence, testimony and demeanor of the Personal Representative and her witnesses, that her handling of the Estate matters were calculated with the intent of bettering her position and share of the estate, as well as deplete the assets of the estate [sic]. Since she was a 1/4th beneficiary, the other beneficiaries were paying 3/4th of all estate expenses and attorney fees which were being lavishly expended. This I find inappropriate and clearly against the intent of the decedent's Will. I especially find the personal representative did not act reasonably on behalf of the estate nor its beneficiaries. Mr. Tall I direct you to prepare the appropriate Order based on the findings and decision set forth herein. Regards,
>
> Carroll D. Padgett, Jr.
> Chief Associate Probate Judge

(R.1946-1948). On November 7, 2018, the Probate Court issued its final Order in the matter, which denied the Parties' post-trial motions, and confirmed the Court's original order in the matter. (R.0059-0083).

*Appeal to the Circuit Court*

The Personal Representative timely appealed the Probate Court Order to the Circuit Court. (R.1579-1581, R.1582-1584, R.1585-1639). A hearing was held on January 22, 2020, and thereafter the Court issued an order affirming the Probate Court's ruling. Specifically, the Circuit Court found that even though the Probate Court applied an incorrect standard in reaching its ruling, the Circuit Court upheld the Probate Court's decision. (R.0100-0101).

Collectively, the orders of the Probate Court and the Circuit Court are referred to herein as the "Lower Court Orders." Because the Probate Court impermissibly substituted its will and its judgment for that of the Decedent, as set forth in his Last Will

and Testament, the rulings of the Horry County Probate Court, and the opinion of the Circuit Court affirming those rulings, must be reversed.

## STANDARD OF REVIEW

A proceeding before the probate court may sound in equity or at law, and the appropriate standard of review applicable to cases originating in the probate court depends upon whether the underlying cause of action is at law or in equity. In re Estate of Hyman, 362 S. C. 20, 25, 606 S. E. 2d 205, 207 (Ct. App. 2004); In re Thames, 344 S. C. 564, 568, 544 S.E. 2d 854, 856 (Ct. App. 2001). Lee v. Lee, 251 S.C. 533, 534, 164 S.E.2d 308, 308 (1968) (holding an action for an accounting to determine whether the guardian received improper compensation was in equity). Ordinarily, an appellate court reviews cases in equity by finding facts in accordance with its own view of the preponderance of the evidence. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

## ARGUMENT

### I. The Lower Court Orders Erroneously Ignored the Guiding Hallmark of Probate Law, Determining and Implementing the Will of the Decedent, and Ignoring his Clear Intent, Instead reformed the Decedent's Last Will and Testament without any Legal Basis for doing so. The Probate Court failed to analyze the PR's behavior in the light of the Testator's Intent and this was a reversible error of law.

The catalyst for this litigation is the dispute over whether the Estate's real property should be distributed in such a way that the parcels each be owned by one beneficiary, or that they each own a ¼ interest in all of them. Rather than designating that specific properties be distributed to a specific beneficiary, Donald's Will unambiguously delegated Jeanne the authority to select which assets went to which

beneficiaries, by bequeathing to her the "sole discretion to designate the real or personal property comprising the respective shares [of each beneficiary] so established, so long as the value thereof is approximately equal." (R.0437, R.1166). In exercising this authority clearly delegated to her, Jeanne proposed to distribute the properties such that they would each be deeded to a single beneficiary in a manner that, at the close of the estate, each beneficiary's portfolio of properties would have approximately equal value. Unlike the approach Irving wanted, which would have each beneficiary owning 25% of each property, Jeanne's approach required that the value of the properties be determined. While Irving's approach might be simpler, the Court overlooked that there are compelling reasons why the parties might not want to own property together, and why being the sole owner of a piece of real estate would have greater value and utility for a beneficiary than owning a one-quarter interest in multiple properties.

In finding Jeanne's conduct violated her duties to the estate, the greatest weight of the Probate Court's analysis focuses on Jeanne's conduct in seeking to establish the value and allocations of the various properties among the various beneficiaries as required under her proposed allocation methodology. However, the Court's analysis presupposes that Jeanne's approach is inconsistent with the Will—when in reality the Court never addressed this threshold issue. To put it simply, if Jeanne's proposal to assign a single owner to each parcel is within the scope of the "sole discretion" afforded her under the Decedent's Last Will, then the Court's reasoning cannot stand. Or, as Jeanne stated in her Motion for Reconsideration, the effect of skipping this step had the effect of reforming the Will such that it read she must allocate each property in 25%

shares to each of the four beneficiaries, rather than what it actually said, which was she had the "sole discretion" to decide the distribution of Estate assets, so long as the final result was "approximately equal." (R.1335, R.1336, R.1337, R.1341, R1343).

