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RECEIVED

Mar 11 2022

SC Court of Appeals

October 12, 2018

Honorable Carroll D. Padgett, Jr.
Chief Associate Probate Judge
1301 Second Avenue
Conway, South Carolina 29526

Via Hand Delivery

Re: Estate of Donald M. Rothgeb
Case No.: 2014-ES-26-00498

Dear Judge Padgett:

I hope this finds you well. I am writing to provide for you, here, a Proposed Order for addressing Motions that were heard in Court on June 29, 2018. I have used, for guidance, your email to counsel dated September 6, 2018.

I have worked to remain consistent with your email ruling, but outline here, some provisions I have included that are not all addressed in your email.

The following items, I believe, are consistent with what you have decided, even while they are not set forth in your email.

In this very contested case, I ask please that you inform me if I have taken any improper liberties to draft anything which is contrary to your views of the case, and your expectations.

Following are the issues I specifically wish to address with you:

1. The proposed Order, with numerous footnote resources, is substantial and includes more details than you have specifically directed, but which I believe provide helpful support to the conclusions you have reached. Without question, the detail that I've provided represent a very different approach than that suggested, recently, by Mr. Boyd's email.

2. While your September 6, 2018 email declared that all Motions were denied, I did not understand you to include Plaintiff's Motion in this category. As set forth in paragraph III of the attached draft (page 21), I have provided a ruling which reads favorably towards the clarification guidance that Plaintiff sought in her March, 2018 Motion.

R2036

Honorable Carroll D. Padgett, Jr.
October 12, 2018
Page Two

3. Regarding Plaintiff's fees and costs, attached is my firm's latest statement, supplementing what was forwarded to the Court on July 20, 2018. In filling out what appears on page 21, paragraph B., I ask the Court to consider the attached supplement. Defendant's efforts to overturn your March 2, 2018 Order have been substantial, and have required substantial reply. Clarification about the amount of reimbursement, and whether this is from the Estate, solely from the Defendant, or from a combination, would greatly assist the parties, and not leave us in a position to seek some future new potentially contested application.

4. Your September 6 email did not address numerous exhibit filings by the Defense, of documents which were not presented at trial, and which were not presented with and evidentiary protocol. I have included, in this draft order, a ruling which excludes these documents from the record. (Paragraph I. B. e. on page 11.)

Thank you for the courtesies you have extended to all of us. I'll be happy to respond, should you have further direction.

Very truly yours,

CLIFFORD H. TALL, P.A.



Clifford H. Tall

CHT:ele
Enclosures

cc: Reese R. Boyd, Esq.
Bret H. Davis, Esq.
Susan Johnson
Julie Irving
Donald Matthew Rothgeb
Steven Taylor Rothgeb

R2037

1

-Item IV of Dr. Rothgeb's Will

A. I may leave written memoranda disposing of certain items of my tangible personal property. Any such item of tangible personal property shall pass according to the terms of such memoranda in existence at the time of my death. If no such written memoranda are found or identified by my Personal Representative within ninety (90) days after my Personal Representative's qualification, it shall be conclusively presumed that there are no such memoranda and any subsequent discovered memoranda shall be ineffective. Any property given and devised to a beneficiary who is not living at the time of my death and for whom no effective alternative provision has been made shall pass according to the provisions of the following paragraph and not pursuant to any anti-lapse statute.

B. In default of such Memoranda or to the extent that such Memoranda does not completely dispose of the property passing hereunder, then I give and bequeath all of such property (or such part as is not disposed of by such Memoranda) to Donald Matthew Rothgeb, Julie Kristin Irvin, Steven Taylor Rothgeb and Jean E. Poafpybitty, or the survivor of them, in approximately equal shares.

If any of the foregoing Donald Matthew Rothgeb, Julie Kristin Irvin, Steven Taylor Rothgeb and Jean E. Poafpybitty do not agree among themselves to the division of the said property bequeathed to them under subparagraph B of this Item, my Personal Representative shall make such division among them, the decision of my Personal Representative to be in all respects binding. The cost of packing and shipping such property shall be charged against my estate as an expense of administration.

ITEM IV

I give, devise and bequeath to Donald Matthew Rothgeb, Julie Kristin Irvin, Steven Taylor and Jean E. Poafpybitty, in approximately equal shares, all the rest, residue and remainder of my property of every kind and description (including lapsed legacies and devises), wherever situate and whether acquired before or after the execution of this Will, absolutely in fee simple; provided, however, that my Personal Representative shall have sole discretion to designate the real or personal property comprising the respective shares so established, so long as the value thereof is approximately equal. If any of the foregoing beneficiaries shall predecease me leaving issue then surviving, then I direct that the children of such predeceased beneficiaries shall take, per stirpes, the share or property their parent would have received had he or she survived me.

ITEM V

I hereby nominate, constitute and appoint as Personal Representative of this, my Last Will and Testament, my wife, Jean E. Poafpybitty, and direct that she shall serve without bond. If for any reason the said wife is unable or unwilling to serve or continue to serve, I nominate, constitute and appoint my daughter, Julie Kristin Irvin, as substitute or successor Personal Representative and direct that she shall serve without bond.



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**-Defendant's March 29, 2018 Motion, and
May 4, 2018 Memo asserting that the Court
has wrongfully reformed Dr. Rothgeb's Will**

ARGUMENT

I. The Order Represents an Improper Reformation of the Decedent's Last Will and Testament.

The Last Will and Testament of Donald M. Rothgeb (the "Decedent") specifically directs that the Personal Representative pay the debts of the estate ("Estate") and divide the remainder of his property in "approximately equal shares" with the Personal Representative having "sole discretion to designate the real or personal property comprising the respective shares so established, so long as the value thereof is approximately equal." Trial testimony revealed there were insufficient assets in the Estate to pay the Estate debts without selling some or all of the Estate's real property. The priorities of the Personal Representative did not deviate from the Decedent's direction in this regard.

The Court cites S.C. Code Ann. 62-2-601 (1976, as amended) in reforming the terms of the decedent's Will. That Section states as follows:

(A) The intention of the testator as expressed in the testator's will controls the legal affect of the testator's dispositions. The rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will.

In this case, the main Estate assets are several pieces of real estate. As emphasized above, the terms of the Will specifically and unambiguously grant discretion in the

Personal Representative to determine which beneficiary receives which piece of real estate in satisfaction of their devise. Section 62-2-601 further provides that:

(B) Notwithstanding subsection (A), the court may reform the terms of the Will, even if unambiguous, to conform to the terms of the testator's intention if it is proved by clear and convincing evidence that the testator's intent and the terms of the Will were affected by a mistake of fact or law, whether in expression of inducement.

S.C. Code Ann. Section 62-2-601(B). Thus, where a duly executed last will and testament is unambiguous, the only basis for reforming the will (and the testator's intent), is where the will is based upon or affected by a mistake of fact or law. *Id.* (emphasis added). In the case at hand, there was no evidence presented (nor even any allegation) that the testator's intentions were affected by a mistake of fact or law. It is therefore the Defendant Personal Representative's contention that this Court did not have discretion in this matter to reform the terms of the Decedent's Will and, in effect, change the clear direction of the Testator, which should have been the "guidepost" directing the Court in the proper resolution of this case.

II. The Order Represents an Improper Reformation of the Decedent's Last Will and Testament.

The Decedent's Last Will and Testament specifically directs that the Personal Representative pay the debts of the Estate and divide the remainder of his property in "approximately equal shares" with the Personal Representative having "sole discretion to designate the real or personal property comprising the respective shares so established, so long as the value thereof is approximately equal." Trial testimony revealed there were insufficient assets in the Estate to pay the Estate debts without selling some or all of the Estate's real property. The priorities of the Personal Representative did not deviate from the Decedent's direction in this regard.

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3

**-§62-3-607 of the South Carolina Probate
Code**

Section 62-3-607 Order restraining personal representative

(a) Upon application of any interested person, the court by temporary order may restrain a personal representative from performing specified acts of administration, disbursement or distribution, or exercise of any powers or discharge of any duties of his office, or make any other order to secure proper performance of his duty, if it appears to the court that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person. Persons with whom the personal representative may transact business may be made parties.

(b) The matter shall be set for hearing within ten days or at such other times as the parties may agree. Notice as the court directs shall be given to the personal representative and his attorney of record, if any, and to any other parties named defendant in the application.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 15, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment, in subsection (a), substituted "any interested person" for "any person who appears to have an interest in the estate"; and in subsection (b), substituted "application" for "petition" at the end.

4

**-Section 62-7-105 of the South Carolina
Probate Code**

Section 62-7-105 Default and mandatory rules

(a) Except as otherwise provided in the terms of the trust, this article governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of this article except:

(1) the requirements for creating a trust;

(2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;

(3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful and possible to achieve;

(4) the power of the court to modify or terminate a trust under Sections 62-7-410 through 62-7-416;

(5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Part 5;

(6) the limitations on the ability of a settlor's agent under a power of attorney to revoke, amend, or make distributions from a revocable trust pursuant to Section 62-7-602A;

(7) the power of the court under Section 62-7-708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;

(8) the effect of an exculpatory term under Section 62-7-1008;

(9) the rights under Sections 62-7-1010 through 62-7-1013 of a person other than a trustee or beneficiary;

(10) periods of limitation for commencing a judicial proceeding;

(11) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and

(12) the subject matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 62-7-201 and 62-7-204.

HISTORY: 2005 Act No. 66, Section 1; 2010 Act No. 244, Section 45, eff June 7, 2010; 2013 Act No. 100, Section 2, eff January 1, 2014.

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**-Pages 3 and 4 of Defendant's May 4, 2018
Memo, asserting that the Court tried to reform
the Decedent's Will and tried to justify this
reformation**

-62-2-601 of the South Carolina Probate Code

Defendant Jeanne Poafpybitty hereby seeks rulings on matters that the Court did not address in its Order; and would further respectfully request that the Court reconsider its findings and rulings contained in the March 2 Order, correct the errors contained therein, based on the record and the law.

ARGUMENT

I. The Order Represents an Improper Reformation of the Decedent's Last Will and Testament.

The Last Will and Testament of Donald M. Rothgeb (the "Decedent") specifically directs that the Personal Representative pay the debts of the estate ("Estate") and divide the remainder of his property in "approximately equal shares" with the Personal Representative having "sole discretion to designate the real or personal property comprising the respective shares so established, so long as the value thereof is approximately equal." Trial testimony revealed there were insufficient assets in the Estate to pay the Estate debts without selling some or all of the Estate's real property. The priorities of the Personal Representative did not deviate from the Decedent's direction in this regard.

The Court/cites S.C. Code Ann. 62-2-601 (1976, as amended) in reforming the terms of the decedent's Will. That Section states as follows:

(A) The intention of the testator as expressed in the testator's will controls the legal affect of the testator's dispositions. The rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will.

In this case, the main Estate assets are several pieces of real estate. As emphasized above, the terms of the Will specifically and unambiguously grant discretion in the

Personal Representative to determine which beneficiary receives which piece of real estate in satisfaction of their devise. Section 62-2-601 further provides that:

(B) Notwithstanding subsection (A), the court may reform the terms of the Will, even if unambiguous, to conform to the terms of the testator's intention if it is proved by clear and convincing evidence that the testator's intent and the terms of the Will were affected by a mistake of fact or law, whether in expression of inducement.

S.C. Code Ann. Section 62-2-601(B). Thus, where a duly executed last will and testament is unambiguous, the only basis for reforming the will (and the testator's intent), is where the will is based upon or affected by a mistake of fact or law. *Id.* (emphasis added). In the case at hand, there was no evidence presented (nor even any allegation) that the testator's intentions were affected by a mistake of fact or law. It is therefore the Defendant Personal Representative's contention that this Court did not have discretion in this matter to reform the terms of the Decedent's Will and, in effect, change the clear direction of the Testator, which should have been the "guidepost" directing the Court in the proper resolution of this case.

II. The Order Improperly Seeks to Impose Rental Fees on the Personal Representative for her continuing residency in a home that was the Marital Home she shared with the Decedent for almost Twenty Years.

It would not be equitable for the Defendant to have to compensate the other heirs for use of the decedent's last residence during the Estate administration. The property currently occupied by Defendant, has been the Defendant's residence for well over twenty years. She lived in it during that time with her husband, the Decedent, with what can be deduced as a tacit understanding with the Decedent that she not be required to pay rent. Secondly, as was testified to at trial, one of the other beneficiaries,

Section 62-2-601 Rules of construction and intention; reformation of will

(A) The intention of a testator as expressed in the testator's will controls the legal effect of the testator's dispositions. The rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will.

(B) Notwithstanding subsection (A), the court may reform the terms of the will, even if unambiguous, to conform the terms to the testator's intention if it is proved by clear and convincing evidence that the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment added subsection designator (A), added subsection (B), relating to reformation of will, and made other nonsubstantive changes.

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**-Defendant's 2-24-15 email request for
guidance from her attorney's office**

bweaver@davisboydlaw.com

From: Jeanne Poafpybitty [jeanep@mullenwylie.com]
Sent: Tuesday, February 24, 2015 12:17 PM
To: bweaver@davisboydlaw.com
Subject: FW: Dad's estate

Hey Becky -

I just came back from the post office picking up mail from the office and found this email from Steven. It will take you awhile to read it.

I don't know how to respond to this. I don't know what they want to know. I guess I could make a list of all the properties and when the leases run out? You and I don't communicate often because I don't really think it is necessary. I have told him that the one property is up for sale and has been for 2 months going on 3. The other properties aren't up for awhile.

I don't know what he thinks you should be doing or telling me. This all really aggravates me. What am I supposed to do, give them a monthly report. A monthly report and say what??? I don't know what more I'm supposed to be doing, that's my question. I know they ALL want the money and I've told them what we discussed a week or so ago that the 2 debts have to be paid off. Can you figure out what more I'm supposed to be telling them? If so, please let me know. It sounds to me like they don't trust me. I didn't know I was supposed to be giving them a blow by blow accounting each month.

Let me know what you think.

Thanks. Jeanne

From: Steve Rothgeb [mailto:strothgeb77@gmail.com]
Sent: Tuesday, February 24, 2015 11:37 AM
To: Jeanne Poafpybitty
Subject: Dad's estate

PLAINTIFF'S
EXHIBIT
#20 2-24-17
PM

Dear Jeanne,

I would like to discuss the estate a bit further and address perhaps some points that were not clarified by the reply from the lawyer's office.

First, let me stress that I would in no way be one capable of properly measuring the grieving process for a widow and I am aware that in South Carolina, an estate can not be distributed among the inheritors until minimal one year has passed from a death, and it has only been about a month since that year mark, so I am not in a position to judge how quickly this process must take. As the executor of the will, you inherit a responsibility that no one would be jealous of and depending on how chaotic Dad left his affairs, I can see how the process can be overwhelming and thankless. And I know you are working with plenty already on your plate. So please do not view addressing these issues as me pointing fingers, casting stones, or any of that.

I think I speak on behalf of the rest of the family that what has been a major concern is a lack of communication regarding the things that have been done since Dad passed. Most importantly, the lawyer situation. I wasn't aware one was hired until I heard through Julie and according to her, when she attempted to make inquiries regarding Dad's estate in her initial contact with the law office, the reply was that they were not at liberty to divulge any information as they would only answer to the client, that being you.

Given the fact that there are four people with four equal vested interests in Dad's estate, I hope you can find it logical that Julie, Matt and myself would feel entitled to have access to the financial status of the various elements that make up Dad's estate. Perhaps some sort of monthly report or something that they would certainly offer to you upon request...I feel like that should be applicable to us all. After all, I assume that the fee for the lawyer is being paid through funds from Dad's estate, so doesn't that mean we are all paying for this lawyer? If that is not the case, then I think there needs to be evidence that supports that. But again, assuming the fees are coming from Dad's estate, then there should be access for all of us.

I think it has been the lack of communication with this lawyer that has my siblings, and to an extent at this point, myself as well, feeling left in the dark. There needs to be an ongoing open dialogue with any legal representatives that are involved among all four of us. Now I understand that any contact with a lawyer comes at a cost. I am not trying to pile up consulting fees, advisement fees or whatever one calls it, and the last thing I want is a situation where Matt is hassling a law office day and night, asking where the money is. But, I feel like whatever actions the lawyer is taking that is made privy to you should be shared among all of us, along with financial records and activities regarding his various assets, starting with a summary of affairs that have taken place since the lawyer was hired until now.

Long story short, I think we need to be kept in the loop, and that hasn't necessarily been happening. Again, this is not an indictment on your ability to handle the estate to this point or that it has taken too long and I am upset, I assure you that is not the case. It is more of a feeling that now is the time to for everyone to be kept in the loop going forward because I assume, now that we are past the year mark, the wheels should be beginning to turn, and while we may not have a definitive distribution of the estate for some time yet to come, we should be entering a phase of this process where the affairs can begin to be taken care of, with the exception of waiting for leases to end on properties. In other words, even if the probate cannot be completed for some time to come because of active leases on some properties, whatever ducks *can* be lined up in a row to execute this efficiently once those properties do become available, ought to be lined up. Then it is merely a matter of waiting for things to play out and we all effectively know where we stand.

Forgive me if this was a bit lengthy, but I do hope we can continue a civil earnest dialogue going about this. If you want to talk on the phone, that's totally cool. I do not think I have requested anything that Matt or Julie would disagree with, it is a matter of piece of mind and that is something we all agree on and deserve despite our foibles. Please respond when you can. If you have anything from the lawyer you want to send, you can CC Julie the same info and one of us will make sure Matt gets a copy. (not sure what his email, or access to email situation is like right now).