Here, the language of the Will is clear, and there is nothing within the Will to suggest that Jeanne's approach was contrary to Donald Rothgeb's intent. Certainly, it must be recognized that had the Decedent desired the distribution be made in a specific manner, he would not have left this to the discretion of his wife Jeanne. Moreover, Irving presented no evidence or argument that it was Donald's intent that as a result of his death, Jeanne be forced to own the martial home they had shared for decades with her three adult step-children.

The guiding principle of probate administration in South Carolina has always been to identify and give effect to the testator's intent as expressed in the testator's estate planning documents. *See* e.g. Estate of Gill ex rel. Grant v. Clemson University Foundation, 397 S.C. 419, 426, 725 S.E. 2d 516, 520 (S.C. Ct. App. 212). South Carolina's Probate Code, as well as its common law, demonstrate that it "is the cardinal rule of will construction that the testator's intent should be ascertained and followed unless it violates some well-established rule of law." McGirt v. Nelson, 360 S.C. 307, 311, 599 S.E.2d 620 (S.C. App. 2004)(citing People's Nat'l Bank of Greenville v. Harrison, 198 S.C. 457, 461, 18 S.E.2d 1, 3 (1941); and Wates v. Fairfield Forest Products Co., 210 S.C. 319, 322, 42 S.E.2d 529, 530 (1947). *See also* S.C. Code Ann. § 62-1-102(b)(2) (providing "it is the underlying purpose . . . and polic[y] of [the Probate Code] to discover and make effective the intent of a decedent in the distribution of his property"). When "arriving

at the intention of the testator, . . . the courts are only concerned with construing the will as it is written." People's Nat'l, 18 S.E.2d at 3. In ascertaining the testator's intent, effect must be given to "every part of the will." McGirt, 360 S.C. at 311.

Here, it is undisputed that the Decedent's intent was to provide Jeanne the "sole discretion . . . to designate personal and real property for Estate distribution." (R.0097). In the simplest sense, the Probate Court found that because it disagreed with Jeanne's use of this discretion, it could therefore remove it. (R.0062) (suggesting it is a proper "remedy" to "remove" the authority the Decedent gave to Jeanne). In responding to Jeanne's Motion for Reconsideration, the Probate Court articulated that it was not reforming the Will, but merely "correcting a fiduciary's wrongdoing." (R.0062). Certainly, it must be recognized that had the Decedent desired the distribution be made in a specific manner, he would not have left this to the discretion of Jeanne. There is no rule that prohibits such a delegation of authority to the Personal Representative, nor was there any evidence introduced at trial to suggest that this provision was based on any mistake of fact. The Probate Court, however, re-wrote this provision of the Decedent's will and provided a different result in its order, which it did not have the authority to do. Thus, the Probate Court's ruling either impermissibly reformed the Decedent's Will, or simply interpreted the Will in a manner that is contrary to its plain and unambiguous text. *Contra* S.C. Code Section 62-2-601(A) ("The intention of the testator as expressed in the testator's will controls the legal affect of the testator's dispositions.")

As the South Carolina Supreme Court has stated, "[o]nly a *very strong reason* can justify the treatment of any of the testator's words in his last will and testament as surplusage." Lemmon v. Wilson, 204 S.C. 50, 28 S.E.2d 792 (S.C. 1944)(emphasis added). Yet here, the Probate Court did exactly that, treating the Decedent's clear testamentary instructions granting Jeanne sole discretion as if they were meaningless or non-existent, instead limiting that discretion to only what the beneficiaries would agree to. This was fundamental, reversible error that ignored the fundamental and guiding tenants of South Carolina's probate law, and completely frustrated the Decedent's clearly drafted testamentary instructions in this case.

## II. The Circuit Court Erroneously Upheld the ruling of the Probate Court, even though the Probate Court's Order in this case directly contravenes the South Carolina Supreme Court's Ruling in *Sullivan v. Brown and Moses (In re Estate of Kay)*, 423 S.C. 476 (2018).

The case of Sullivan v. Brown and Moses (In re Estate of Kay), 423 S.C. 476, 816 S.E.2d 542 (S.C. 2018), is strikingly similar to the matter now before this Court, and in all relevant respects, the Sullivan case appears to be directly on point to the present case. Sullivan involved a probate court trial ruling that was appealed first to the Circuit Court, and then to the S.C. Court of Appeals (418 S.C. 400, 792 S.E.2d 907), and finally to our State Supreme Court.

The Sullivan case primarily involved the appropriate amount of compensation due the personal representative, the breadth of authority afforded the personal representative under the language of the decedent's last will and testament, whether the personal representative was entitled to be reimbursed for his legal and other estate

expenses, and whether the petitioning beneficiaries in that case were entitled to have their legal fees paid under the "common fund" doctrine. Id., 423 S.C. at 479, 480. The case also dealt with a disgruntled beneficiary challenging the efforts of a personal representative to exercise authority granted under a last will to realize the intent of the decedent under the last will and testament. Id. These issues as raised in the Sullivan case are very much the same issues raised by the present case here before this Court.