Hoping this finds you well,

Steve

7

-Excerpt from March 2, 2018 Court Order
-Defendant's March 8, 2015 email reply
-Defendant's March 19, 2015 forwarding of
information charts, with commentary
-Excerpt from Defendant's May 4, 2018
Memo

1. Steven Rothgeb's letter of March 7, 2015, was respectful and cordial. In a polite manner, it inquired about basic Estate administration issues. Steven Rothgeb asked for sharing about "financial records and activities regarding Dad's various assets, starting with a summary of activities that have taken place since the lawyer was hired until now." He reported how there had not been success in securing information, when inquiries were previously made directly to the lawyers which Ms. Poafpybitty had engaged.

2. The Decedent's Estate included twelve (12) parcels of real property, many of which were actively leased to tenants. Following a year of administration, the type of financial inquiry forwarded by Steven Rothgeb was well within what the Personal Representative should have expected, and should have been prepared to reasonably to address.

3. Presentations at trial display how Ms. Poafpybitty expressed annoyance at receiving Steven Rothgeb's March 7, 2015 inquiry³. Among her responses to this inquiry was that she had not recently given out details to Estate devisees, "...because there are no details to

³ Plaintiff's Exhibit 20 (paragraph 3)
Plaintiff's Exhibit 2 (paragraph 7)

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give.⁴ Nonetheless, Ms. Poafpybitty offered, in her own March 8, 2015 written response, a commitment to getting information together, and sending it out within a week.⁵

4. A trial Exhibit shows that on March 19, 2015, Ms. Poafpybitty forwarded, to Steven Rothgeb, by email, summary tables which contained a description of rental property locations, floor plans, HOA dues and 2014 realty taxes.⁶ Presumably, this was Ms. Poafpybitty's follow-up for her written commitment to share financial information, in response to Steven Rothgeb's March 7, 2015 written inquiry. The email shared Ms. Poafpybitty's impressions that Ms. Irving has been acting out, because of money concerns⁷ and then included, "Well there isn't going to be any money today or tomorrow so I guess we all just need to get a grip."⁸ Ms. Poafpybitty repeated her position, shared with devisees, on February 17, 2015⁹, that two mortgage debts needed be paid, before Estate closure and distributions.

5. Ms. Poafpybitty's tables, described above, did not outline, rental income, property sales activities, mortgage payments, almost \$4,000.00 in legal expenses and other financial

⁴ Plaintiff's Exhibit 2 (third paragraph)

⁵ Plaintiff's Exhibit 2 (last paragraph)

⁶ Defendant's Exhibit 10

⁷ Defendant's Exhibit 10 (third paragraph)

⁸ Defendant's Exhibit 10 (third paragraph)

⁹ Defendant's Exhibit 10 (second paragraph)

details which appear clearly to be the subject of Steven Rothgeb's March 7, 2015 written inquiry¹⁰.

6. After reviewing what Ms. Poafpybitty had forwarded, and being disappointed with the absence of details, Ms. Irving and her brothers sought legal counsel. Attorney Jack M. Scoville wrote to the Estate, introducing himself on April 8, 2015.¹¹

B. WHETHER, ACCORDING TO DECEDENT DONALD M. ROTHGEB'S INSTRUCTIONS, TWO MORTGAGE DEBTS HAD TO BE FULLY PAID, BEFORE ESTATE ADMINISTRATION COULD CONCLUDE.

Another significant issue regarding Estate administration were the terms used by the Decedent in Item I of his Will. Whether or not there was fair dealing between the Personal Representative and devisees, and whether or not there was reasonable communications from Ms. Poafpybitty to devisees (all of which are issues addressed in this litigation and addressed by this Order), the parties also have significant focus on what is included at Item I of the Decedent's Will.¹²

¹⁰ Defendant's Exhibit 10 and legal accountings filed with the Court in July 2016

¹¹ Plaintiff's Exhibit 25

¹² Defendant's Exhibit 5

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CDP

PLAINTIFF'S
EXHIBIT

#2 2.17.15 PM

From: jeanne p [mailto:jep0814@yahoo.com]
Sent: Sunday, March 08, 2015 11:56 AM
To: Julie Irving
Cc: strothgeb77@gmail.com
Subject: Re: hello

HELO TO YOU: Sorry. I got Steven's email (with your input) and have been trying to get a table together to give you some details, but I have been very busy at work and have not had time to finish it. I will get it to you this week.

What I can't understand is I talked to you on the phone every other week and the last time I spoke to you we had a nice conversation about the Guardian ad Litem meeting you were about to have and I gave you some good suggestions for that meeting. You also thanked me and I've never heard from you again like I dropped off the face of the earth. Then I get this long email from Steven (with some suggestions from you I'm sure).

The reason I have not given you any details recently is because there are no details to give. There are 2 debts, i.e., the house and the equity line that need to be paid off before the estate can be settled. If it was similar to your mother's estate, the timeframe would be a year I'm sure, but that's not set in stone. With as many properties as your father had and these two debts, the one-year period does not necessarily hold true. Like you already know, I have one property on the market and it has been on the market for 2+ months. As you also know, because you are trying to sell your house, the winter months are not a good time for people to be buying anything. It's cold and people wait to come here starting around March. Then people start coming, the restaurants start hiring, the businesses open back up, etc. Steven knows that from living here for years. I have contacted John and asked me when the next units come up for lease expiration. The next one is June and I have told him to put it on the market right away at that time. There are two more in December and I have told him the same thing about those.

These two debts have to be paid off because they are the debts of the estate. There is nothing I can do about that. Your father left me in a mess with all this and I'm trying to do the best I can to resolve it. He stopped paying on his life insurance a long time ago because he said he didn't feel like paying for it anymore is what he told me so he let it go. So there is no life insurance to pay any debts. He tried to refinance the house, but Wells Fargo told him his debt to income ratio was not good so they couldn't do it.

I'm working every day, don't live an extravagant lifestyle, don't go on trips, don't go to fancy restaurants -- I'm just living one day at a time like I'm supposed to. Anything I need to pay for of my own comes out of my personal account, that's the way it's always been. I have always treated all of you like my own ever since you were young and feel like you think I'm doing something wrong. I have a meeting with the lawyer on the 17th and will see what he says at that point and will let y'all know. I haven't talked to his office much because there is nothing to say. I'm waiting for the property to sell so I can pay off this debt. The \$5,000 you wanted me to give Steven for the car that he never got took \$20,000 out of the bank account.

The rents here aren't high like they are in the DC/Virginia area. I have to keep some kind of cushion in the bank in case an AC unit goes down or something else happens that needs to be fixed. I have found a plumber that does a good job and doesn't rip me off like some people. I try to keep expenses down as much as possible. I'm doing the best that I can. I found 3 letters that your dad wrote to Matt in July and August of 2013 when he was so disgusted with him. In one of the letters he mentioned about how much he helped y'all with paying for college for you and Steven and you receiving the \$10,000 a couple of years ago, how he supported Steven when he couldn't find a

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R2060

job, and how much he kept doing for things over and over for Matt and wasn't going to do it anymore. When I send you the property information next week, I'll send you a copy of the letters.

Right before he got really sick and you called that Sunday to talk to him because you weren't feeling well and he had just gone to lay down, I debated on whether to have him call you back. But I gave him the phone and you started telling him how you weren't feeling well. He had been feeling bad for a couple of days at that point and he didn't feel like talking. You got upset because you told me he wasn't interested in you and you not feeling well and you told me YOU WERE NEVER GOING TO TALK TO HIM AGAIN AND THAT IF ANYTHING HAPPENED TO HIM YOU DIDN'T WANT ANYTHING. You were extremely mad -- do you remember that? I do. I never told him about that because I knew it would only hurt his feelings and he wasn't trying to hurt you in any way, he was just feeling terrible at the time. Not long after that, he got worse.

So, I'm sorry I didn't respond sooner to Steven's email. I will get information together this week and send it to both of you.

TJ 2
R2061

From: Jeanne Poafpybitty [jeannep@mullenwylie.com]
Sent: Thursday, March 19, 2015 12:21 PM
To: strothgeb77@gmail.com
Subject: FW: INFO
Attachments: 20150319102306336.pdf

Here are a couple of charts that show the properties that include the condo fees, the taxes for 2014 and the size of the units.

I don't know what kind of updates you want me to give y'all. I'm waiting to sell the unit that's on the market. There is nothing else going on at the moment to report to you about. Like I said before, the 2 debts have to be paid off and then we can move forward. I know y'all thought the one year time period was etched in stone, but I'm sorry to say that it isn't. With as many properties as your father had, it's not like an estate with no assets and no debts would be quick and over with in that period of time.

Other than the fact that I had to put Max to sleep last night at the Vet's office, I have nothing else to report. I will say, however, it is very disappointing to know that through all these 37 years of trying my best to treat everybody fairly and like you were my kids and bent over backwards to smooth things over regarding y'all whenever there was a problem with your dad and being treated not very nice at times through the years by him, I can't believe that Julie is acting towards me the way she is. She never had to put up with anything like you and I did

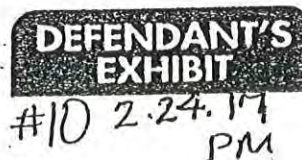
and both of us hung in there. But that's okay, I know it's always all about money. Well, there isn't going to be any money today or tomorrow so I guess we all just need to get a grip. It will take time, as I have tried to explain, but nobody seems to be hearing me. So you can pass this on.

-----Original Message-----

From: mullenwylieseekings@sc.rr.com
[mailto:mullenwylieseekings@sc.rr.com]
Sent: Thursday, March 19, 2015 10:23 AM
To: Jeanne Poafpybitty
Subject:

This E-mail was sent from "mullinswylieseekings" (Aficio MP C3300).

Scan Date: 03.19.2015 10:23:06 (-0400)
Queries to: mullenwylieseekings@sc.rr.com



RENTAL PROPERTIES				
PROPERTY			HOA DUES	TAXES PD 2014
SOUTHBRIDGE	2 bedroom	LEASED	\$202.00	\$857.20
ANDOVER	3 bedroom	LEASED	\$290.00	\$964.43
ANDOVER	2 bedroom	EMPTY for SALE	\$261.00	\$767.15
TIMROD	3 bedroom	LEASED (10%) Commission	\$290.00	\$964.43
CLEARWATER	3 bedroom	LEASED	\$212.00	\$964.43
LINDEN	2 bedroom	LEASED (10%) Commission	\$209.00	\$1,438.44
RETREAT	1 bedroom	LEASED	\$185.00	\$397.25
PLANTATION house	3 bedroom	LEASED (10%) Commission	0	\$1,792.60
RACEWATER (MATT)	3 bedroom	0	0	\$611.91

JP/PR 00626

R2063

RENTAL PROPERTIES

2015

SOUTHBRIDGE (bottom floor) 2 bedrooms

SOUTHBAY LAKES

(bottom floor) 3 bedrooms

(top floor) 2 bedrooms

(top floor) 3 bedrooms

(top floor) 3 bedrooms

SEAGATE VILLAGE

2 BEDROOM DUPLEX

DEERFIELD

house

RETREAT AT GLENNS BAY (top floor) -- 1 bedroom

MATT'S HOUSE

JP/PR 00625

R2064

between the parties). There were also numerous communications between the Plaintiff's first lawyer and counsel for the Estate and later between the Plaintiff and the Estate counsel. It took great hyperbole and animation for counsel for the Plaintiff to make the Court believe that effective and numerous communications between the parties had not taken place. It was not that communications did not take place; it was that the communications were at times not what the Plaintiff wanted to hear. It is also important to note that the Plaintiff and her brothers were represented together by the first lawyer and that only the Plaintiff (without her brothers) hired the new lawyer. This indicates that it was the Plaintiff alone that was causing the problems.

The ruling also contends that the Defendant intentionally delayed the administration of the Estate. This assertion is one of the most confusing of them all. The facts indicate just the opposite.³ The Defendant was prepared to distribute the Estate assets and close the Estate in November of 2015, which is when the appraisals that the Plaintiff's first counsel insisted on had been completed. It was the Plaintiff herself that keep that from happening. The Plaintiff is solely responsible for the Estate not closing, not the Defendant. Her litigation has now caused the Estate to remain open for two (2) more unnecessary years, not to mention the time that will be involved in any appeals in this matter. Moreover, there was clear testimony from Clark Parker, CPA during the trial that the Plaintiff flatly refused to provide her social security number to

³ It is important to note that the Plaintiff never filed any action pursuant to S.C. Code Ann. § 62-3-1001 (1976, as amended), which is customary if a beneficiary is concerned that a personal representative is not fulfilling their duties and filing the required probate filings.

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**-Page 2, Jeanne Poafpybitty's Affidavit of
October 26, 2016**

R2066

3. After my husband's death, I had the option of applying before the Probate Court for a 1/3 spousal interest in the Estate. However, I chose not to do that, as I did not want to upset my step-children, whom I've had a good relationship with since they were toddlers. I wanted the Estate to run smoothly, and not be a subject of family discord.

4. During my marriage to Donald M. Rothgeb, we accumulated several rental properties and I handled for many years all of the transactions associated with the rental properties, including maintenance and repairs of those properties.

5. Within the first approximately nine (9) months that the Estate was open, I understood from communications to the Estate's attorneys that Julie Irving had decided how she wanted the Estate's properties distributed. I understood that Ms. Irving wanted the property located at 526 Plantation Drive, that Steven Rothgeb wanted the three-bedroom condo property located at South Bay Lakes, and that Matthew wanted the house he had been living in since 2007. I had no objection to any of these requests, and also made it known that I sought the marital residence that I had been living in since 1995 (which is subject to a \$128,000 mortgage), and understood at the time that there were no objections to that request.

6. Despite my diligent efforts to promptly administer the Estate, and my efforts being directed to achieve the very results that I thought the beneficiaries desired, exactly one year and one day after my husband's death, Julie Irving hired her first lawyer, Mr. Jack Scoville, to pursue a claim against the Estate because (it appeared) that she felt she was not getting her fair share of the Estate.

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- Excerpt from March 2, 2018 Court Order
- April 8, 2015 letter to Estate from Attorney Jack Seoville
- May 13, 2015 letter to Jack Scoville from Estate counsel

details which appear clearly to be the subject of Steven Rothgeb's March 7, 2015 written inquiry¹⁰.

6. After reviewing what Ms. Poafpybitty had forwarded, and being disappointed with the absence of details, Ms. Irving and her brothers sought legal counsel. Attorney Jack M. Scoville wrote to the Estate, introducing himself on April 8, 2015.¹¹

B. WHETHER, ACCORDING TO DECEDENT DONALD M. ROTHGEB'S INSTRUCTIONS, TWO MORTGAGE DEBTS HAD TO BE FULLY PAID, BEFORE ESTATE ADMINISTRATION COULD CONCLUDE.

Another significant issue regarding Estate administration were the terms used by the Decedent in Item I of his Will. Whether or not there was fair dealing between the Personal Representative and devisees, and whether or not there was reasonable communications from Ms. Poafpybitty to devisees (all of which are issues addressed in this litigation and addressed by this Order), the parties also have significant focus on what is included at Item I of the Decedent's Will.¹²

¹⁰ Defendant's Exhibit 10 and legal accountings filed with the Court in July 2016

¹¹ Plaintiff's Exhibit 25

¹² Defendant's Exhibit 5

7
CAPG

After review of the parties' presentations about terms in Item I of the Decedent's Will, the Court has reached the following findings of fact, which have contributed to conclusions that follow in this Order:

1. In February 2015, Ms. Poafpybitty communicated her view that, because the Estate had two (2) outstanding mortgage debts, the Decedent's Will required full satisfaction of these debts, before final Estate distributions could be made¹³. In the interim period, properties would be sold, and income of the Estate should be accumulated, so that these debts, of a combined \$221,008.43, could be extinguished.

2. Accepted as a Trial Exhibit was attorney, Jack M. Scoville's letter to the Estate of April 8, 2015¹⁴. Mr. Scoville introduced himself as having been retained by all of the Decedent's children, and he expressed the following concerns:

a. Because the Decedent's Will, at Item I, specifically provides that devisees, who take mortgaged property, are to take such properties, subject to the outstanding mortgage, what is the justification for Ms. Poafpybitty delaying Estate closure, and selling off income producing assets, so as to pay off the mortgages?

¹³ Plaintiff's Exhibit 19

¹⁴ Defendant's Exhibit 25

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CRFg

R2070

b. Ms. Poafpybitty continues to occupy, without compensation to anyone,
a residence which is owned by four (4) Estate beneficiaries.

c. Status of financial accounts once owned by the Decedent.

d. Accountings for Estate activities during more than a year of
administration.

e. Status and distribution opportunities regarding the Decedent's
personal effects.

3. Mr. Scoville's April 8, 2015 letter was responded to by letter of an Estate's
attorney, Bret H. Davis, dated May 13, 2015¹⁵, which letter references telephone
communications between law offices since April 8, 2015. In his letter, Mr. Davis, on behalf of
Ms. Poafpybitty, addressed Mr. Scoville's listed concerns as follows:

a. The Estate agreed to preparing and sharing an interim financial
accounting.

b. While reserving the right of a Personal Representative to sell income

¹⁵ Plaintiff's Exhibit 21

producing assets, if she believes it is prudent, the Estate agrees that real properties, which are subject to outstanding mortgages, will be taken by devisees, subject to any such related mortgages.

c. The Estate offered what it considered justification for Ms.

Poafpybitty's continued occupancy of the Decedent's last residence, without payment of rent.

d. The Estate explained that the Decedent's financial account was held, with Ms. Poafpybitty, as surviving joint owner, and therefore, would not be shared with Estate beneficiaries.

e. The Estate addressed opportunities for sharing of the Decedent's personal effects.

4. In light of item 3. b., above, an impression exists that the Estate may have withdrawn its early proposal to extinguish mortgage debt, by continuing to sell off the Decedent's real properties? The issue remained puzzling, however, as an Estate Motion for accounting extension, filed on September 25, 2015, cited as one justification, "Personal

Jack M. Scoville, Jr.
Attorney at Law
A Professional Association
1001 Front Street
Post Office Drawer 1228
Georgetown, South Carolina 29442

TELEPHONE: (843) 546-1130
FAX # (843) 546-0726
EMAIL: scorac@aol.com

April 8, 2015

Bret H. Davis, Esquire
Davis & Boyd, LLC
P.O. Box 70517
Myrtle Beach, SC 29572

RE: The Estate of Donald Rothgeb

Dear Mr. Davis:

I have been retained by the children of Donald Rothgeb to represent them in all matters related to their father's estate. In reviewing the probate file, it appears that the Personal Representative, Mrs. Poafpybitty, has yet to file an accounting. There have been several emails from her to my clients, but this correspondence has raised more questions than it has answered.

It appears that Mrs. Poafpybitty is selling off assets of the estate to pay off the mortgages on Mr. Rothgeb's residence. While the Will states that the Personal Representative should pay all secured debts of the estate, it further states the Personal Representative has discretion in this matter. Finally, the Will specifically states that anyone taking mortgaged property is to take that property subject to the mortgage.

What is Mrs. Poafpybitty's justification for selling income producing properties to pay off these mortgages?

The second issue concerns her occupancy of the residence. Under the terms of the Will, she has only a one-quarter interest in this property. Is she paying rent to the estate for this occupancy? If not, will the children get credit in the final distribution for the rent?

The third issue concerns the liquid assets of Mr. Rothgeb at the time of his death.

JI 245

R2073

He sold a condominium a few months before he died, but there is no amount shown on the Inventory and Appraisement for any cash, bank accounts, etc. Given his cash flow and the sale of the condominium a few months before his death, we find it hard to accept that he did not have substantial liquid assets at the time of his death. What was the status of his bank accounts, etc., at the date of death?

Fourth, Mrs. Poafpybitty has not presented any accounting, bank statements, etc., concerning the income derived from the rental properties and the expenses of caring same during the time of the administration. The fact that she has now requested an extension to file the accounting is very troubling to us.

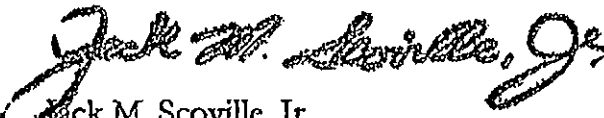
Fifth, Mrs. Poafpybitty has not allowed the children access to their father's personal effects. This should be done asap.

We must insist upon an immediate accounting for this estate. If Mrs. Poafpybitty has been handling the estate properly, she would have an estate account set up. The statements from this account should be easy to reproduce for our inspection. Hopefully everything is in order, and we can rapidly proceed to distributing the assets and closing the account. However, please be advised that if we have not received an accounting within ten days of the date of this letter, we intend to petition the Probate Court to relieve Mrs. Poafpybitty as Personal Representative.

Please call me if you have any questions or need to discuss this matter.

Hopefully our concerns will be cleared up by Mrs. Poafpybitty providing the necessary information to us in a timely fashion.

Very truly yours


Jack M. Scoville, Jr.

JMSjr/mmww

cc: Julie K. Irving
Steven Rothgeb
Donald Rothgeb

J1 246

R2074

BRET H. DAVIS, JD*, CPA
* Licensed in SC and NC

DAVIS & BOYD, LLC
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Myrtle Beach, SC 29572

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Facsimile: (843) 839-9801
www.davisboydlaw.com

May 13, 2015

Jack M. Scoville, Jr., Esquire
P.O. Drawer 1228
Georgetown, SC 29442

Re: Estate of Donald M. Rothgeb
Our File No. 02905.002

Dear Jack:

This will follow our previous telephone conference and your follow up communications with Becky of my office regarding the captioned matter. I wanted to provide a little more detail about the issues that you raised in your letter to me of April 8, 2015.

With regard to your inquiry about an estate accounting, the final accounting will be filed when the estate is about to be closed. As you know, there are several properties in the estate that the personal representative is trying to sell, and having the proceeds from the properties instead of the properties themselves (except for the properties that the family has already identified for certain beneficiaries) will be much easier to distribute to the beneficiaries. That being said, I agree with you that it is reasonable for the beneficiaries to know what is going on in the estate, and in that regard we are in the process of preparing an interim accounting.

With regard to the issues raised in the second paragraph of your letter, we agree that any property taken will be taken subject to any related mortgage. I don't see how the personal representative has done anything that is inconsistent with that understanding. The equity in any property distributed or the net proceeds from any mortgaged property sold would be divided based on the terms of the will. I also do not understand your question about the justification for selling income producing assets to pay off mortgages. As you know, the personal representative clearly has discretion to do that if she believes that it is prudent from an estate administration standpoint to do so.

With regard to your question about the personal representative living in the residence. As you may or may not know, the personal representative has lived in the residence since 1995 rent free. Also, one of the decedent's children, Stephen, lived in the residence with the personal representative for approximately nine months and he was not charged rent. Additionally, the decedent's son, Matt, lives in another estate property and has not been paying rent. Given the history of how things have been handled in the past, I don't see how making the personal representative pay rent would be fruitful to an efficient and orderly administration.

J1 3
R2075

Jack M. Scoville, Jr., Esquire
May 13, 2015
Page -2-

The next paragraph of your letter mentions liquid assets of the estate, particularly bank accounts or cash. There was a checking account that was owned jointly by the decedent and the personal representative. As you know, under Article VI of the South Carolina Probate Code, that account became the sole property of the personal representative upon the decedent's death.

Your inquiry about access to the personal property of the decedent is puzzling to me given the response I received from the personal representative when I asked her about this. She explained that Stephen lived in the residence for nine months after the decedent's death, during which time he could have certainly had access to whatever personal property the decedent had. Also, as you would probably suspect, a lot of the tangible personal property was owned personally by the personal representative or jointly by the personal representative and the decedent. However, I was advised that there were a few specific items that were owned only by the decedent, such as a sofa, a computer (which I understand is broken), and dining room furniture. There are a few cars that were also only in the decedent's name, which the personal representative is in the process of selling. Lastly, with regard to access to the personal property, I understand that the beneficiaries have not requested an opportunity to see the personal property of the decedent. The personal representative does not have a problem with giving them access.

I appreciate your reference to an action to have the personal representative removed. However, I would encourage you to revisit Sections 62-3-611 and 62-3-1001. I am not aware of any facts that would support an action to remove the personal representative under Section 62-3-611. The only relief that I see that your clients could avail themselves of is to have the personal representative file the required court filings, which she has done or which she is in the process of doing now.

Hopefully, once your clients receive and review the information that Becky is pulling together for them, they will see that the estate administration is moving along at a reasonable pace, when you consider the types of assets in the estate. I also want to let you know that early on in the administration process I explained to the personal representative that she may want to seek other legal counsel to represent her in her capacity as the surviving spouse and beneficiary of the estate, for purposes of considering whether or not to pursue an elective share claim for one third of the estate, since the will only left her twenty-five percent. She advised me that she did not want to do that, that she did not want the decedent's children to think that she was trying to get more than the decedent wanted her to get. I find that position particularly interesting, as I am sure you will, when you consider what the decedent's other beneficiaries are now doing.

Please feel free to contact me with any questions or comments. With kind regards, I am

Sincerely,



Bret H. Davis

BHD/

cc: Jeanne E. Poafpybitty

J1 3

R2076

10

**-Pages 37 and 38 of hearing transcript where
Estate counsel offers interpretation
regarding Item I of Dr. Rothgeb's Will**

1 Estate was comprised -- numerous times, that
2 the Estate was comprised exclusively, almost
3 exclusively, of rental properties that had all
4 kinds of issues, Mortgages, tenants,
5 negligence, repairs. All right. There was --
6 there was a lot of discussion -- Your Honor,
7 Exhibit C is the -- is the first page of the
8 Will, which is offered as an exhibit. There
9 was a lot of discussion about raising money to
10 pay off the Mortgages. And as I'm going to get
11 to a little later, the definition of good
12 faith is whether you do -- you have some
13 colorable legal right to do that or a reason to
14 do that. And I'll get into that in more
15 detail. Well, there was absolutely a horrible
16 reason to do what -- what she did. On the
17 Will, it says, I direct -- under Item 1, I
18 direct that all of my legally enforceable
19 debts, secured and unsecured, be paid as soon
20 as practical after my death. There was also
21 some discussion from Mr. Tall about this last
22 sentence. It says, If and at any time of my
23 death, any of the real property herein devised
24 is subject to a Mortgage, I direct that the
25 devisee, singular, taken such mortgage property



1 shall be taken subject to such Mortgage.
2 There's a question. Should the property --
3 should the Mortgage be paid off before it is
4 distributed, or does this language mean that
5 the properties should be distributed subject to
6 a Mortgage? I can tell you as an expert what
7 I believe, according to Mr. Tall, authority, he
8 called me an authority. As an authority of
9 Probate law, that's not clear. So is there a
10 colorable reason, legal reason, for her to do
11 what she did? Absolutely. Positively. It
12 says right here in the first sentence, I direct
13 that all my legally enforceable debts, secured
14 and unsecured, be paid as soon as practical
15 after my death. That tells me that she needs
16 to liquidate some things and pay off the debts.
17 That's what the Will Says. That's what it says
18 to me and that's what it says to the Personal
19 Representative. Well, this last sentence, as
20 it was testified to at trial appears to say, Is
21 it a specific piece of property as devised to
22 a certain person, then they take that property
23 subject to the Mortgage. Here we didn't have
24 any specific devises. We only had a residuary
25 devise. So that residuary devise does not say



11

-Item I of Dr. Rothgeb's Will

11

LAST WILL AND TESTAMENT

OF

DONALD M. ROTHGEB

I, Donald M. Rothgeb, a resident of and domiciled in the City of Surfside Beach, County of Horry, and State of South Carolina, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all Wills and Codicils at any time heretofore made by me. I represent that I am lawfully married to Jean E. Poafpybitty and that I have three adult children born of a prior marriage which ended in divorce, namely, Donald Matthew Rothgeb, Julie Kristin Irvin and Steven Taylor Rothgeb.

ITEM I

I direct that all my legally enforceable debts, secured and unsecured, be paid as soon as practicable after my death. I direct that my personal representative may cause any debt to be carried, renewed and refinanced from time to time upon such terms and with such securities for its repayment as my personal representative may deem advisable taking into consideration the best interest of the beneficiaries hereunder. If at the time of my death any of the real property herein devised is subject to a mortgage, I direct that the devisee taking such mortgaged property shall take it subject to such mortgage and that he shall not be entitled to have the obligation secured thereby paid out of my general estate.

ITEM II

I direct that all estate, inheritance, succession, death or similar taxes (except generation-skipping transfer taxes) assessed with respect to my estate herein disposed of, or any part thereof, or on any bequest or devise contained in this my Last Will (which term wherever used herein shall include any Codicil hereto), or on any insurance upon my life or on any property held jointly by me with another or on any transfer made by me during my lifetime or on any other property or interests in property included in my estate for such tax purposes be paid out of my residuary estate and shall not be charged to or against any recipient, beneficiary, transferee or owner of any such property or interests in property included in my estate for such tax purposes.

ITEM III

I give and bequeath all of my personal and household effects of every kind including but not limited to furniture, appliances, furnishings, pictures, silverware, china, glass, books, jewelry, wearing apparel, boats, automobiles, and other vehicles, and all policies of fire, burglary, property damage, and other insurance on or in connection with the use of this property, as follows:

Donald M. Rothgeb

12

-Excerpt from May 27, 2016 hearing transcript where Estate counsel describes discretion of the Personal Representative

12

1 individual. I don't know of any precedent or any
2 authority that would give the Court the opportunity to
3 order that, Your Honor. The fact is, she is the PR, and
4 I've seen nothing in this file -- and the Court can
5 review the file, certainly; the Court has the file before
6 it -- that would justify any sort of restraint on this PR
7 or any sort of -- any sort of other sanction to be
8 imposed upon her at this time. My client's first desire -
9 - and she does have this discretion under the will, Your
10 Honor, and I think the will was written the way it was
11 for a reason, Your Honor. It's not language that we
12 typically see. It obviously is there for a reason, Your
13 Honor. Unfortunately, the decedent's not here to
14 testify. We don't know exactly why he put that
15 language in there, but the will says what it says. My
16 client's first intent was to simply retain the residence
17 that she was residing in, to have Matt, the -- one of the
18 decedent's children, to retain the property that he was
19 residing in, and to sell the balance of the properties and
20 distribute the proceeds. That was not acceptable. Then
21 we received a proposal from the prior attorney who
22 represented the petitioner, Mr. Jack Scoville. We were
23 agreeable to that.

24 MR. TALL: Your Honor, I'm going to object. If
25 you don't have something in the record, I don't want

13

**-Section 62-7-802(a) and Section 62-3-713 of
the South Carolina Probate Code**

13

Section 62-7-802 Duty of loyalty

(a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in Section 62-7-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

(1) the transaction was authorized by the terms of the trust;

(2) the transaction was approved by the court;

(3) the beneficiary did not commence a judicial proceeding within the time allowed by Section 62-7-1005;

(4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with Section 62-7-1009; or

(5) the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

(c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

(1) the trustee's spouse;

(2) the trustee's descendants, siblings, parents, or their spouses;

(3) an agent or attorney of the trustee;

(4) a corporation or other person or enterprise in which the trustee has such a substantial interest that it might affect the trustee's best judgment; and

(5) a corporation or other person or enterprise which has such a substantial interest in the trustee that it might affect the trustee's best judgment.

(d) A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by

the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(f) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of Part 9. The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under Section 62-7-813 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined.

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(h) This section does not preclude the following transactions, if fair to the beneficiaries:

(1) an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(2) payment of reasonable compensation to the trustee;

(3) a transaction between a trust and another trust, decedent's estate, or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) a deposit of trust money in a regulated financial-service institution operated by the trustee; or

(5) an advance by the trustee of money for the protection of the trust.

(i) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

Section 62-3-713 Sale, encumbrance, or transaction involving conflict of interest; voidable; exceptions

Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or **any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable** by any person interested in the estate except one who has consented after fair disclosure unless:

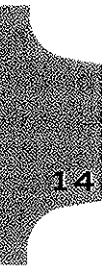
- (1) the will or a contract entered into by the decedent expressly authorized the transaction; or
- (2) the transaction is approved by the court after notice to interested persons.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

14

-Excerpt from March 2, 2018 Court Order

-December 9, 2015 email from the Estate



d. The Court finds that nothing contained in Mr. Scoville's letter of October 6, 2015, gives evidence of an Estate settlement agreement. Any hostility shown by the Estate towards Ms. Irving, because she continued to question appraisal values, Estate accountings, Estate expenses and proposals for fiduciary compensation, is an unjustified response to inquiries of an Estate's interest party.

5. A trial exhibit dated December 9, 2015 displays that Ms. Poafpybitty, through her attorneys, forwarded to Ms. Irving a proposal for the distribution of Estate real properties²¹. Mr. Scoville had been disengaged by the Decedent's children at this time, so the Estate was free to communicate directly with Ms. Irving. Included in the Estate's proposal was that Ms. Poafpybitty receive the Decedent's last residence, at a value of \$95,000.00²². This figure is less than half of the residence value listed in two sworn inventory forms, previously filed with the Court by Ms. Poafpybitty.

6. Some values for Estate real properties on Ms. Poafpybitty's distribution proposal, other than the Decedent's last residence, also differed from the values presented on the Estate's filed inventories. According to Court presentations, all of the differing values were

²¹ Plaintiff's Exhibit 9

²² Plaintiff's Exhibit 9

associated with the work of Appraiser James Cromartie, who was engaged by the Estate in 2015.

No party has objected to real property values, other than the value listed, by Ms. Poafpybitty for distribution of the Decedent's last residence.

7. Ms. Irving's response to receiving Ms. Poafpybitty's distribution proposal was to ask for a copy of Mr. Cromartie's residence appraisal²³. The appraisal work had not been forwarded by the Estate with its December 9, 2015 proposal. When Ms. Irving was given opportunity to review Mr. Cromartie's appraisal, she noted what Mr. Cromartie described to be the "deplorable condition²⁴" of the Decedent's last residence. Among the most serious troubles was mold infestation, associated with rain water leaks in the structure.

8. Notwithstanding Mr. Cromartie's appraisal opinion, Ms. Irving was convinced, from her own personal knowledge of her father's residence, that Ms. Poafpybitty's distribution proposal did not reasonably reflect fair value of her father's residence. Ms. Irving was especially convinced of her opinion, as it was revealed that Ms. Poafpybitty had spent some \$29,000.00 of Estate resources for a new roof and mold remediation work at the Decedent's

²³ Plaintiff's Exhibit 26

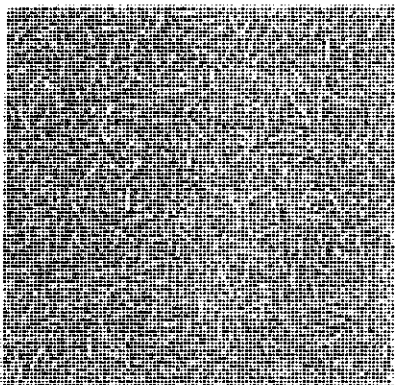
²⁴ Defendant's Exhibit 1

From: bweaver@davisboydlaw.com <bweaver@davisboydlaw.com>

Sent: Wednesday, December 9, 2015 5:08 PM

To: 'Julie Irving'

Subject: Estate of Donald Rothgeb



We have done a spreadsheet with the proposed real property distributions from the estate. Attached is that spreadsheet with the properties and the value of the proposed distributions.