In much the same manner as in the instant case, the petitioning beneficiaries in Sullivan (Brown and Moses) challenged the manner in which the personal representative administered the estate, the amount of compensation the personal representative sought to receive, and the manner in which the assets of the estate were to be disbursed. Id., 423 S.C. at 483-85. Brown and Moses alleged that the personal representative unnecessarily complicated the administration of the estate and that he delayed the distribution of estate assets. Id. Significantly, they also claimed that the personal representative should simply distribute estate real property assets in-kind (the same argument that Irving has made in this case), instead of bringing a partition action as the personal representative chose to do. Id., 423 S.C. at 484.

The Sullivan probate court found the personal representative's (Sullivan's) commission to be excessive, and significantly reduced it, from approximately 20% to 10%, and also awarded Brown and Moses their attorneys' fees under the "Common Fund" doctrine. Id., 423 S.C. at 485. The circuit court upheld the probate court and both parties appealed to this Court, which affirmed the probate court on all grounds, except for the award of attorney's fees to Brown and Moses. Id. Both sides further appealed

this Court's decision in Sullivan, and the S.C. Supreme Court affirmed and reversed in part, remanding the case back to the probate court for further proceedings. Id. The S.C. Supreme Court found that a reduction in Sullivan's commission was appropriate (from the approximate 20% of the estate's value that Sullivan sought, to an amount that was approximately 10% of the estate's value), that Sullivan was entitled to his legal fees incurred in the matter, and that Brown and Moses were not entitled to their attorney's fees under the Common Fund Doctrine, as the probate court had ruled, because beneficiaries were not all united in the pursuit of the claims, and that the beneficiary parties' interests were in fact adverse, and that therefore the Common Fund Doctrine did not apply. Id., 423 S.C. at 488-490. The Supreme Court further found that, on facts uncannily similar to the facts of this case, Sullivan had acted in good faith, that his legal fees and expenses incurred should be reimbursed, and that the award of attorney's fees to the beneficiaries Sullivan and Brown was improper because the Common Fund Doctrine did not apply:

> Taking our own view of the preponderance of the evidence, we agree all actions by Sullivan as PR were taken in good faith. Sullivan had the authority under the will to sell the real estate, and while the probate court determined Sullivan prolonged the estate by seeking a partition order, we question whether a deed a distribution was even a viable alternative under these facts. We believe Sullivan acted well within his authority under the will when he sought partition of the real property. Moreover, prior to filing the action, Sullivan repeatedly attempted to reach an amicable solution among the beneficiaries.

Id., 423 S.C. at 488. The Personal Representative submits that the cases are so strikingly similar that the above paragraph could just as easily refer to the Estate of Donald Rothgeb, as to the Estate of Marion Kay.

In regard to the Sullivan beneficiaries claim for attorney's fees under the Common Fund Doctrine, our State Supreme Court noted that "if the parties interests are adverse, the doctrine does not apply," and that while all the Sullivan beneficiaries "might arguably have benefited from Brown and Moses' efforts to challenge Sullivan's compensation, we find that the beneficiaries of the estate were not united in pursuit of this cause." Id., 423 S.C. at 490. Here, it should be noted that Jeanne is not just the Personal Representative, she is also a beneficiary, and that her relationship with Julie Irving, another beneficiary, is directly and explicitly adverse, as reflected in the caption in these proceedings and in the probate court below. Because the parties are not unified, and are in fact directly adverse, the Common Fund Doctrine does not apply. (R.0315, R.0330, R.0448, R.0464, R.0519, R.0708). The Probate Court's award of attorney's fees to Julie Irving was therefore improper and constitutes reversible error.

The Circuit Court's opinion in this matter, if allowed to stand, will significantly undermine the S.C. Supreme Court's opinion in Sullivan. The probate and circuit court rulings in this matter are directly contrary to the S.C. Supreme Court's ruling in Sullivan, and the two cases cannot co-exist. With slight adjustments being made for the specific facts involved, the two cases are essentially the same case. Indeed, the cases are so strikingly similar, that during the hearing on the Jeanne Poafpybitty's Rule 59 Motions on June 29, 2018, her counsel played portions of the Sullivan oral argument and colloquy for the probate court judge. (R.0831-0832). The Supreme Court heard the case on March 7, 2018, and the proceeding was available online, even though the court's

opinion in the case was not issued until May 23, 2018. (Sullivan, 423 S.C. at 478; R.0831-0832).

The Sullivan case is an important case that has provided important guidance for probate administration in South Carolina. It involved a case that was heard by a probate court, reviewed by the circuit court, reviewed by this Court of Appeals, and then reviewed by the State Supreme Court, first on cross-appeals by the parties from this Court, and then on motion for rehearing, which was denied by our Supreme Court on August 2, 2018. Id. The S.C. Supreme Court resolved Sullivan by upholding the personal representative's commission at a level representing an approximately 10% commission on the estate's value, it confirmed this Court's holding that the petitioning beneficiaries were responsible for their own legal fees, and it held that the Sullivan PR was entitled to reimbursement of his necessary expenses incurred, including reasonable attorney's fees under Section 62-3-720, and remanded the case to the probate court for determination of the proper amount of what those fees were, which is exactly what this Court should do with the case before you now: reverse the award of attorney's fees to Julie Irving, order that the Personal Representative has the authority to conclude the Estate administration and should not be removed as the personal representative, and to remand this case to the Probate Court for determination of the amount of fees incurred by Jeanne Poafpybitty, so that those fees may be reimbursed by the Estate pursuant to Section 62-3-720. Id., 423 S.C. at 490.