Please review the spreadsheet and provide your agreement with the distributions and amounts.

Thank you.

Becky Weaver

Probate Paralegal to Bret H. Davis

Davis & Boyd, LLC

1110 London St., Ste. 201

Myrtle Beach, SC 29577

Ph. (843) 839-9800

Fax (843) 839-9801

Email: bweaver@davisboydlaw.com

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R2091

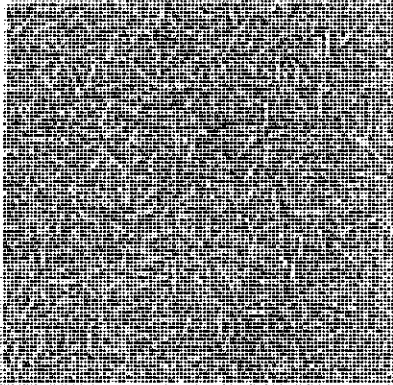
	A	B	C	D	E	F	G	H	I
PROPOSED DISTRIBUTIONS FROM ESTATE OF DONALD ROTHGEB									
1									
2	Description of Property	TMS #	Appraised Value For Basis	Mortgage/ Loan Payable	Net Value	Security Deposit Amount	Lease End Date	Rent	Distribution Beneficiary
3	2258 Clearwater Dr., Unit H, Surfside Beach, SC	191-28-01-286	78,000.00	0.00	78,000.00	750.00	8/31/2016	750.00	Steven Rothgeb
4	526 Plantation Dr., Surfside Beach, SC	191-17-01-489	100,000.00	80,654.10	19,345.90	800.00	12/31/2015	800.00	Julie Irving
5	722 Racewater Dr., Myrtle Beach, SC	179-17-05-003	50,000.00	0.00	50,000.00				Donald M. Rothgeb
6	1529 Crooked Pine Dr., Surfside Beach, SC	191-08-04-038	95,000.00	129,372.57	-34,372.57				Jeanne Poafpybitty-Rothgeb
7	8557 Southbridge Dr., Unit D, Surfside Beach, SC	191-28-01-717	65,000.00	0.00	65,000.00	600.00	10/18/2016	600.00	Jeanne Poafpybitty-Rothgeb
8	2210 Andover Dr., Unit D, Surfside Beach, SC	191-28-01-075	72,000.00	0.00	72,000.00	725.00	9/30/2016	725.00	Pending Signed Contract for Sale
9	1356 Glenns Bay Rd., Bldg 208, Unit L, Surfside Beach, SC	191-15-06-090	40,000.00	0.00	40,000.00		10/31/2016	500.00	Jeanne Poafpybitty-Rothgeb
10									
11	Name	Proposed Distribution							Total Proposed Value of Property to Beneficiary
12	Steven Rothgeb	78,000.00							78,000.00
13	Julie Irving	19,345.90							19,345.90
14	Donald M. Rothgeb	50,000.00							50,000.00
15	Jeanne Poafpybitty-Rothgeb	-34,372.57							
16		65,000.00							
17		40,000.00							
18									70,627.43
19									

15

-January 29, 2016 email from the Estate

15

From: bweaver@davisboydlaw.com <bweaver@davisboydlaw.com>
Sent: Friday, January 29, 2016 10:14 AM
To: 'Julie Irving'
Cc: 'Bret Davis'; 'Jeanne Poafpybitty'
Subject: Estate of Donald M. Rothgeb



Ms. Irving,

We have revised the estate property distribution proposed by the personal representative and have attached it to this email. Once repairs have been completed to the property occupied by Matthew, it is the intention of the personal representative to distribute the properties by deeds of distribution.

Please let us know by February 10, 2016 if you are still interested in taking the 526 Plantation Drive property in Surfside Beach as a property distribution.

Thank you.

Becky
Becky Weaver
Probate Paralegal to Bret H. Davis
Davis & Boyd, LLC
1110 London St., Ste. 201
Myrtle Beach, SC 29577
Ph. (843) 839-9800
Fax (843) 839-9801
Email: bweaver@davisboydlaw.com

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R2094

PROPOSED DISTRIBUTIONS FROM ESTATE OF DONALD M. ROTHGEB 2014-ES-26-00498

A	B	C	D	E	F	G	H	I
1								
2	Description of Property	TMS #	Appraised Value For Basis	Mortgage/ Loan Payable	Net Value	Security Deposit Amount	Lease End Date	Rent
3	7258 Clearwater Dr., Unit H, Surfside Beach, SC	191-28-01-286	78,000.00	0.00	78,000.00	750.00	8/31/2016	750.00
4	526 Plantation Dr., Surfside Beach, SC	191-17-01-489	100,000.00	80,654.10	19,345.90	800.00	12/31/2015	800.00
5	722 Racewater Dr., Myrtle Beach, SC	179-17-05-003	50,000.00	0.00	50,000.00			
6	1529 Crooked Pine Dr., Surfside Beach, SC	191-08-04-038	95,000.00	129,372.57	-34,372.57			
7	8657 Southbridge Dr., Unit D Surfside Beach, SC	191-28-01-717	65,000.00	0.00	65,000.00	600.00	10/18/2016	600.00
8	2210 Andover Dr., Unit D, Surfside Beach, SC	191-28-01-075	72,000.00	0.00	72,000.00	725.00	9/30/2016	725.00
9	1356 Glenns Bay Rd., Bldg 208, Unit L, Surfside Beach, SC	191-15-06-090	40,000.00	0.00	40,000.00		10/31/2016	500.00
10			500,000.00	210,026.67	289,973.33			
11	Name	Proposed Distribution				Value of Repairs Post Appraisals		Total Proposed Value of Property to Beneficiary
12	Steven Rothgeb	78,000.00						78,000.00
13	Julie Irving	19,345.90						19,345.90
14	Donald M. Rothgeb	50,000.00				7,500.00		57,500.00
15	Jeanne Poafpyblity-Rothgeb	-34,372.57				20,349.00		
16		65,000.00						
17		40,000.00						
18								90,976.43

discretionary authority, recorded in page 18, lines 15-20 of the May 27, 2016 hearing transcript.¹²

C. Recognition that, according to her Decedent's Will Item I interpretation, and Defendant's administrative practices, Defendant has, for years, avoided taking expense responsibility for a residence that she has used for her own, and that she wished to personally own outright. This included having the Estate pay for all residence expenses, including Defendant's personal utilities charges. Instead of making a personal residence distribution, and assuming responsibility for the personal residence mortgage and other expenses, Defendant took improper personal advantage which shifted financial burdens on to all Estate beneficiaries.

D. Taking all of the above into account, a significant aspect of Defendant's fiduciary failings can be recognized. She was not free to ignore clear terms contained in the Will, and act only upon other terms which personally benefited her own interests. The standards set forth in §62-7-802 (a) and §62-3-713 of the South Carolina Probate Code have not been met.¹³ Plaintiff's corrective actions were justified.

iii. Pages 15 and 16 of the Court Order describe how, on December 9, 2015,¹⁴ Defendant attempted to secure personal ownership of an Estate residence, without disclosing that she had used \$27,849.00 in Estate finances (previously referred to as "some \$29,000.00" in the Court Order) to improve this desired residence. Following Plaintiff's inquiries, Defendant acknowledged and accounted for these \$27,849.00 Estate expenditures on January 29, 2016.¹⁵ However, even allowing that Defendant's November 2015 \$95,000.00 appraisal may have been accurate when it was issued, Defendant would not acknowledge that Estate expenditures of \$27,849.00, for post appraisal residence repairs created significant

16

**-Excerpt from 2016 professional appraisal of
Crooked Pine Drive residence**

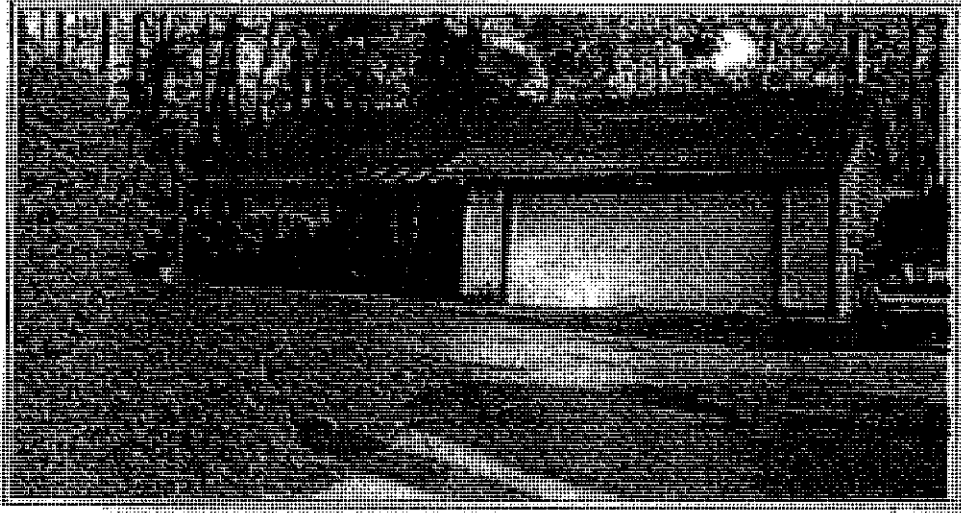
16

**BURGESS RELATY & APPRAISAL SERVICE
APPRAISAL REPORT**

File No. 120216SF-TALL

1
COPY

APPRAISAL OF



Single Family Residential

LOCATED AT:

**1529 Crooked Pine Dr.
Surfside Beach, SC 29575-5251**

FOR:

**Mr. Clifford Tall, Esq. Attorney at Law
4702 Oleander Drive
Myrtle Beach, SC 29577**

BORROWER:

N/A

AS OF:

December 2, 2016

BY:

**Russell R. Burgess, Jr.
Certified General Appraiser, SC Lic. # 2150**

THANK YOU FOR THE OPPORTUNITY TO SERVE YOU !

R2098

**BURGESS RELATY & APPRAISAL SERVICE
APPRAISAL REPORT**

File No. **120216SF-TALL**

12/6/2016

**TO:
Clifford Tall, esq. Attorney at Law
4702 Oleander Drive
Myrtle Beach, SC 29577**

File Number: **120216SF-TALL**

Dear Mr. Tall:

In accordance with your request, I have appraised the real property at:

**1529 Crooked Pine Dr
Surfside Beach, SC 29575-5251**

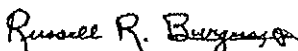
The purpose of this appraisal is to develop an opinion of the market value of the subject property, as improved. The property rights appraised are the fee simple interest in the site and improvements.

In my opinion, the market value of the property as of **December 2, 2016** is:

**\$193,800
One Hundred Ninety-Three Thousand Nine Hundred Dollars**

The attached report contains the description, analysis and supportive data for the conclusions, final opinion of value, descriptive photographs, limiting conditions and appropriate certifications.

Sincerely,


**Russell R. Burgess, Jr.
Certified General Appraiser: SC Lic.# 2159
P.O. Box 807 North Myrtle Beach, SC 29597**

THANK YOU FOR THE OPPORTUNITY TO SERVE YOU !

R2099

SOUTH CAROLINA LICENSE

Borrower: N/A	File No.: 120216SF-TALL
Property Address: 1529 Crooked Pine Dr	Case No.:
City: Surfside Beach	State: SC Zip: 29575-5251
Lender: Cliford Tall, esq. Attorney at Law	

State of South Carolina Real Estate Appraisers Board

RUSSELL R BURGESS JR
2150

Having Satisfied The Qualifications Of The South Carolina Real Estate Appraisers Board And
Having Complied With The Requirements Prescribed By Law, Is Hereby Entitled To Practice As A

CERTIFIED GENERAL APPRAISER

In Witness Whereof, The State Of South Carolina Real Estate Appraisers Board By Virtue Of The
Authority Vested In It By Chapter 64, Title 49, Code Of Laws Of South Carolina Has Caused This
Document To Be Issued With Its Seal Imprinted Hereon.



Shannon L. Smith
Administrator

Property of South Carolina Real Estate Appraisers Board

THANK YOU FOR THE OPPORTUNITY TO SERVE YOU !

R2100

17

-Excerpt from March 2, 2018 Court Order

-Estate's counterclaims against Ms. Irving

17

counsel reported that a final distribution plan would soon be prepared²⁸. Thereafter, Ms. Irving hired new counsel, and filed this action, to secure what she termed fair and prompt Estate closure.

11. On June 3, 2016, the Estate filed accounting and distribution proposals, in response to proceedings on May 27, 2016. Ms. Poafpybitty stood by her proposal for a \$95,000.00 charge to her, for her personal acquisition of the Decedent's last residence. Ms. Poafpybitty also proposed to accept a charge, to her, of the \$29,000.00 in Estate funds, which funds had been used in 2015, to repair the Decedent's residence.

12. Following many communications between the parties, and the Court, the Court issued an Order dated November 10, 2016, with written input from counsel representing both Ms. Irving and Ms. Poafpybitty. A number of procedural and discovery issues were addressed, and new hearing dates were established.

13. In its Order of November 10, 2016, this Court granted the Estate's request that appraiser James Cromartie could be present, when another real estate appraiser, Russell Burgess, examined the interior of 1529 Crooked Pine Drive, Surfside Beach, South Carolina, on

²⁸ Testimony of Julie Irving

behalf of Ms. Irving²⁹. During hearing on May 27, 2016, the Estate argued that Mr. Burgess was mistaken regarding his May 18, 2016 appraisal affidavit. Mr. Burgess had not examined the residence interior, and his criticism of Mr. Cromartie's \$95,000.00 property appraisal could not, the Estate argued, be accurate.

14. Arrangements were made for Mr. Cromartie to be present when Russell Burgess visited the Decedent's last residence in late 2016. Both Mr. Burgess and Mr. Cromartie attended the trial in this matter, and both offered testimony.

15. At trial, Russell Burgess testified about his written appraisal, describing the Decedent's residence as having \$193,900.00 in value³⁰. It is clear to both parties, and to the Court, that the residence has a new roof and, according to workmen receipt and Ms. Poafpybitty's own testimony, the trouble with mold has been corrected. What, then, did Mr. Cromartie have to say about the value of the Decedent's last residence, now that it was in repair? According to Mr. Cromartie, he had not been engaged by the Estate to offer his opinion of current value, and at trial he offered no valuation. In fairness, however, to Mr. Cromartie, he

²⁹ Terms of Court Order

³⁰ Plaintiff's Exhibit 8

shared that he would remain concerned about a residence which once had the mold problem he observed in 2015.

16. Mr. Cromartie stands by his \$95,000.00 appraisal, made at a time when, in 2015, he says the Decedent's last residence was in very poor condition. Since the time of repair to this residence, and even while the Court made specific arrangements for Mr. Cromartie to be present for Russell Burgess' 2016 residence inspection, Mr. Cromartie, at trial, did not have his own current appraisal of value to offer³¹.

17. The Court has reached specific findings of fact regarding Mr. Cromartie, and his 2015 appraisal of the Decedent's residence. At hearing on May 27, 2016, the Estate argued about how Mr. Cromartie's appraisal was certified and proper. In its June 3, 2016 distribution proposal, the Estate stood by this 2015 appraisal. As late as October 2016, Ms. Poafpybitty, in affidavit filed with this Court³², outlined the very poor condition of this residence which she wished to acquire, at the appraised price of \$95,000.00. According to Ms. Poafpybitty's October 26, 2016 affidavit, the Decedent's last residence was "...in very poor condition, with a roof that

³¹ Mr. Cromartie's testimony

³² Plaintiff's Exhibit 22

had been leaking and which in turn had caused a mold infestation in the house...³³ Based upon trial presentations, this was not an accurate description of the Decedent's last residence, when it was proposed by Ms. Poafpybitty for distribution to herself in December 2015 and June 2016.

18. The Court finds it to be unreasonable for Ms. Poafpybitty to have made distribution proposals for an admittedly repaired residence, by making continuing reference to the Decedent's last residence while it was in an unrepaired condition. This position is contrary to Ms. Poafpybitty's fiduciary duty, and in taking this position, Ms. Poafpybitty could well have anticipated that it would generate conflict, if not outright litigation. At a time when Ms. Poafpybitty initially proposed a \$95,000.00 residence valuation, a position she continued to support, following into 2016 litigation and the issuance of Court Order, the residence was no longer the deplorable property which Mr. Cromartie reported about. At trial, Ms. Poafpybitty failed to acknowledge how her continuing use of Mr. Cromartie's initial appraisal, to justify a \$95,000.00 final distribution proposal, has sparked very expensive conflict³⁴.

19. Subject to substantial criticism from the Estate, Ms. Irving took what she

³³ Plaintiff's Exhibit 22

³⁴ Testimony of Jeanne Poafpybitty

considered to be corrective action. Ms. Irving's own appraiser, Russell Burgess, has offered the only professional valuation of the Decedent's last residence, following its repair. This is repair which was directed by Ms. Poafpybitty, and was paid for by Estate funds in Ms. Poafpybitty's control. The Estate engaged Ms. Poafpybitty's own professional appraiser to view the repaired residence, and to observe Mr. Burgess' work. However, the Estate asked for no assistance, and received no assistance from its appraiser's testimony³⁵, regarding the repaired distribution value of the home which Ms. Poafpybitty had, in 2015 and 2016, wished to acquire for herself.

20. In its Order of June 13, 2016, the Court cited §62-3-708 of the South Carolina Probate Code. This section sets forth the duty of a Personal Representative, which has still not been carried out in this case, even following issuance of the June 13, 2016 Order. The Court finds that significant conflict has arisen in this case because, in 2015, Ms. Poafpybitty began advocating for a valuation of the Decedent's last residence, at a price which was less than half of what Ms. Poafpybitty, herself, had sworn to, in two separate Probate Court inventories filed by the Estate.

21. Section 62-3-708 of the Code requires Ms. Poafpybitty to file with the Court a

³⁵ Mr. Cromartie's Testimony

22
CDP

R2106

supplementary, amended or corrected inventory, if she learns, during administration, that a valuation in a previously filed inventory was erroneous. Ms. Poafpybitty has continued, to this day, in failing with her inventory valuation duties.

22. In response to this Court's Order of November 10, 2016, the Estate filed an accounting and proposal for final distribution of Estate assets dated February 14, 2017. According to the Court's November 10, 2016 Order, these documents were due for filing, ten days before the February 17, 2017 Hearing. These documents abandon the June 3, 2016 proposal listing \$95,000.00 as the value of the Decedent's personal residence, and abandon Ms. Poafpybitty's desire to retain this residence for herself. The February 14, 2017 Estate accountings list \$193,900.00 as the value of Donald M. Rothgeb's last residence. One other issue, regarding the new February 14, 2017 final Estate proposals; there is a place on standard Court forms for the Personal Representative's signature, under oath. These documents are not signed by the Personal Representative. Did Ms. Poafpybitty agree with the details of what was filed?

23. In testimony at trial, Ms. Poafpybitty offered specific disagreement with the

23
CWPg

R2107

residence valuation contained in February 14, 2017 accountings signed by one of her attorneys, and also the residence valuation contained in her own two previously filed sworn inventory forms. With numbers, it may appear that the Estate has now accepted Ms. Irving's charge of fiduciary misconduct. A property inventoried by the Personal Representative at more than \$193,000.00 was once actively proposed by the Personal Representative for distribution to her at only a \$95,000.00 value. There is now, however, a disconnect between what Ms. Poafpybitty's counsel has filed with the Court, and what Ms. Poafpybitty, herself, has offered in testimony at trial, regarding convoluted valuations.

24. The Court finds that, notwithstanding the stress of litigation, and the Personal Representative's disappointments with how beneficiaries have responded to her actions, Ms. Poafpybitty, as Personal Representative, has continuing obligations to prepare and file accurate inventory and accountings with the Court. Ms. Poafpybitty explains that, due to what she considers to be unfairness presented by Ms. Irving, Ms. Poafpybitty no longer wants to receive her husband's residence, and she feels justified in failing to sign, or to stand by, valuation positions which the Probate Code requires her to establish.

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R2108

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE PROBATE COURT
HORRY COUNTY
CASE NO.: 2014-ES-26-00498

IN THE MATTER OF THE ESTATE
OF: Donald M. Rothgeb

Julie Irving,

Plaintiff,

vs.

Jeanne Poafpybitty, Personal
Representative of the Estate of
Donald M. Rothgeb,

Defendant,

and

Jeanne Poafpybitty, Donald Matthew
Rothgeb and Steven Taylor Rothgeb,

Defendants.

ANSWER AND COUNTERCLAIM
OF THE DEFENDANT PERSONAL
REPRESENTATIVE, JEANNE
POAFPYBITTY

TO: Clifford H. Tall, Esq., Attorney for Plaintiff:

COMES NOW the Defendant in the above entitled action, Jeanne Poafpybitty, ("Defendant"), by and through her undersigned counsel, who, responding to the Complaint of the Plaintiff, Julie Irving, would respectfully show unto the Court as follows:

FOR A FIRST DEFENSE
(General Denial)

PROBATE COURT
HORRY COUNTY, SC
2016 OCT 25 PM 4:27
KATHY G. JONES
PROBATE JUDGE

R2109

attorney's fee incurred in connection with filing a response and otherwise addressing the Complaint, as further set forth herein below.

FOR A SEVENTH DEFENSE
(Reservation and Non-Waiver)

23. The Defendant re-alleges and reiterates the allegations contained in each of the above paragraphs, as if each were repeated here verbatim.

24. The Defendant hereby gives notice of her intent to assert any further affirmative defenses that the discovery process or her further research and investigation into the instant case may indicate are appropriate, available to her, and/or supported by the facts and/or the law of the case.

FOR AN EIGHTH DEFENSE and FOR A FIRST COUNTERCLAIM
(Demand for Attorney's Fees and Costs)

25. The Defendant re-alleges and reiterates the allegations contained in each of the above paragraphs, as if each were repeated here verbatim.

26. Having fully responded to the Plaintiff's Complaint, Defendant hereby requests that this Court inquire into the basis of the Complaint, and that if the same shall be found to be without merit or foundation, or substantially frivolous or intended to harass the Defendant in her administration of this Estate, that this Court would in such case use its broad equitable authority to direct that the attorney's fees incurred by Defendant, in connection with this matter, to be paid by the Plaintiff, and, if necessary, offset by the Defendant against those disbursement(s) from the Estate that the Plaintiff may otherwise be entitled to.

FOR A NINTH DEFENSE and FOR A SECOND COUNTERCLAIM
(Abuse of Process)

27. The Defendant re-alleges and reiterates the allegations contained in each of the above paragraphs, as if each were repeated here verbatim.

28. The Defendant has previously participated in multiple and ongoing discussions with the beneficiaries of this Estate in an effort to promote the prompt, fair and reasonable resolution and conclusion of the Estate's business. Plaintiff's claims to the contrary in this matter are wholly without merit.

29. Prior to the involvement of Plaintiff's current counsel, the Defendant Personal Representative dealt extensively through her counsel with prior counsel, Jack Scoville, Esq., and as a result of those efforts, was under the impression that a global plan for the administration of the Estate had been reached which was acceptable to all beneficiaries.

30. Defendant contends that, notwithstanding her over-arching efforts to accommodate the Plaintiff and reach a plan for the administration of the Estate that was agreeable to her, the Plaintiff has continued for some time to harbor ill will toward the Defendant, her step-mother.

31. The Plaintiff has used the filing of this legal proceeding for a purpose not intended by the Rules of Civil Procedure, that being vengeance upon her Step-mother, the Defendant Jeanne Poafpybitty.

32. Plaintiff has an ulterior purpose in filing this action, and that is to gain an objective that is not legitimate in the use of the process.

33. Plaintiff undertook a willful act in the use of civil process herein that was aimed at an illegitimate collateral objective.

34. Defendant Jeanne Poafpybitty has suffered and will continue to suffer damage that is directly and proximately caused by Plaintiff's abuse of process in these proceedings.

Having fully responded to the Plaintiff's Complaint, Defendant hereby requests that this Court inquire into the basis of the Complaint, and that if the same shall be found to be without merit or foundation, or substantially frivolous or intended to harass the Defendant in her administration of this Estate, that this Court would in such case use its broad equitable authority to direct that the attorney's fees incurred by Defendant, in connection with this matter, to be paid by the Plaintiff, and, if necessary, offset by the Defendant against those disbursement(s) from the Estate that the Plaintiff may otherwise have been entitled to.

WHEREFORE, having fully answered the Complaint, Defendant would respectfully request of this Court the following:

- a) That the Plaintiff neither have, recover, nor be awarded any of the relief requested in her Complaint;
- b) That this Court enter judgment in favor of the Defendant as to all claims that Plaintiff has alleged in this case, and as to all claims alleged against the Plaintiff;
- c) That the Court grant to the Defendant her costs and attorneys' fees associated with her response to the Complaint, in particular, and more generally, her fees and costs in connection with this proceeding in its entirety; and
- d) That the Court award the Defendant such other and further relief as this Court may deem just and proper under the circumstance of the case.

18

**-Copies of checks written from Estate
resources for Ms. Poafpybitty's attorneys,
after issuance of this Court's June 13, 2016
Order**

ESTATE OF DONALD ROTHGES
JEANNE E POFFYBILITY FLEP
119 CROOKS BLVD
SUNNYVALE, CA 94086-1011

708
7/11/16

PAID TO
Dad's & Day's
S. H. H. and
\$6,000.00

02905.02 J.P. Poffyblity

6053207766 13055180214 00708

REF#8126898401 CK# 706 6000.00

ESTATE OF DONALD ROTHGES
JEANNE E POFFYBILITY FLEP
119 CROOKS BLVD
SUNNYVALE, CA 94086-1011

734
8/23/16

PAID TO
Dad's & Day's
S. H. H. and
\$3,175.00

02905.02 J.P. Poffyblity

6053207766 13055180214 00734

REF#8726128159 CK# 734 3175.00

ESTATE OF DONALD ROTHGES
JEANNE E POFFYBILITY FLEP
119 CROOKS BLVD
SUNNYVALE, CA 94086-1011

750
9/12/16

PAID TO
Dad's & Day's
S. H. H. and
\$5,000.00

02905.02 J.P. Poffyblity

6053207766 13055180214 00750

REF#8325052729 CK# 750 5000.00

ESTATE OF DONALD ROTHGES
JEANNE E POFFYBILITY FLEP
119 CROOKS BLVD
SUNNYVALE, CA 94086-1011

792
11/16/16

PAID TO
Dad's & Day's
S. H. H. and
\$5,000.00

02905.02 J.P. Poffyblity

6053207766 13055180214 00792

REF#8122893963 CK# 792 5000.00

R2114

19

- Excerpt from March 2, 2018 Court Order**
- Excerpt from February 14, 2017 Accounting**
- Excerpt from Ms. Poafpybitty's trial testimony**

19

behalf of Ms. Irving²⁹. During hearing on May 27, 2016, the Estate argued that Mr. Burgess was mistaken regarding his May 18, 2016 appraisal affidavit. Mr. Burgess had not examined the residence interior, and his criticism of Mr. Cromartie's \$95,000.00 property appraisal could not, the Estate argued, be accurate.

14. Arrangements were made for Mr. Cromartie to be present when Russell Burgess visited the Decedent's last residence in late 2016. Both Mr. Burgess and Mr. Cromartie attended the trial in this matter, and both offered testimony.

15. At trial, Russell Burgess testified about his written appraisal, describing the Decedent's residence as having \$193,900.00 in value³⁰. It is clear to both parties, and to the Court, that the residence has a new roof and, according to workmen receipt and Ms. Poaspybitty's own testimony, the trouble with mold has been corrected. What, then, did Mr. Cromartie have to say about the value of the Decedent's last residence, now that it was in repair? According to Mr. Cromartie, he had not been engaged by the Estate to offer his opinion of current value, and at trial he offered no valuation. In fairness, however, to Mr. Cromartie, he

²⁹ Terms of Court Order

³⁰ Plaintiff's Exhibit 8

shared that he would remain concerned about a residence which once had the mold problem he observed in 2015.

16. Mr. Cromartie stands by his \$95,000.00 appraisal, made at a time when, in 2015, he says the Decedent's last residence was in very poor condition. Since the time of repair to this residence, and even while the Court made specific arrangements for Mr. Cromartie to be present for Russell Burgess' 2016 residence inspection, Mr. Cromartie, at trial, did not have his own current appraisal of value to offer³¹.

17. The Court has reached specific findings of fact regarding Mr. Cromartie, and his 2015 appraisal of the Decedent's residence. At hearing on May 27, 2016, the Estate argued about how Mr. Cromartie's appraisal was certified and proper. In its June 3, 2016 distribution proposal, the Estate stood by this 2015 appraisal. As late as October 2016, Ms. Poafpybitty, in affidavit filed with this Court³², outlined the very poor condition of this residence which she wished to acquire, at the appraised price of \$95,000.00. According to Ms. Poafpybitty's October 26, 2016 affidavit, the Decedent's last residence was "...in very poor condition, with a roof that

³¹ Mr. Cromartie's testimony

³² Plaintiff's Exhibit 22

had been leaking and which in turn had caused a mold infestation in the house...³³ Based upon trial presentations, this was not an accurate description of the Decedent's last residence, when it was proposed by Ms. Poafpybitty for distribution to herself in December 2015 and June 2016.

18. The Court finds it to be unreasonable for Ms. Poafpybitty to have made distribution proposals for an admittedly repaired residence, by making continuing reference to the Decedent's last residence while it was in an unrepaired condition. This position is contrary to Ms. Poafpybitty's fiduciary duty, and in taking this position, Ms. Poafpybitty could well have anticipated that it would generate conflict, if not outright litigation. At a time when Ms. Poafpybitty initially proposed a \$95,000.00 residence valuation, a position she continued to support, following into 2016 litigation and the issuance of Court Order, the residence was no longer the deplorable property which Mr. Cromartie reported about. At trial, Ms. Poafpybitty failed to acknowledge how her continuing use of Mr. Cromartie's initial appraisal, to justify a \$95,000.00 final distribution proposal, has sparked very expensive conflict³⁴.

19. Subject to substantial criticism from the Estate, Ms. Irving took what she

³³ Plaintiff's Exhibit 22

³⁴ Testimony of Jeanne Poafpybitty

considered to be corrective action. Ms. Irving's own appraiser, Russell Burgess, has offered the only professional valuation of the Decedent's last residence, following its repair. This is repair which was directed by Ms. Poafpybitty, and was paid for by Estate funds in Ms. Poafpybitty's control. The Estate engaged Ms. Poafpybitty's own professional appraiser to view the repaired residence, and to observe Mr. Burgess' work. However, the Estate asked for no assistance, and received no assistance from its appraiser's testimony³⁵, regarding the repaired distribution value of the home which Ms. Poafpybitty had, in 2015 and 2016, wished to acquire for herself.

20. In its Order of June 13, 2016, the Court cited §62-3-708 of the South Carolina Probate Code. This section sets forth the duty of a Personal Representative, which has still not been carried out in this case, even following issuance of the June 13, 2016 Order. The Court finds that significant conflict has arisen in this case because, in 2015, Ms. Poafpybitty began advocating for a valuation of the Decedent's last residence, at a price which was less than half of what Ms. Poafpybitty, herself, had sworn to, in two separate Probate Court inventories filed by the Estate.

21. Section 62-3-708 of the Code requires Ms. Poafpybitty to file with the Court a

³⁵ Mr. Cromartie's Testimony

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CDP

R2119

supplementary, amended or corrected inventory, if she learns, during administration, that a valuation in a previously filed inventory was erroneous. Ms. Poafpybitty has continued, to this day, in failing with her inventory valuation duties.

22. In response to this Court's Order of November 10, 2016, the Estate filed an accounting and proposal for final distribution of Estate assets dated February 14, 2017. According to the Court's November 10, 2016 Order, these documents were due for filing, ten days before the February 17, 2017 Hearing. These documents abandon the June 3, 2016 proposal listing \$95,000.00 as the value of the Decedent's personal residence, and abandon Ms. Poafpybitty's desire to retain this residence for herself. The February 14, 2017 Estate accountings list \$193,900.00 as the value of Donald M. Rothgeb's last residence. One other issue, regarding the new February 14, 2017 final Estate proposals; there is a place on standard Court forms for the Personal Representative's signature, under oath. These documents are not signed by the Personal Representative. Did Ms. Poafpybitty agree with the details of what was filed?

23. In testimony at trial, Ms. Poafpybitty offered specific disagreement with the

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COP

R2120

residence valuation contained in February 14, 2017 accountings signed by one of her attorneys, and also the residence valuation contained in her own two previously filed sworn inventory forms. With numbers, it may appear that the Estate has now accepted Ms. Irving's charge of fiduciary misconduct. A property inventoried by the Personal Representative at more than \$193,000.00 was once actively proposed by the Personal Representative for distribution to her at only a \$95,000.00 value. There is now, however, a disconnect between what Ms. Poafpybitty's counsel has filed with the Court, and what Ms. Poafpybitty, herself, has offered in testimony at trial, regarding convoluted valuations.

24. The Court finds that, notwithstanding the stress of litigation, and the Personal Representative's disappointments with how beneficiaries have responded to her actions, Ms. Poafpybitty, as Personal Representative, has continuing obligations to prepare and file accurate inventory and accountings with the Court. Ms. Poafpybitty explains that, due to what she considers to be unfairness presented by Ms. Irving, Ms. Poafpybitty no longer wants to receive her husband's residence, and she feels justified in failing to sign, or to stand by, valuation positions which the Probate Code requires her to establish.

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R2121

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF Horry

ACCOUNTING
AMENDED

IN THE MATTER OF:
ESTATE OF DONALD M. ROTHGEB
(Decedent)

CASE NUMBER: 2014-ES-26-00498

[X] FINAL

[] INTERIM #1

The undersigned Personal Representative(s) submits this accounting, which covers the period from January 27, 2014 through February 10, 2017

The documentation on the following page(s) of this form sets forth a complete accounting for the period specified, which is summarized as follows:

Beginning Balance	<u>1,069,472.00</u>
Plus: Receipts	<u>202,949.61</u>
Subtotal	<u>1,272,421.61</u>
Less: Disbursements	<u>(1,272,421.61)</u>
Ending Balance	<u>\$0.00</u>

The Personal Representative declares that this account has been examined and that its contents represent a correct statement of all receipts and disbursements and are true to the best knowledge and belief of the Personal Representative(s).

SWORN to before me this 14
day of February, 2017.