## III. The Trial Court Incorrectly Applied Trust Standards to the Personal Representative, When the South Carolina Trust Code Specifically States that such Standards do not Apply to the Administration of Estates.

In paragraph 2 on page 35 of the Probate Court's March 2, 2018 Order, the court cites Section 62-7-804 of the South Carolina Probate Code. The Order represents that Section as providing: "The Personal Representative, regarding affairs of a Decedent's Estate, shall exercise the same reasonable fiduciary care, skill and caution as is required of Trustees in the South Carolina Trust Code." That statement misstates the statutory language. The actual language provides: "A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." The Probate Court simply confused the responsibilities of personal representatives and trustees. The Probate Court effectively attributed all the standards that apply to trustees of trusts to personal representatives of estates. The sections of the Probate Code that apply to personal representatives include specific duties that do not apply to trustees and, conversely, the provisions of the Trust Code are not applicable to personal representatives. The South Carolina Trust Code expressly states that "[t]his Article does not apply to ... administration of decedent's estates..." S.C. Code Ann. 62-7-102 (1976, as amended).

Here, the Personal Representative complied with the statutory requirements that apply to personal representatives. The Personal Representative also satisfied additional standards that the Probate Court erroneously imposed upon her, even though they do not apply. The Probate Court's Order of November 7, 2018, refers to sections of the South Carolina Trust Code that simply do not apply to the Personal Representative. (R.0062, R.0064, R.0066, R.0072, R.0075). Additionally, in its March 2, 2018 Order, the

Probate Court makes reference to statute sections that do not even exist. (R.0049). By citing and relying upon sections of the South Carolina Trust that do not apply and upon nonexistent sections, the Probate Court's decision amounted to reversable error. In affirming the Probate Court, the Circuit Court compounded the error. The Circuit Court held that the Probate Court applied the wrong standard and that Section 62-7-804 of the South Carolina Trust Code does not apply. Out of all references that the Probate Court made to the South Carolina Trust Code in its Orders, Section 62-7-804 is the only section that could have any application, as it is referenced in Section 62-3-703. All other sections to the South Carolina Trust Code are plainly excluded from application to the administration of estates by the terms of Section 62-7-102.

In addition to the Probate Court's incorrect standard and erroneous application, during the hearing on the Personal Representative's Motion for Reconsideration, Irving's counsel made reference to "implicit" requirements or duties that would apply to the Personal Representative. (R.0888, R.0924). The Probate Court relied on "implicit" findings to justify its ruling that the Personal Representative did not act in good faith. (R.0827-0828). Application of incorrect standards amounts to reversible error on the part of the Probate Court.

## IV. The Probate Court erred in awarding Irving her personal legal fees to be paid by the Estate, based on a flawed application of the "Common Fund" doctrine. The Circuit Court erred in upholding this portion of the Probate Court's ruling, and this aspect of the Probate Court's ruling in this matter must be reversed.

The Probate Court erred by awarding attorneys fees to Irving based on the "common fund" doctrine. In its informal e-mail ruling of May 26, 2017, the Probate

Court cited Sullivan as supporting its ruling. (R.1863-1865). In Sullivan, the probate court also granted attorney's fees to two beneficiaries who brought suit against their estate, on the basis of the "Common Fund" doctrine.[1] However, the decision was appealed to this Court, which reversed that aspect of the Sullivan case. [Sullivan v. Brown (In re: Estate of Kay), 418 S.C. 400, 792 S.E. 2d 907, 792 S.E. 2d 907 (S.C. Ct. App 2016).] For the same reason, the award of attorney's fees in this case is also improper, and should be reversed.

In reversing the trial court in Sullivan, this Court stated that "[t]he common fund doctrine allows a court in its equitable jurisdiction to award reasonable attorney's fees to a party who, at his own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property." Sullivan v. Brown (In re Estate of Kay), 418 S.C. 400, 417, 792 S.E.2d 907, 916 (S.C. App., 2016) (citing Layman v. State, 376 S.C. 434, 452, 658 S.E. 2d 320, 329 (2008) (citing Johnson v. Williams, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941)). However, this Court added the following cautionary language in regard to the Common Fund doctrine:

> [T]he allowance of attorney's fees out of a common fund is subject to abuse and is only permitted in exceptional cases when required to promote justice. Although the attorney's services might have benefitted all parties, fees cannot be awarded when the interests of the parties are adverse."