[Signature]
Notary Public for State of South Carolina

My Commission Expires: January 18, 2023

Signature: [Signature]

Name: Bret H. Davis, Davis & Boyd, LLC

Address: PO Box 70517

Myrtle Beach, SC 29572

Telephone (Work): 843-839-9800

(Home): _____

(Cell): _____

Email: _____

Signature: _____

Name: _____

Address: _____

Telephone (Work): _____

(Home): _____

(Cell): _____

Email: _____

INVENTORY PROBATE ASSETS & RECEIPTS		DISBURSEMENTS & DISTRIBUTIONS	
Real Estate:		Real Estate Adjustments:	
1) Longleaf Place; DWL 7-B TMS 1731206048	62,000.00	1) Longleaf Place TMS 1731206048	
Sold for 57,000.00		Closing Costs and Sale Price Difference	10,231.17
2) South Bay Lakes VII HPR TMS	74,000.00	2) South Bay Lakes VII TMS 1912801485	
Sold for 64,000.00		Closing Costs and Sale Price Difference	17,921.23
3) SouthBridge VI HPR TMS 1912801717	64,000.00	3) SouthBridge VI HPR TMS 1912801717	
Appraisal Increase	1,000.00	Appraisal Increase 1,000.00	
4) South Bay Lakes III HPR TMS 1912801074	98,000.00	4) South Bay Lakes III HPR TMS 1912801074	
Appraisal Decrease 26,000.00		Appraisal Decrease	26,000.00
5) South Bay Lakes III HPR TMS 1912801100	59,000.00	5) South Bay Lakes III HPR TMS 1912801100	
Sold for 50,000.00		Closing Costs and Sale Price Difference	13,137.18
6) South Bay Lakes III HPR TMS 1912801112	98,000.00	6) South Bay Lakes III HPR TMS 1912801112	
Sold for 75,000.00		Closing Costs and Sale Price Difference	28,724.57
7) South Bay Lakes V HPR TMS 1912801286	98,000.00	7) South Bay Lakes V HPR TMS 1912801286	
Appraisal Decrease 20,000.00		Appraisal Decrease	20,000.00
8) Seagate Village PH V TMS 1862501231	91,000.00	8) Seagate Village PH V TMS 1862501231	
Sales Premium	11,000.00	Closing Costs	7,782.88
9) Retreat @ Glns Bay TMS 1911506090	44,000.00	9) Retreat @ Glns Bay TMS 1911506090	
Appraisal Decrease 4,000.00		Appraisal Decrease	4,000.00
10) Deerfield Plant LT 489 TMS 1911701489	140,700.00	10) Deerfield Plant LT 489 TMS 1911701489	
Appraisal Decrease 40,700.00		Appraisal Decrease	40,700.00
11) 28x51 89 Sterling: LT3 BL E Inland Reef TMS 1791705003	40,800.00	11) 28x51 89 Sterling: LT3 BL E Inland Reef TMS 1791705003	
Appraisal Increase	9,200.00	Appraisal Increase 9,200.00	
12) Deerfield LT 408 TMS 1910804038	191,200.00	12) Deerfield LT 408 TMS 1910804038	
Appraisal Increase	2,700.00	Appraisal Increase 2,700.00	
Miscellaneous Personal Property:		Estate Expenses:	
1999 Mitsubishi Montero VIN xx70	3,817.00	DeFalco's Mitsubishi Repair	326.52
2000 Toyota Avalon VIN xx87	3,729.00	Tire Town - Mitsubishi Repair	686.93
2000 Chrysler Sebring VIN xx75	651.00	Averill - Mitsubishi Repair	198.45
Miscellaneous Household Items	250.00	The Hartford Insurance (estate properties)	14,761.73
Miscellaneous Personal Property	325.00	Court Fees and Filings	2,042.24
		Veterinarian - Decedent's Dog	32.73
Cash:		Groomer - Decedent's Dog	180.00
Loan from PR to Open Estate Account	63,374.80	Carolina Radiology - AutoPay	28.61
Loan from PR for POA and Misc. for Steven	300.00	PCHS- CPA Estate Tax Prep.	2,850.00
Receipts From Rental Properties	115,374.81	Cost for Copy of Deeds	23.50
		Legal Fees - Davis & Boyd, LLC	50,000.00
		Wells Fargo - Decedent's Credit Card Svcs	1,143.27
		Wells Fargo - Decedent's Credit Card Svcs	850.00
		Wells Fargo Mortgage - Deerfield Lt 408	35,304.68
		Wells Fargo Equity - Deerfield Lt 489	9,024.63
		Deerfield Plantation HOA Fees	1,988.99
		Deerfield Plantation Maintenance	29,540.51
		Longleaf Place COA & POA Fees	2,222.08
		Longleaf Place - Maintenance	1,059.00
		Retreat @ Glenns Bay HOA Fees	6,553.00
FORM #361ES (1/2014)			
62-3-704, 62-3-1001			

VALUE TO THE COURT.

Q I WILL BE VERY SPECIFIC. DO YOU THINK THAT
PROPERTY IS WORTH \$193,000.00, MS. JENE?

A NO. NO, I DON'T.

Q HOW DID YOU LET YOUR LAW FIRM PUT IN PLEADINGS
THAT INDICATING THAT IS THE VALUE?

A BECAUSE THAT'S WHAT YOUR APPRAISER, WHO IS A
PROFESSIONAL, APPRAISED THE PROPERTY AT. SO, IF
THAT'S WHAT HE APPRAISED THE PROPERTY AT, THEN
THAT'S THE FIGURE THAT SHOULD BE PUT DOWN THERE
ACCORDING TO WHAT YOUR EXPERT SAID. I DON'T
KNOW ANYTHING ABOUT APPRAISERS AND APPRAISALS.
YOU HAVE AN EXPERT THAT DID THE APPRAISAL. SO,
IF THAT'S WHAT HE SAID, THEN I WILL GO ALONG
WITH WHAT HE SAID.

Q YOU WILL FILE A PLEADING UNDER OATH IN FRONT OF
A NOTARY?

MR. BOYD: OBJECTION, YOUR HONOR. HE'S
BADGERING HER WHEN THE DOCUMENTS SPEAK
FOR THEMSELVES AND SHE HAS JUST
EXPLAINED WHY THE EVALUATION IS THERE.
JUDGE PADGETT: IN THE DOCUMENTS THAT
WERE FILED IN JUNE OF LAST YEAR, WHERE
THEY WERE SIGNED BY THE PR AND WERE THEY
SIGNED BY YOU?

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**-Section 62-3-720 of the South Carolina
Probate Code**

20

Section 62-3-720 Expenses in estate litigation

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.

HISTORY: 1986 Act No. 539, Section 1; 2013 Act No. 100, Section 1, eff January 1, 2014.

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**Section 62-3-607, Section 62-1-111, Section
62-7-1001 and Section 62-7-1004, South
Carolina Probate Code**

21

Section 62-3-607 Order restraining personal representative

(a) Upon application of any interested person, the court by temporary order may restrain a personal representative from performing specified acts of administration, disbursement or distribution, or exercise of any powers or discharge of any duties of his office, or make any other order to secure proper performance of his duty, if it appears to the court that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person. Persons with whom the personal representative may transact business may be made parties.

(b) The matter shall be set for hearing within ten days or at such other times as the parties may agree. Notice as the court directs shall be given to the personal representative and his attorney of record, if any, and to any other parties named defendant in the application.

HISTORY: 1986 Act No. 539, Section 1; 2010 Act No. 244, Section 15, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment, in subsection (a), substituted "any interested person" for "any person who appears to have an interest in the estate"; and in subsection (b), substituted "application" for "petition" at the end.

Section 62-1-111 Authority to award costs and expenses

In a formal proceeding, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the estate that is the subject of the controversy.

HISTORY: 2013 Act No. 100, Section 1, eff January 1, 2014.

Section 62-7-1001 Remedies for breach of trust

(a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:

- (1) compel the trustee to perform the trustee's duties;
- (2) enjoin the trustee from committing a breach of trust;
- (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
- (4) order a trustee to account;
- (5) appoint a special fiduciary to take possession of the trust property and administer the trust;
- (6) suspend the trustee;
- (7) remove the trustee as provided in Section 62-7-706;
- (8) reduce or deny compensation to the trustee;
- (9) subject to Section 62-7-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
- (10) order any other appropriate relief.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

Section 62-7-1004 Attorney's fees and costs

In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

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- Excerpt from March 2, 2018 Court Order**
 - Excerpt from Defendant's May 4, 2018 Memo**
 - Excerpt from Defendant's March 29, 2018 Memo**
 - Excerpt from Defendant's March 20, 2017**
- Summation letter**
- Excerpt from trial exhibit, Defendant's May 13, 2015 letter**

reached the following findings of fact, which have contributed to conclusions that follow in this

Order:

1. Among the trial exhibits was a letter dated October 6, 2015, from attorney Jack M. Scoville, representing all of the Decedent's three (3) children¹⁸.

2. Mr. Scoville's letter acknowledges Ms. Poafpybitty's insistence that she acquire full ownership of the Decedent's residence from the Estate¹⁹. Although, according to testimony, there had been a period of marital separation, this is the residence where both the Decedent and Ms. Poafpybitty resided as man and wife. Ms. Poafpybitty has, since the Decedent's 2014 passing, continued to live in the residence. The Estate, during this period, has been paying for mortgage debt installments, insurance, taxes and utilities, associated with this residence. Ms. Poafpybitty has not been financially contributing to the Estate, regarding these items and for any rental value of the residence.

¹⁸ Plaintiff's Exhibit 3

¹⁹ Plaintiff's Exhibit 3 (first paragraph)

V. The Order Improperly Seeks to Impose Rental Fees for the Personal Representative for her Continuing Residency in a Home that was the Marital Home she Shared with the Decedent for Almost Twenty Years.

It would not be equitable for the Defendant to have to compensate the other heirs for use of the decedent's last residence during the Estate administration. The property currently occupied by Defendant, has been the Defendant's residence for well over twenty years. She lived in it during that time with her husband, the Decedent, with what can be deduced as a tacit understanding with the Decedent that she not be required to pay rent. Secondly, as was testified to at trial, one of the other beneficiaries, Steven Rothgeb, also lived in the same residence with the Defendant for approximately nine months following the Decedent's death, and he was not charged for any rent or utilities during the period that he stayed in the property. Third, another beneficiary of the Estate, Matthew Rothgeb, has also lived in another of the Estate's properties for the same time period, and for years prior to the Decedent's passing, also without paying rent. The Court fails to address the other heirs in ruling that "No continuing exclusive use of this residence by Ms. Poafpybitty shall be free from adjustments and compensation to other co-owners, following issuance of this Order." The Court erred in failing to also address the residence occupied by Matthew Rothgeb, and previous use of estate real estate by Stephen Rothgeb, all of which has been without compensation to the Estate. The ruling further neglects the due consideration to be given the special

took away, effectively, virtually all of the Personal Representative's commission. It is also important to note that the Sullivan case has been appealed to the South Carolina Supreme Court and is not settled law. Oral arguments were held for this case on March 7, 2018, and can be viewed on the South Carolina Supreme Court's website at <http://www.sccourts.org/scvideo/termSearchVideo.cfm>.

relationship of the Personal Representative, Jeanne Poafpybitty, in living with and providing care to the decedent for many years in the residence that has been her home for well over twenty years. This uneven handed approach, and draconian treatment of this Personal Representative, reflects the generally harsh and unjustified position the Court has taken in this matter. The Plaintiff specifically requests that this unjust and inequitable result contained in the Court's order of March 2, 2018 be reconsidered.

VI. The Court's Ruling that the Estate Properties be Distributed Equally in Undivided Shares to all the Beneficiaries is Problematic and Shortsighted and Would Create new and More Difficult Issues for the Beneficiaries to Resolve.

The Court provided in its March 2, 2018 ruling that the Estate assets be "equally divided" among the Estate's four devisees. As a practical matter, the Defendant Jeanne Poafpybitty would note that she spent the last many months prior to and during the initial phase of the instant legal proceeding, trying to accomplish just that: a relatively equal distribution of the Estate's assets. Such an equal division has already been attempted, and multiple appraisals were commissioned by the Estate at the request of the Plaintiff, so that the proposed distributions could be equalized for purposes of fairness and equity, and consistent with the intent of the Testator, as expressed in his Last Will and Testament.

Ample credible testimony was presented at trial, which establishes that the Personal Representative retained a neutral appraiser, Cromartie Appraisal Service, without any direction to appraise any property in any particular way. This was done to ensure that the proposal for distribution of estate assets was fair and equitable in all

Personal Representative to determine which beneficiary receives which piece of real estate in satisfaction of their devise. Section 62-2-601 further provides that:

(B) Notwithstanding subsection (A), the court may reform the terms of the Will , even if unambiguous, to conform to the terms of the testator's intention if it is proved by clear and convincing evidence that the testator's intent and the terms of the Will were affected by a mistake of fact or law, whether in expression of inducement.

S.C. Code Ann. Section 62-2-601(B). Thus, where a duly executed last will and testament is unambiguous, the only basis for reforming the will (and the testator's intent), is where the will is based upon or affected by a mistake of fact or law. *Id.* (emphasis added). In the case at hand, there was no evidence presented (nor even any allegation) that the testator's intentions were affected by a mistake of fact or law. It is therefore the Defendant Personal Representative's contention that this Court did not have discretion in this matter to reform the terms of the Decedent's Will and, in effect, change the clear direction of the Testator, which should have been the "guidepost" directing the Court in the proper resolution of this case.

II. The Order Improperly Seeks to Impose Rental Fees on the Personal Representative for her continuing residency in a home that was the Marital Home she shared with the Decedent for almost Twenty Years.

It would not be equitable for the Defendant to have to compensate the other heirs for use of the decedent's last residence during the Estate administration. The property currently occupied by Defendant, has been the Defendant's residence for well over twenty years. She lived in it during that time with her husband, the Decedent, with what can be deduced as a tacit understanding with the Decedent that she not be required to pay rent. Secondly, as was testified to at trial, one of the other beneficiaries,

Steven Rothgeb, also lived in the same residence with the Defendant for approximately nine months following the Decedent's death, and he was not charged for any rent or utilities during the period that he stayed in the property. Third, another beneficiary of the Estate, Matthew Rothgeb, has also lived in another of the Estate's properties for the same time period, and for years prior to the Decedent's passing, also without paying rent. The Court fails to address the other heirs in ruling that "No continuing exclusive use of this residence by Ms. Poafpybitty shall be free from adjustments and compensation to other co-owners, following issuance of this Order." The Court erred in failing to also address the residence occupied by Matthew Rothgeb, and previous use of estate real estate by Stephen Rothgeb, all of which has been without compensation to the Estate. The ruling further neglects the due consideration to be given the special relationship of the Personal Representative, Jeanne Poafpybitty, in living with and providing care to the decedent for many years in the residence that has been her home for well over twenty years. The Defendant specifically requests that this unjust and inequitable result contained in the Court's order of March 2, be reconsidered.

- III. The Court's ruling that the Personal Representative should personally bear all of the Estate's Legal Fees after March 25, 2016, is Arbitrary, Capricious, and would work an Unreasonable Hardship on Jeanne Poafpybitty, the Personal Representative that is not justified by the Evidence presented in this Case.**

The actions filed by the Plaintiff were not necessary for the administration of the Estate. To the contrary, the Plaintiff's actions have actually lengthened the amount of time that the Estate has had to be open and has, through the incurrence of legal fees, decreased the amount that each beneficiary will receive. These actions were caused by

3. Plaintiff requests that the Defendant should compensate the Estate for rent and utilities for occupying the principal residence during the Estate administration (page 4 of the Attachment):

It would not be equitable for the Defendant to have to pay for rent and utilities for the residence during the Estate administration for many reasons. First, the property that the Plaintiff is referring to, as has been testified to many times, has been the Defendant's residence for more than twenty years. She lived in it during that time with her husband, the Decedent, with what can be deduced as a tacit understanding with the Decedent that she not be required to pay rent. Second, one of the other beneficiaries, Steven Rothgeb, also lived in the same residence with the Defendant for approximately nine months following the Decedent's death, and he was not charged for any rent or utilities during the period that he stayed in the property. Third, another beneficiary of the Estate, Matt Rothgeb, has also lived in an Estate property for the same time period, and for years prior to the Decedent's passing, also without paying rent.

4. Plaintiff requests that the Defendant should be charged with legal fees related to defending the Estate from the actions of the Plaintiff (page 4 of the Attachment):

The actions filed by the Plaintiff were not necessary for the administration of the Estate. To the contrary, the actions have actually lengthened the amount of time that the Estate has had to be open and has, through the incurrence of legal fees, decreased the amount that each beneficiary will receive. These actions were caused by and instituted by the Plaintiff. They were unjustified, wasteful, and have resulted in the

Representative had done wrong, or that had harmed the Estate or its beneficiaries. He further noted that he thought the Personal Representative had done a good job in cooperating with him to provide the information needed to prepare the necessary tax returns for the Estate. Mr. Parker did not have the same opinion of Ms. Irving, however, noting that she had failed to cooperate with his efforts to obtain her Social Security number and the Social Security numbers of the other Estate beneficiaries and that, as of the date Mr. Parker appeared for trial of the matter on February 24, 2017, Ms. Irving had still not provided her Social Security number to him, despite numerous requests.

Mr. Parker's assessment of his dealings with Ms. Irving in this matter stands in stark contrast to his remarks concerning his contacts with the Personal Representative. Moreover, because she failed to cooperate with the accountant's efforts to finalize and file the Estate's tax returns, Mr. Parker testified that there were losses attributable to the Estate's operation that could have passed out to the Estate beneficiaries through a K-1 report, and that the beneficiaries should likely have been able to benefit from such pass-through of the Estate's losses. Because Mr. Parker did not have the Social Security numbers of all Estate beneficiaries, however, he could not prepare and file the K-1's in question, and the losses of the Estate as of this juncture have still not been passed through to the Estate's beneficiaries.