Sullivan v. Brown (In re Estate of Kay), 418 S.C. 400, 417, 792 S.E.2d 907, 916 (S.C. App., 2016) (citing Johnson v. Williams, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941) and Bedford

[1] While the South Carolina Probate Code has been amended since the Sullivan case with regard to a probate court's discretion in awarding attorney fees and costs, the principles related to any such award are still based on the equitable principles set forth in the common fund doctrine.

v. Citizens & S. Nat'l Bank of S.C., 203 S.C. 507, 515, 28 S.E.2d 405, 407 (1943)). In this case, the actions of Irving have not worked a net benefit to the Estate's beneficiaries, but rather have harmed the Estate's beneficiaries when this matter is considered as a whole. Irving caused substantial and unnecessary delay, and additional expense for this Estate which, in one way or another, will ultimately be borne by those who have interests in this Estate. On that basis, the Sullivan trial court's award of attorney's fees to disgruntled beneficiaries was reversed by this Court and the Court should rule likewise here.

## V. The Probate Court erred in removing the Personal Representative and appointing a Special Administrator to oversee the conclusion of the Administration of this Estate.

The Probate Court's Order of March 2, 2018, provides that the Personal Representative be removed and that a Special Administrator be appointed to continue the administration of the Estate. This ruling is inconsistent with the law in South Carolina. South Carolina Code § 62-3-614(1) provides that, "[a] special administrator may be appointed: (1) informally by the court on the application of an interested person when necessary." Irving never requested a special administrator in her pleadings.[2] No discussion of a special administrator was raised or occurred at trial. The Probate Court's e-mail ruling of May 26, 2017, did not mention the appointment of a Special Administrator. The idea was raised for the first time in the proposed order that Irving's counsel prepared in response to the Probate Court's e-mail ruling. It was only when the Personal Representative's counsel received the proposed order from Irving that the

[2] There was also no motion made during the trial to amend the pleadings, nor did the Probate Court order the pleadings amended during the trial.

Personal Representative learned that she was to be removed as the Personal Representative of the Decedent's Estate. Thus, not only do the facts in this case not warrant the appointment of a special administrator, Irving never applied for that remedy, as Section 62-3-614(1) requires.

Moreover, the standards identified by the South Carolina Supreme Court for removal of a Personal Representative and appointment of a special administrator are not met here. The seminal case in South Carolina on this issue is Blackmon v. Weaver, 366 S.C. 245, 621 S.E.2d 42 (S.C. 2005), in which the Supreme Court stated:

> Section 62-3-611(b) of the South Carolina Code (1976) governs removal of a personal representative, and allows for removal when it is in the best interest of the estate, when the personal representative mismanages the estate, or when the personal representative fails to perform any duty pertaining to the office. However, there is a strong deference shown to the personal representative chosen by the testator. 'The Courts have ever been reluctant to take the management of an estate from those to whom it has been confided by the testator, for to that extent the intention expressed in his will would be defeated.' *Smith v. Heyward,* 115 S.C. 145, 164, 105 S.E. 275, 282 (1920). The power to remove a personal representative "should be executed with great caution, and not at all, unless it is made to appear to be necessary for the protection of the estate, to prevent loss or injury to it from misappropriation, maladministration or fraud." *Id.* at 164-65, 105 S.E. at 282.

Blackmon, 621 S.E.2d at 45. Here, there is no evidence in the record that indicates that the Personal Representative failed to perform any statutorily required step in this Estate. There is also no evidence that the Personal Representative has misappropriated any Estate asset or committed any form of maladministration or fraud. Since the Personal Representative did not know that the Probate Court was even considering removing her, she had no opportunity to present evidence or defenses contesting any claim for removal.

The removal of the Personal Representative and the appointment of a special administrator at this late juncture in the Estate's administration will only serve to increase the expense of an estate administration that has already overwhelmed the available assets with extraordinary legal and other professional fees. The Probate Court's appointment of a Special Administrator was never requested by Irving or any party, and is not supported by the evidence. It constitutes reversible error, and it must be reversed by this Court.

## VI. The Probate Court Erroneously Ordered the Personal Representative to be Personally Responsible for the Estate's Legal Fees without a sufficient finding of Bad Faith as required by Section 62-3-720 of the South Carolina Probate Code

In addition to its error in affirming the Probate Court's error reforming the Decedent's will, the Circuit Court also erroneously directed the Personal Representative to personally pay the legal fees and costs she incurred in defending herself in the underlying action here and in the preparation of customary estate closing documents and other legal responsibilities required for the closing of the Estate. Neither of these directives were supported by the necessary finding of bad faith which S.C. Code Ann. § 62-3-720 (1976, as amended) requires:

> "If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred." (S.C. Code Ann. § 62-3-720)

Under this clear and unambiguous standard, legal fees and costs incurred in a good faith defense of any action brought against a personal representative of an estate in his

or her fiduciary capacity for matters related to estate administration shall be borne by the estate, and not personally by the personal representative.