Thus, while the testimony adduced at trial of this matter failed to adduce any substantial evidence that the Personal Representative has harmed the Estate's beneficiaries by her actions in any way, the testimony produced at trial, and specifically the testimony of accountant Clark Parker, ironically demonstrates that the Plaintiff, by her actions, and specifically her refusal as a beneficiary to cooperate with the Estate's accountant, has herself harmed the Estate's beneficiaries, including her own interests.

Rent on Crooked Pine Drive Property:

While the matter is not raised in the Plaintiff's pleadings, and is therefore not properly a matter before this Court, there was discussion and testimony adduced at trial by the Plaintiff that the Personal Representative should have been required to pay rent to the Estate for her residency at the Crooked Pine Drive property. While the Personal Representative feels that the matter has not been properly raised and is therefore not properly before the Court, the Personal Representative nonetheless wishes to respond to this argument. Forcing the Personal Representative, Ms. Poafpybitty, to pay rent in connection with the marital residence would not be equitable. First, as was testified to at trial, the Crooked Pine Drive property has been Ms. Poafpybitty's

residence for more than twenty years. She lived in it during that time with her husband, the Decedent, with what can be inferred as a tacit understanding with the Decedent that she not be required to pay rent. The Decedent never required Ms. Poafpybitty to pay rent during his lifetime, as Ms. Poafpybitty testified, and it would not be equitable under the circumstances to force her to pay rent now. Moreover, Ms. Poafpybitty is not the only Estate beneficiary to live in the property without paying rent. The Personal Representative also testified that, for a period of nine months after Dr. Rothgeb's passing, Steven Rothgeb also lived in the same residence with Ms. Poafpybitty, and he also was not charged any rent for staying in the property. Third, another beneficiary of the Estate, Matthew Rothgeb, has also lived in an Estate property for an even longer period of time - during the entire period during which the Estate has been open and, according to the testimony of Ms. Poafpybitty, years before Dr. Rothgeb's passing as well - all without paying rent for the property he has been living in. Thus, the Estate has not been run in an other than even-handed fashion. It would be harsh and un-equitable under the circumstances, to force Ms. Poafpybitty the pay rent on a property that has been her marital residence for more than twenty years.

Personal Representative's Reporting of Legal Fees:

Finally, much has been made recently, in a filing that portends to be a response to the Estate's most recent proposals for distribution, concerning an error apparently made by the Personal Representative's probate attorneys in completing an interim accounting that reflected an incorrect amount incurred in legal fees through September 2015. The Plaintiff's counsel also offered information at trial, though the subject matter is not referenced in any pleadings of the Plaintiff prior her testimony in court, concerning the alleged discrepancy. The Personal Representative does not dispute that the amount in question was in error, but the amount reported was in fact an amount that produced as part of the Personal Representative's discussions with Jack Scoville, the Plaintiff's prior counsel, and the amount was inadvertently transferred to the interim accounting, even though the actual amount incurred in legal fees increased by the time the interim accounting in question was actually filed.

Plaintiff's emphasizing this oversight in yet another filing, and attempting again to somehow attach meaning to what is, at bottom, a clerical error, yet again evidences the lengths to which Plaintiff and her counsel have been willing to go to find an offense to suit their purposes, and their Complaint. But none exists here, and the discrepancy in question is, yet again, no evidence that the Personal Representative has breached any duty to the Plaintiff or anyone else. It is simply indication that neither she nor her counsel are perfect, and that in the course of filing thousands of pages of documents

BRET H. DAVIS, JD*, CPA
* Licensed in SC and NC

DAVIS & BOYD, LLC
Attorneys and Counselors at Law

REESE R. BOYD, III

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Mailing Address:
Post Office Box 70517
Myrtle Beach, SC 29572

Telephone: (843) 839-9800
Facsimile: (843) 839-9801
www.davisboydlaw.com

May 13, 2015

Jack M. Scoville, Jr., Esquire
P.O. Drawer 1228
Georgetown, SC 29442

Re: Estate of Donald M. Rothgeb
Our File No. 02905.002

Dear Jack:

This will follow our previous telephone conference and your follow up communications with Becky of my office regarding the captioned matter. I wanted to provide a little more detail about the issues that you raised in your letter to me of April 8, 2015.

With regard to your inquiry about an estate accounting, the final accounting will be filed when the estate is about to be closed. As you know, there are several properties in the estate that the personal representative is trying to sell, and having the proceeds from the properties instead of the properties themselves (except for the properties that the family has already identified for certain beneficiaries) will be much easier to distribute to the beneficiaries. That being said, I agree with you that it is reasonable for the beneficiaries to know what is going on in the estate, and in that regard we are in the process of preparing an interim accounting.

With regard to the issues raised in the second paragraph of your letter, we agree that any property taken will be taken subject to any related mortgage. I don't see how the personal representative has done anything that is inconsistent with that understanding. The equity in any property distributed or the net proceeds from any mortgaged property sold would be divided based on the terms of the will. I also do not understand your question about the justification for selling income producing assets to pay off mortgages. As you know, the personal representative clearly has discretion to do that if she believes that it is prudent from an estate administration standpoint to do so.

With regard to your question about the personal representative living in the residence. As you may or may not know, the personal representative has lived in the residence since 1995 rent free. Also, one of the decedent's children, Stephen, lived in the residence with the personal representative for approximately nine months and he was not charged rent. Additionally, the decedent's son, Matt, lives in another estate property and has not been paying rent. Given the history of how things have been handled in the past, I don't see how making the personal representative pay rent would be fruitful to an efficient and orderly administration.

J/ 3
R2141

23

**-Excerpt from Defendant's May 4, 2018
memo**

their way through. The Plaintiff's strong willed personality is well known within the family (pages 37, 42, 339, 372, and 405 of the Trial Transcript). The Decedent's other child, Steven, withdrew from the controversy and relocated and currently lives in Thailand. He did not participate in the trial. As has been consistent with her personality, the Plaintiff took the lead in the litigation in this matter, leading what has shown to be a very ill-advised route to resolving any Estate issues.

The Decedent left behind a surviving spouse that was left to pick up the pieces and start a new chapter in her life without feeling like she was constantly walking on egg shells. The residence of the Decedent and the Defendant was owned solely in the name of the Decedent. Despite the fact that they had been together for more than thirty-five (35) years and married for more than twenty-five (25) years, the Decedent did not put the Defendant's name on the residence. To keep the peace with her husband, the Defendant did not press the issue to have her name included on the deed to their residence.

The Decedent's will appoints the Defendant as personal representative ("Personal Representative") of his Estate, and provides that all assets of the Estate are to be divided equally between the Defendant and the Decedent's three children, with each to receive a twenty-five (25%) percent interest. Within weeks after the Decedent's death, the Defendant was advised that she could elect against the Decedent's will and receive a one-third (1/3) interest in the Estate instead of the one-fourth (1/4) interest that she was devised. As testified to at the trial, the Defendant made an informed and

24

-Excerpt from May 27, 2018 hearing
transcript

1 beneficiary and in her capacity as the personal
2 representative. Your Honor, if the parties are
3 agreeable, we're happy to bifurcate our representation,
4 but we've done nothing for this client, other than to
5 work for her as the personal representative. But we're
6 ninety percent in agreement with what Mr. Tall has
7 asked for, Your Honor. We're willing to do it. It's
8 what we've been trying to do, Your Honor. And on a
9 reasonable basis, we're happy to move forward
10 consistent with that. But this client -- my client has
11 done nothing to justify any punitive sanctions, or
12 restraint, or other similar order from the Court, Your
13 Honor. And I'm happy to put her on the stand. We can
14 ask her any question that the Court would like to hear.
15 I'll be happy to offer her testimony, but frankly, I think
16 we're mostly in agreement. I don't know that that's
17 necessary, so I'll leave that to the Court's discretion,
18 Your Honor.

19 JUDGE: Thank you, Mr. Boyd. As I indicated
20 earlier, we had an extensive conversation where both
21 sides -- I hope they felt like, because I did, that the
22 Court gave them opportunity to give us background as
23 well as all the information that they wanted to tell the
24 Court in regard to this matter. I am cognizant of the
25 fact that the estate has been opened for over two years,

25

- Excerpt from Defendant's Answer
- Excerpt from Defendant's March 29, 2018 Motion
- Excerpt from Defendant's May 4, 2018 Memo
- Excerpt from June 29, 2018 hearing transcript

27. The Defendant re-alleges and reiterates the allegations contained in each of the above paragraphs, as if each were repeated here verbatim.

28. The Defendant has previously participated in multiple and ongoing discussions with the beneficiaries of this Estate in an effort to promote the prompt, fair and reasonable resolution and conclusion of the Estate's business. Plaintiff's claims to the contrary in this matter are wholly without merit.

29. Prior to the involvement of Plaintiff's current counsel, the Defendant Personal Representative dealt extensively through her counsel with prior counsel, Jack Scoville, Esq., and as a result of those efforts, was under the impression that a global plan for the administration of the Estate had been reached which was acceptable to all beneficiaries.

30. Defendant contends that, notwithstanding her over-arching efforts to accommodate the Plaintiff and reach a plan for the administration of the Estate that was agreeable to her, the Plaintiff has continued for some time to harbor ill will toward the Defendant, her step-mother.

31. The Plaintiff has used the filing of this legal proceeding for a purpose not intended by the Rules of Civil Procedure, that being vengeance upon her Step-mother, the Defendant Jeanne Poafpybitty.

32. Plaintiff has an ulterior purpose in filing this action, and that is to gain an objective that is not legitimate in the use of the process.

33. Plaintiff undertook a willful act in the use of civil process herein that was aimed at an illegitimate collateral objective.

34. Defendant Jeanne Poafpybitty has suffered and will continue to suffer damage that is directly and proximately caused by Plaintiff's abuse of process in these proceedings.

Having fully responded to the Plaintiff's Complaint, Defendant hereby requests that this Court inquire into the basis of the Complaint, and that if the same shall be found to be without merit or foundation, or substantially frivolous or intended to harass the Defendant in her administration of this Estate, that this Court would in such case use its broad equitable authority to direct that the attorney's fees incurred by Defendant, in connection with this matter, to be paid by the Plaintiff, and, if necessary, offset by the Defendant against those disbursement(s) from the Estate that the Plaintiff may otherwise have been entitled to.

WHEREFORE, having fully answered the Complaint, Defendant would respectfully request of this Court the following:

- a) That the Plaintiff neither have, recover, nor be awarded any of the relief requested in her Complaint;
- b) That this Court enter judgment in favor of the Defendant as to all claims that Plaintiff has alleged in this case, and as to all claims alleged against the Plaintiff;
- c) That the Court grant to the Defendant her costs and attorneys' fees associated with her response to the Complaint, in particular, and more generally, her fees and costs in connection with this proceeding in its entirety; and
- d) That the Court award the Defendant such other and further relief as this Court may deem just and proper under the circumstance of the case.

would receive. She later requested copies of the appraisals for all the properties and was provided with those appraisals by the Defendant or counsel for the Estate.¹ Subsequent to receiving this information, the Plaintiff began insisting to the Estate's counsel that all properties be deeded equally to all four of the Estate's beneficiaries. Counsel for the Estate learned from a phone conference with the Plaintiff and from her testimony at trial that the Plaintiff was advised by someone that she could demand this action and that after such action was taken she would then be in control of the Estate assets (pages 372, 373, and 525 of the Trial Transcript). It appears that Plaintiff then sought to use this control (with her and her brother's collectively having a seventy-five (75%) percent interest in the Estate properties) to do what she wanted and not what anyone else wanted to do, with the Estate properties. The Plaintiff claimed that the reason she wanted to have all the properties deeded to all the beneficiaries was because the appraised value for one of the properties that was supposed to go to the Defendant (the marital residence) had gone down substantially since the original inventory, yet the Plaintiff failed to acknowledge that the appraised value for a property that she was to receive also went down substantially. See Exhibit "E", which is a spreadsheet discussed at trial which shows a comparison of the changes in the Estate properties' respective appraised values. Plaintiff's insistence on gaining control of the Estate is consistent with testimony from the Defendant concerning her controlling personality, her

¹ It is important to note that prior to the Plaintiff retaining the services of her current attorney, she had received all the pertinent information related to the Estate. Despite what counsel for the Plaintiff may contend, it was not ever necessary for the Plaintiff to retain her current counsel to obtain any information related to the Estate.

presentation at trial, and her actions since the trial of this matter has been concluded. It is a trigger point in this case that has been the source of a tremendous amount of heartache and unnecessary expense for the parties to this Estate.

Shortly after terminating her first attorney, in or around November, 2015, Plaintiff began building her case for a lawsuit. She sent off demand letters to counsel for the Estate in rapid succession. See Exhibits "F" and "G", which are the letters discussed during the trial from the Plaintiff to counsel for the Estate. Noticing that the action of the Plaintiff was taking a wrong turn, counsel for the Estate sent multiple communications to the Plaintiff requesting a meeting with the beneficiaries to resolve any open or unknown issues. See Exhibit "H", which is a collection of e-mails discussed at trial wherein the Estate's counsel sought a meeting or conference call with the Plaintiff and the other beneficiaries. After counsel for the Estate was unable to get the parties to agree to meet, he insisted on at least a phone conference in which all the parties would participate. At the insistence of the Estate's counsel, the Plaintiff agreed to a conference call. A call took place on February 12, 2016 between the Plaintiff, the Estate's counsel and the Estate counsel's probate paralegal (pages 210, 215, and 525 of the Trial Transcript). Also see Exhibit "I", which is a transcript of the call played for the Court during the trial of this matter. The Plaintiff recorded this call without the knowledge of or notice to the Estate's counsel. She did not inform the Estate's counsel that the call was being recorded and she did not seek anyone's consent to record the call when it was held. The covert and sneaky nature of the recording by the Plaintiff is in

opposed to considering any type of distributions unless they were to have all the properties owned equally by all four of the beneficiaries. This hammers home the point that the Plaintiff was only concerned with gaining control of the Estate property and that she was not interested in a reasonable resolution of the Estate. It also confirms that the Plaintiff was the party responsible for the issues in this litigation.

II. The Order Represents an Improper Reformation of the Decedent's Last Will and Testament.

The Decedent's Last Will and Testament specifically directs that the Personal Representative pay the debts of the Estate and divide the remainder of his property in "approximately equal shares" with the Personal Representative having "sole discretion to designate the real or personal property comprising the respective shares so established, so long as the value thereof is approximately equal." Trial testimony revealed there were insufficient assets in the Estate to pay the Estate debts without selling some or all of the Estate's real property. The priorities of the Personal Representative did not deviate from the Decedent's direction in this regard.

The Court cites S.C. Code Ann. 62-2-601 (1976, as amended) in reforming the terms of the decedent's Will. That Section states as follows:

(A) The intention of the testator as expressed in the testator's will controls the legal affect of the testator's dispositions. The rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will.

In this case, the main Estate assets are several pieces of real estate. As emphasized above, the terms of the Will *specifically and unambiguously* grants discretion in the

Personal Representative to determine which beneficiary receives which piece of real estate in satisfaction of their devise. Section 62-2-601 further provides that:

(B) Notwithstanding subsection (A), the court may reform the terms of the Will, even if unambiguous, to conform to the terms of the testator's intention if it is proved by clear and convincing evidence that the testator's intent and the terms of the Will were affected by a mistake of fact or law, whether in expression of inducement.

S.C. Code Ann. Section 62-2-601(B). Thus, where a duly executed last will and testament is unambiguous, the only basis for reforming the will (and the testator's intent), is where the will is based upon or affected by a mistake of fact or law. *Id.* (emphasis added). In the case at hand, there was no evidence presented (nor even any allegation) that the testator's intentions were affected by a mistake of fact or law. It is therefore the Defendant Personal Representative's contention that this Court did not have discretion in this matter to reform the terms of the Decedent's Will and, in effect, change the clear direction of the Testator, which should have been the "guidepost" for directing the Court in the proper resolution of this case.

III. The Court's Ruling Wrongfully Requires the Personal Representative to Bear all of the Estate's Legal Fees After March 25, 2016.

The actions filed by the Plaintiff were not necessary for the administration of the Estate. To the contrary, the Plaintiff's actions have actually lengthened the amount of time that the Estate has had to be open and has, through the accumulation of legal fees, decreased the amount that each beneficiary will receive. These actions were caused by and instituted by the Plaintiff as a result of her refusal to communicate and work with the Personal Representative, and her retention of multiple legal counsels to represent

her in this Estate. The Defendant was naturally cautious and hesitant to do anything more than preserve and protect the assets of the Estate when the Plaintiff retained counsel, which has been the case throughout the bulk of this Estate administration. So any claims related to the delays caused by the Personal Representative in the administration of this Estate are actually attributable, in reality, to the Plaintiff's insistence on litigating the administration of this Estate, if at any point it was not administered exactly how she wanted it administered. The Plaintiff was never going to be satisfied with the way the Estate was being administered unless it was done exactly the way she wanted it to be done, regardless of whether or not her wishes were consistent with the terms of the Decedent's Will or with existing probate law. Plaintiff's actions were unjustified, wasteful, and have resulted in the depletion of Estate assets and, therefore, costs in this matter should be charged against the Plaintiff's share of the Estate, not against the Personal Representative personally.

The Court's ruling in the Order that the Defendant will be required to pay all legal fees incurred by the Personal Representative's counsel after May 25, 2016 has the practical effect of requiring the Personal Representative to *personally pay from her funds for the administration of this Estate by the Estate's counsel*, a harsh and draconian remedy which is *not even sought by the Plaintiff in her Petition in this matter*.