Here, Irving, one of the Estate beneficiaries, brought the underlying action against the Personal Representative in her fiduciary capacity. The Personal Representative defended the action in good faith, entitling her to receive the costs of that defense from the Estate, as Section 62-3-720 directs. Other sections of the Probate Code also provide that a personal representative may retain legal services in the administration of an estate and that such expenses shall be an expense of the estate[3]. Consequently, the Lower Court Orders violated these clear standards by requiring the Personal Representative to personally pay these costs.

The Lower Court Orders held that the Personal Representative was to personally pay all legal fees incurred related to Estate matters from May 25, 2016 (an arbitrary date apparently representing a thirty-day period from the date the Irving Petition was filed), through the date of the Probate Court's Order on March 2, 2018. During this period, the Personal Representative incurred legal fees and costs related to routine and customary estate administration matters, in addition to the costs of defending the Irving Petition. (R.0748-0749). The Lower Court Orders imposing these costs on the Personal Representative individually are flatly inconsistent with the well-established law governing estate administration and litigation in South Carolina.

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[3] Section 62-1-201 (13) specifically provides that attorney fees are an expense of administration and Section 62-3-715 (19) specifically authorizes a personal representative to employ attorneys and pay for such attorneys from estate funds.

In Franklin v. Chavis, 640 S.E.2d 873, 877, 371 S.C. 527 (S.C. 2007), the South Carolina Supreme Court approved a personal representative's use of estate funds to defend an action against him, even though the personal representative was alleged to have engaged in multiple improper acts. Franklin, at 877. Among other acts of significant wrongdoing the personal representative engaged in the unauthorized practice of law in drafting a will for the testator in which he named himself as the testator's personal representative. Id. Nonetheless, the Court found that the use of estate funds by the personal representative to retain counsel to defend the action in question is proper, stating:

> Petitioners also complain that the personal representative is using estate funds to defend the action below which challenges the will on the ground of undue influence. This is a legitimate use of estate funds under S.C. Code Ann. § 62-3-720 (1987) which allows for the expenses of estate litigation to be paid by the estate.

Id., at 877. Section 62-3-720 and supporting case law leave little doubt that the personal representative should be able to look to the Estate for payments of the costs the lower courts imposed on her personally. Adoption of a rule as advanced in the Lower Court Orders would allow disgruntled beneficiaries to frustrate the administration of estates, merely by making an allegation of wrongdoing against the personal representative and bringing a claim in the probate court, requiring the personal representative to defend herself using her personal funds. As a practical matter, such a result would likely cause most personal representatives to resign or decline to serve out of concern of being unable to recover costs of any legal defense of their estate. Section 62-3-720 only requires that the personal representative's defense of an action must be in "good faith."

Moreover, without bad faith, the personal representative is entitled to have legal fees incurred in her defense paid by the estate. This point of law was recently restated by this Court of Appeals and confirmed by the South Carolina Supreme Court. Sullivan v. Brown (In re Estate of Kay), 418 S.C. 400, 415, 792 S.E.2d 907, 915 (S.C. App., 2016) and Sullivan v. Brown (In re Estate of Kay), 423 S.C. 476, 816 S.E.2d 542 (2018).

Here, the Irving Petition does not allege that the Personal Representative acted in bad faith. The term "bad faith" was not used at trial and does not appear in the trial transcript. Additionally, neither the Probate Court's initial e-mail ruling of May 26, 2017, nor the Order of March 2, 2018, found that the Personal Representative acted in bad faith. It was not until the Personal Representative pointed out to the Probate Judge in her Motion for Reconsideration that a finding of bad faith was required, that the Probate Court attempted to address the requirement for a finding of bad faith. Instead of acknowledging that a finding of bad faith was required and that the evidence did not support a finding of bad faith, the Probate Court maintained its position and issued another e-mail ruling on the Motion for Reconsideration, dated September 6, 2018, in which the Probate Court endeavored to find support for its initial ruling.

Whether the Personal Representative's actions were in good faith or bad faith is dependent upon what it means to act in "good faith." Section 62-8-102(4) of the South Carolina Probate Code states that "'good faith' means honesty in fact."[4] In Delaney v. Casepro, Inc., the United States District Court for the District of South Carolina stated

[4] Also see Section 11-35-30 of the South Carolina Code stating that "Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. 'Good faith' means honestly in fact in the conduct of transaction concerned and the observance of reasonable commercial standards of fair dealing."

that "'bad faith' connotes an action taken without any colorable legal or factual basis." No. 9:14-cv-4355-DCN 2015 (citing Rutherford v. Cannon, No. 8:09-cv-2137, 2010) Black's Law Dictionary 139 (6th ed. 2006) defines bad faith as "[t]he opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." The entry further cites Stath v. Williams, Ind. App., 367 N.E.2nd 1120, 1124, stating "[the] [t]erm 'bad faith' is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will." Black's Law Dictionary 139 (6th ed. 2006).

Here, there were no allegations pled or credible evidence presented at trial to establish that the Personal Representative acted in bad faith under these or any established legal standards. The Lower Court's finding of "bad faith" is unsupportable, and consequently, the Probate Court's decision to impose costs personally on the Personal Representative is reversible error.

While the Probate Court's Orders do not set forth clear findings of bad faith, they appear to base support for such a finding on the following arguments, all of which lack factual and legal support and which constitute reversible error:

1. Manipulation of Asset. The Probate Court held that the Personal Representative manipulated at least one asset, the personal residence, for her personal

benefit and apparently to the exclusion of the other beneficiaries. (R.0022, R.0051). The facts of the case do not support this finding. The Probate Court appears to have analyzed the manipulation of the residence in two ways: a) that the residence was occupied rent-free by the Personal Representative and b) that the Personal Representative had the residence appraised for an amount that was not consistent with its fair market value.

Regarding the residence being occupied rent-free, the Personal Representative testified that she had lived rent-free in the residence for over twenty years with the Decedent, her husband, prior to his death. (R.0522). Other beneficiaries also occupied Estate properties rent-free. Beneficiary, Steven Rothgeb, lived in the residence rent-free with the Personal Representative for nine months after the Decedent's death. Another beneficiary, Matthew Rothgeb, has lived, and continues to live, in another Estate property rent-free. (R.0639-0640). Basing a finding of manipulation of an asset on these facts is reversible error.

Regarding the residence being appraised for less than fair market value, there are several important factual points that demonstrate reversible error on the part of the Probate Court. After a distribution agreement of the Estate properties was worked through between the Estate's counsel and Irving's first counsel (R.1326-1327), the Estate commissioned a mutually agreed upon independent appraiser to appraise the Estate properties[5]. (R.0775). The appraiser was given no direction on how to appraise the

[5] Irving's counsel, not the Personal Representative, requested that the Estate properties be appraised for distribution purposes. The Personal Representative intended to use the tax-assessed values.

properties, nor did he even know how the properties would be distributed. (R.0340). The appraised values for almost all of the Estate properties declined considerably in value, including the property that Irving was to receive. (R.0341, R.1131-1155).

To reach a finding that the Personal Representative manipulated the value of the residence for distribution purposes and committed bad faith, the Probate Court had to take several unusual steps. First, it had to ignore the established fact that the appraised values for other Estate properties were also considerably lower than their tax-assessed values. After that, the Probate Court had to completely discount the sworn testimony of the mutually agreed upon independent appraiser, the Estate's probate counsel, and the Personal Representative, along with the arguments of the Estate's counsel. (R.0337-0347). Even more, the Probate Court also had to disregard the established fact that the Personal Representative voluntarily forwent her statutorily protected elected share, which she certainly would have availed herself of, if she were attempting to improve her lot in the Estate. The only thread of evidence that the Probate Court had to support an extraordinary finding that the Personal Representative somehow manipulated the value of the residence was a new appraisal from an appraiser commissioned by Irving to appraise only one Estate property, the residence, and to appraise it after repairs. There was no evidence presented that the Personal Representative caused the residence to be appraised lower than its tax-assessed value. In fact, the initial appraiser testified to the poor conditions of the residence, with extensive mold and water damage throughout. (R.0343). Ironically, Irving's appraiser even testified that he would not purchase the residence for his higher appraised value. (R.0347). The Probate Court

committed reversible error in failing to state any reasonable facts to support its finding that the Personal Representative manipulated an Estate asset for her personal benefit.

2. Inconsistent Treatment of Legal Fees. As a ground for a finding of wrongdoing, the Probate Court's Order erroneously held that the Personal Representative had "lavishly expended" Estate funds on legal fees. (R.1946-1948). The fees and costs submitted by Irving's counsel were $110,479.20 (with an amount of $98,324.00 for work through June 2018), which the Probate Court approved in full without comment or hearing. The Personal Representative's legal fees and costs for the same time period were $104,769.79. Due to the similarity in fees and costs, along with the fact that Irving was the filing party and the Personal Representative was required to respond to Irving's claims, it can hardly be said that the Personal Representative had "lavishly expended" Estate funds on legal fees, especially when the Personal Representative's legal fees also included costs for estate administration. The Probate Court's reliance on this element as a basis for finding "bad faith" is misplaced and cannot be sustained.

3. Estate Tax Matter. The record establishes that Irving refused to provide her social security number to the Personal Representative or the Certified Public Accountant for the Estate after they made numerous requests for such information, which was necessary to enable the Estate to file its tax return for the 2014 tax year. (R.0378, R.0382, R.0393, R.0424, R.0425, R.0593) Those refusals forced the Estate to file its return in a manner that eliminated the ability to take advantage of the pass-through of losses to Estate beneficiaries. Irving attempted to use the tax situation as a basis to

show that the Personal Representative committed some act of wrongdoing or breached some duty. (R.0038-0041). The Personal Representative had the Estate tax return completed and sent to the beneficiaries approximately two weeks before the April 15th personal filing deadline. (R.0039). Irving had apparently filed her personal tax return before the April 15th deadline and was concerned that she might have to go back and amend her return after receiving the tax information from the Estate. (R.0279, R.0381, R.0384, R.0386). The Probate Court concluded that the Personal Representative had some duty to give the beneficiaries tax advice. (R.0038-0041). The Personal Representative has no requirement or duty to give tax advice to Estate beneficiaries. The actual issue here is that Irving's refusal to provide her social security number forced the Beneficiaries to postpone losses that they could have timely taken had Irving not done so. This tax matter is unrelated to a finding of bad faith, but based on the Probate Court's Order of March 2, 2018, it appears to be part of the grounds that the Probate court used to establish wrongdoing on the part of the Personal Representative.

4. Mischaracterized Representations. In its Order dated March 2, 2018, the Probate Court addressed whether and how the Personal Representative responded to Irving about the status of the Estate administration. In one paragraph, the Order sets forth a proposition that it refutes in the following paragraphs. In paragraphs 1 through 3 (R.0018-0019), the Probate Court expresses concern about a request for information from an Estate beneficiary, to which the Personal Representative did not respond. However, in the following paragraphs the Probate Court explains that the Personal Representative responded to the request with detailed information.

Another example of mischaracterized information upon which the Probate Court apparently based its finding of wrongdoing appears at page 32 of its March 2, 2018 Order. Irving argued that the Personal Representative did not know the amount of legal fees that would be incurred during the trial. In the middle of trial, a party can hardly be expected to know the exact amount of legal fees for which it might be liable when the fees are billed on an hourly basis.

Another example of mischaracterized information appears in the March 2, 2018 Order. The Order claims that the Personal Representative intentionally inhibited and delayed the closing of the Estate. (R.0050). Yet, the Personal Representative was fully prepared to distribute the Estate assets and close the Estate when the appraisals were completed. (R.0537-0551). By insisting that the only acceptable manner to distribute Estate assets was to distribute them all in kind in equal shares, Irving, not the Personal Representative, prevented the timely distribution and closing of the Estate.

Yet another example of mischaracterized information is Irving attempting to use an unsupported accusation that the Personal Representative told an Estate beneficiary, Matthew Rothgeb, that she had not sold any Estate properties. (R.0297). This accusation was false and was never substantiated by Matthew Rothgeb or anyone else at trial. In fact, it was specifically repudiated by the Personal Representative. (R.0642).

These mischaracterizations are not germane to a finding of bad faith, but they were apparently relied on by the Probate Court to try to establish some form of wrongdoing on the part of the Personal Representative.

5. Interim Accounting. There was an issue with a minor discrepancy between the attorney fees that were listed on the interim accounting and the actual fees incurred for such designated time period, due to the timing of when the interim accounting was finalized and the monthly billing records of Estate's counsel were updated. (R.0045). However, all the bank records for the Estate account had been given to Irving's first attorney and the amount of legal fees paid by the Personal Representative were transparent. (R.0312). There was nothing nefarious or intentionally misleading on the part of the Personal Representative in this regard, and certainly nothing that would amount to bad faith.

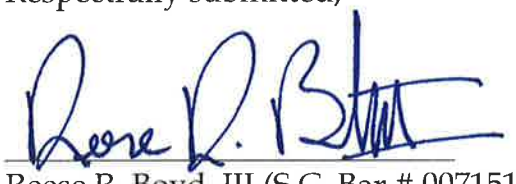
6. Accommodation by Personal Representative. In an effort to resolve the Estate issues, in the revised Estate closing documents, the Personal Representative stated that she would be willing to move out of the Estate property that she had occupied her residence for over twenty years with her husband, the Decedent, and give it to the other beneficiaries, at the value that Irving had insisted it was worth as reflected in the Estate closing documents filed in February 2017 (R.0544). The Personal Representative would then accept some other properties, distributing the residence and the other properties out in equal shares to the other three beneficiaries. Irving indicated she would not take the residence at the value at which she insisted the Personal Representative should take it. The Probate Court apparently attempted to attribute wrongdoing to the Personal Representative for listing the residence on the revised closing documents at the value Irving insisted it was worth and not the value the

Estate's appraiser had established, an argument that is hard to understand and which certainly is not grounds for a finding of bad faith. (R.0036-0037).

## CONCLUSION

For the reasons set forth herein, this Court should reverse the judgments of the Lower Courts and remand this case back to the Horry County Probate Court for further proceedings as necessary to conclude the administration of the Estate of Donald Rothgeb consistent with the Testator's intent as set forth in his Last Will and Testament. Jeanne respectfully requests that this Court Order that she is entitled to her reasonable PR commission, that she is entitled to her fees and costs incurred in defending this action, that she is not removed as the PR of her husband's Estate, and that the Common Fund Doctrine is inapplicable and that Julie Irving is responsible for her own legal fees on that basis. This Court should further Order that the case is remanded to the Horry County Probate Court to determine the proper amounts of fees, expenses and commissions to be paid, pursuant to this Court's direction, and for the Probate Court's supervision of the remaining administration and closure of the Estate of Donald Rothgeb.

Respectfully submitted,



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