1 But just to prove my point, I don't even know
2 that frankly we want that remedy. I don't want
3 the Estate to have to bear the burden of trying
4 this Estate -- trying this matter again. If
5 the Court thinks that's the appropriate remedy,
6 we'll do what the Court wants to do. I would
7 actually prefer to see the Court take a hard
8 look at its Order. I think the Court's -- Mr.
9 Tall says the -- the Order is balanced. I find
10 it to be very imbalanced. I find it to see a
11 lot of collected nits that have been assembled
12 against the Personal Representative and to
13 overlook a lot of the -- of the factors frankly
14 on the part of the Plaintiff that contributed
15 to this situation. And, again, it's not my
16 place to be personal. I don't mean this
17 personally against Ms. Irving. I'm -- I'm sure
18 she's a very nice lady. But there is such a
19 thing as an eggshell plaintiff, Your Honor, and
20 there are certain types, certain personalities
21 that contribute to litigious outcomes. And I
22 do think the Plaintiff's behavior since the
23 trial, these issues are relevant, the Court can
24 look at these issues, the Court can take its
25 own view of the facts, you are sitting in

26

**-Excerpt from Defendant's May 4, 2018
Memo**

-Answers of Plaintiff's brothers

between the parties). There were also numerous communications between the Plaintiff's first lawyer and counsel for the Estate and later between the Plaintiff and the Estate counsel. It took great hyperbole and animation for counsel for the Plaintiff to make the Court believe that effective and numerous communications between the parties had not taken place. It was not that communications did not take place; it was that the communications were at times not what the Plaintiff wanted to hear. It is also important to note that the Plaintiff and her brothers were represented together by the first lawyer and that only the Plaintiff (without her brothers) hired the new lawyer. This indicates that it was the Plaintiff alone that was causing the problems.

The ruling also contends that the Defendant intentionally delayed the administration of the Estate. This assertion is one of the most confusing of them all. The facts indicate just the opposite.³ The Defendant was prepared to distribute the Estate assets and close the Estate in November of 2015, which is when the appraisals that the Plaintiff's first counsel insisted on had been completed. It was the Plaintiff herself that keep that from happening. The Plaintiff is solely responsible for the Estate not closing, not the Defendant. Her litigation has now caused the Estate to remain open for two (2) more unnecessary years, not to mention the time that will be involved in any appeals in this matter. Moreover, there was clear testimony from Clark Parker, CPA during the trial that the Plaintiff flatly refused to provide her social security number to

³ It is important to note that the Plaintiff never filed any action pursuant to S.C. Code Ann. § 62-3-1001 (1976, as amended), which is customary if a beneficiary is concerned that a personal representative is not fulfilling their duties and filing the required probate filings.

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF HORRY

CASE NO: 2014-ES-26-00498

JULIE IRVING,

PLAINTIFF,

vs.

ACCEPTANCE OF SERVICE
AND ANSWER EXPRESSING
AGREEMENT WITH PLAINTIFF'S
ALLEGATIONS AND PRAYERS
FOR RELIEF

JEANNE POAFPYBITTY, PERSONAL
REPRESENTATIVE OF THE ESTATE
OF DONALD M. ROTHGEB,

DEFENDANT,

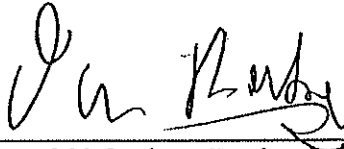
AND

JEANNE POAFPYBITTY, DONALD
MATTHEW ROTHGEB AND STEVEN
TAYLOR ROTHGEB,

DEFENDANTS.

I, Donald Matthew Rothgeb, Defendant, agree to accept service of the Summons, Complaint, Motion for Temporary Restraining Order, Affidavit and Notice of Hearing now calendared for May 27, 2016.

Further, I hereby express my agreement with all terms expressed in Plaintiff's Complaint, and join in Plaintiff's prayers for relief.


Donald Matthew Rothgeb

5-19-16
Date

R2157

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

JULIE IRVING,

PLAINTIFF,

vs.

JEANNE POAFPYBITTY, PERSONAL
REPRESENTATIVE OF THE ESTATE
OF DONALD M. ROTHGEB,

DEFENDANT,

AND

JEANNE POAFPYBITTY, DONALD
MATTHEW ROTHGEB AND STEVEN
TAYLOR ROTHGEB,

DEFENDANTS.

IN THE PROBATE COURT

CASE NO: 2014-ES-26-00498

ACCEPTANCE OF SERVICE
AND ANSWER EXPRESSING
AGREEMENT WITH PLAINTIFF'S
ALLEGATIONS AND PRAYERS
FOR RELIEF

I, Steven Taylor Rothgeb, Defendant, agree to accept service of the Summons, Complaint, Motion for Temporary Restraining Order, Affidavit and Notice of Hearing now calendared for May 27, 2016.

Further, I hereby express my agreement with all terms expressed in Plaintiff's Complaint, and join in Plaintiff's prayers for relief.


Steven Taylor Rothgeb

5/5/16
Date

R2158

27

**-July 5, 2016 hearing demands
-June 2018 acknowledgments
-Stephen Rothgeb's Affidavit in support of
Sanctions**

CLIFFORD H. TALL, P.A.
ATTORNEY AT LAW
4702 OLEANDER DRIVE
MYRTLE BEACH, SOUTH CAROLINA 29577
(843) 497-9777

CLIFFORD H. TALL
LICENSED IN SOUTH CAROLINA
AND FLORIDA

FAX
(843) 497-9778
E-MAIL
ctalipa@sc.rr.com

July 5, 2016

The Honorable Carroll D. Padgett, Jr.
Chief Associate Probate Judge
Horry County Probate Court
Post Office Box 288
Conway, South Carolina 29528

Re: Estate of Donald M. Rothgeb
Case No.: 2014-ES-26-00498

Dear Judge Padgett:

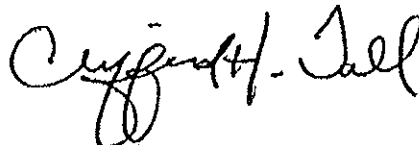
I've been asked by Donald Matthew Rothgeb and Steven Taylor Rothgeb to assist with their filing of the attached demands for hearing, in connection with the Estate's June 3, 2016 filings.

Steven and Matt Rothgeb, similar to their sister, Julie, wish with these filings, only to preserve rights associated with what still appears to be incomplete filings by the Estate. Once legal billing records ordered by the Court are filed, the Rothgeb children anticipate an opportunity to review additional records and work with the Estate for resolutions for final distributions. There is, at this time, no desire to calendar any specific hearing or mediation.

Thank you for your courtesies.

Best regards,

CLIFFORD H. TALL, P.A.



Clifford H. Tall

CHT:ele
Enclosures

cc: Reese Boyd, III

R2160

STATE OF SOUTH CAROLINA

COUNTY OF: HORRY.

IN THE MATTER OF:
DONALD M. ROTHGEB
(Decedent)

IN THE PROBATE COURT

DEMAND FOR HEARING (ESTATES ONLY)
Pursuant to Notice of Right to Demand Hearing

CASE NUMBER: 2014-ES-26-00498

Pursuant to SCPC 62-3-1001, I demand a hearing in the above-referenced estate.

The estate issues I would like addressed are:

Details of Estate accountings, to include:

1. Proper inventory and management of Estate assets.
2. All items of expenses.
3. Property valuations which support final distribution proposals, and final distribution proposals, in general.
4. Fiduciary compensation proposals.
5. The Estate's use of asset sale proceeds.

(attach additional sheets if necessary)

Executed this 5th day of July, 2016.

Signature: Clifford H. Tall

Print Name: Steven Taylor Rothgeb

Address: 157 Mattox Ave.
Colonial Beach, VA 22443

Telephone (Work):

(Home): (06) 663-162-9200

(Cell):

Email: Strothgeb77@gmail.com

Relationship to Decedent/Estate: Defendant

Attorney: Clifford H. Tall

Address: 4702 Oleander Drive
Myrtle Beach, SC 29577

Telephone: (843) 497-9777

Email: ctallpa@sc.rr.com

STATE OF SOUTH CAROLINA

COUNTY OF Horry

IN THE MATTER OF
DONALD M. ROTHCEB
(Decedent)

IN THE PROBATE COURT

DEMAND FOR HEARING (ESTATES ONLY)
RETURNED TO NOTICE OF RIGHT TO DEMAND HEARING

CASE NUMBER: 2014 ES-26-00498

Pursuant to SCPC §2-6-1001, I demand a hearing in the above referenced estate.

The estate issues I would like addressed are:

Details of Estate accountings to include:

1. Proper inventory and management of Estate assets.
2. All items of expenses.
3. Property valuations which support final distribution proposals, and final distribution proposals, in general.
4. Fiduciary compensation proposals.
5. The Estate's use of asset sale proceeds.

(attach additional sheets if necessary)

Executed this 3rd day of July, 2016

Signature: [Signature]

Print Name: Steven Taylor Rothce

Address: 137 Marine Avenue

Telephone (Work): 252-331-5100

(Home): 252-331-5100

(Cell): 252-331-5100

Email: staylor@staylor.com

Relationship to Decedent/Estate: Defendant

Attorney: Clifford H. Tall

Address: 4702 Oleander Drive

Myrtle Beach, SC 29577

Telephone: (616) 887-9777

Email: htallpa@scbar.com

STATE OF SOUTH CAROLINA

COUNTY OF: HORRY

IN THE MATTER OF:
DONALD M. ROTHGEB
(Decedent)

IN THE PROBATE COURT

DEMAND FOR HEARING (ESTATES ONLY)
Pursuant to Notice of Right to Demand Hearing

CASE NUMBER: 2014-ES-26-00498

Pursuant to SCPC 62-3-1001, I demand a hearing in the above-referenced estate.

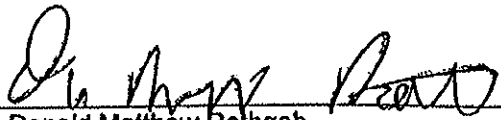
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1. Proper inventory and management of Estate assets.
2. All items of expenses.
3. Property valuations which support final distribution proposals, and final distribution proposals, in general.
4. Fiduciary compensation proposals.
5. The Estate's use of asset sale proceeds.

(attach additional sheets if necessary)

Executed this 5th day of July, 2016.

Signature: 

Print Name: Donald Matthew Rothgeb

Address: 722 Racewater Drive

Myrtle Beach, SC 29588

Telephone (Work):

(Home): (843) 685-9007

(Cell):

Email:

Relationship to Decedent/Estate: Defendant

Attorney:

Address:

Telephone:

Email:

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

JULIE IRVING,

PLAINTIFF,

vs.

JEANNE POAFPYBITTY, PERSONAL
REPRESENTATIVE OF THE ESTATE
OF DONALD M. ROTHGEB,

DEFENDANT,

AND

JEANNE POAFPYBITTY, DONALD
MATTHEW ROTHGEB AND STEVEN
TAYLOR ROTHGEB,

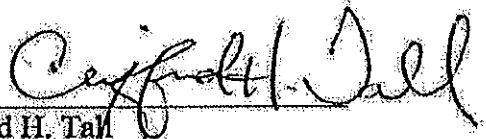
DEFENDANTS.

IN THE PROBATE COURT

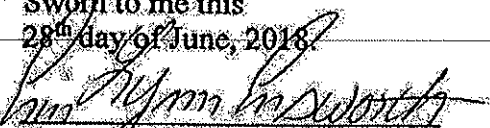
CASE NO: 2014-ES-26-00498

AFFIDAVIT REGARDING
DEFENDANTS'
ACKNOWLEDGMENTS

The undersigned reports that the attached was forwarded to him regarding the knowledge of Defendants' Donald Matthew Rothgeb and Steven Taylor Rothgeb regarding Motions filed by parties in this matter on March 29, 2018, and the opportunity of Donald Matthew Rothgeb and Steven Taylor Rothgeb to participate in the hearing now calendared for June 29, 2018 in the Horry County Probate Court.


Clifford H. Tall
SC Bar No.: 0005463
4702 Oleander Drive
Myrtle Beach, SC 29577
(843) 497-9777
ctallpa@sc.rr.com

Sworn to me this
28th day of June, 2018.


Notary public for South Carolina
Commission Expires 12-1-2018

PROBATE COURT
HORRY COUNTY, SC
2018 JUL -5 PM 12:19
KATHY G. HARRIS
PROBATE JUDGE

R2164

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

JULIE IRVING,

PLAINTIFF,

vs.

JEANNE POAFPYBITTY, PERSONAL
REPRESENTATIVE OF THE ESTATE
OF DONALD M. ROTHGEB,

DEFENDANT,

AND

JEANNE POAFPYBITTY, DONALD
MATTHEW ROTHGEB AND STEVEN
TAYLOR ROTHGEB,

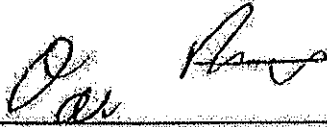
DEFENDANTS.

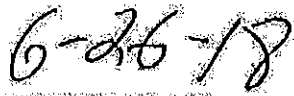
IN THE PROBATE COURT

CASE NO: 2014-ES-26-00498

ACKNOWLEDGMENT OF
HEARING NOTICE

I, Donald Matthew Rothgeb, hereby acknowledge timely notice of the hearing to address post-trial Motions filed on March 29, 2018, and acknowledge my opportunity to attend and participate in said hearing now calendared for June 29, 2018 at 9:00 am in the Horry County Probate Court.


Donald Matthew Rothgeb


Date

PROBATE COURT
HORRY COUNTY, SC
2018 JUL -5 PM 12:19
KATHY E. HARRIS
PROBATE JUDGE

R2165

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

JULIE IRVING,

PLAINTIFF,

vs.

JEANNE ROAFFYBETTY, PERSONAL
REPRESENTATIVE OF THE ESTATE
OF DONALD R. ROTHGER,

DEFENDANT,

AND

JEANNE ROAFFYBETTY, DONALD
MATTHEW ROTHGER AND STEVEN
TAYLOR ROTHGER,

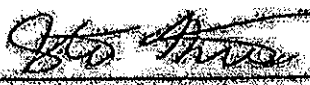
DEFENDANTS.

IN THE PROBATE COURT

CASE NO: 2014-ES-26-00498

ACKNOWLEDGMENT OF
HEARING NOTICE

I, Stephen Taylor Rothger, hereby acknowledge timely notice of the hearing to address post-trial Motions filed on March 29, 2018, and acknowledge my opportunity to attend and participate in said hearing now calendared for June 29, 2018 at 9:00 am in the Horry County Probate Court.


Stephen Taylor Rothger

6/28/18
Date

PROBATE COURT
HORRY COUNTY, SC
2018 JUL -5 PM 12:19
KATHY S. WARD
PROBATE JUDGE

R2166



SWORN STATEMENT OF

STEVEN ROTHGEB

I am Steven Rothgeb, and under oath to be truthful, I offer the following statement, in support of efforts by my Sister, Julie Irving, to secure fairness for concluding my Father's Estate administration.

I have reviewed my Sister's Motion for Sanctions and Motion for Summary Judgment. I understand the facts of the case, and write to express my support of my Sister's efforts in these Motions, and in other ways that my Sister has taken action.

I have heard charges that my Sister has dominated me, and that if it was not for her being difficult and aggressive with me, I would be happy with how the Estate has been handled by my Stepmother, Jeanne Poafpybitty. These charges are wrong and unfounded. They demonstrate how our Stepmother has tried to wrongfully divide us.

As an example, I am forwarding the attached email, which was sent to me by my Stepmother, just following a time when the lawyers met to discuss why my siblings and I had not been informed about a condominium sale. Money from the condominium sale was to help provide finances to the Estate beneficiaries, as set out in the Court's June 13, 2016 Order.

My Stepmother's email tells me that because of my Sister's troublemaking, I should make plans to leave my work in Thailand, and come to the U.S. for a deposition. As it turns out, no party has asked me for a deposition, and the Court ordered that I could participate, in any deposition by phone, without travelling to the U.S.

I am aware that for a year after my Father's passing, all three of my Father's children were respectful of our Stepmother, and allowed her to handle Estate matters, as she preferred.

All three children hired Attorney Scoville, and he was helpful in getting information which had previously been withheld by the Estate. Prior to involving any attorney, my Stepmother chose not to respond, when I asked her basic questions in email. My Stepmother's actions appeared mysterious to all three of us, and I am convinced that, were it not for Mr. Scoville's actions, we would not have received information about property sales and values.

After Mr. Scoville's departure, unfortunately, conflicts continue. Besides facts which show that my Stepmother kept spending, against what was decided at Hearing, my Sister is now attacked, because of false charges.

The Estate's false charge about Mr. Scoville, is that all of us would be bound, and could ask no more property questions, following 2015 appraisals. The Estate has been the difficult party in these matters, and I'm proud of how my Sister, Julie, has stood up for all three of us.

I was in Court on May 27, when the Judge decided that the Estate should be restricted in additional Estate spending. I have been kept informed about questions, responses and dates. Because of my work, I am not available to the Court, and to my Sister, on February 17. I thank the Court for allowing the review which is taking place.


Steven Taylor Rothgeb

SWORN to me this
14 day of February, 2017.



Reg. No. / notary public 7066/2019
Commission Expires / notary public
Date / notary public December 13, 2019

signed before me on 14 February 2017
by Mr. Steven Taylor Rothgeb
holder of Passport No. 728192694
Signature Charnat Thunchit
(Mr. Charnat Thunchit)
Notarial Services Attorney Registration No. 9066/2018
Lawyer License No. 916/2549

R2168

----- Forwarded message -----

From: Jeanne p <jep0814@yahoo.com>

Date: Sat, Oct 29, 2016 at 4:00 AM

Subject: ESTATE

To: Steve Rothgeb <strothgeb77@gmail.com>

Cc: "reese@davisboydlaw.com" <reese@davisboydlaw.com>, "bdavis@davisboydlaw.com" <bdavis@davisboydlaw.com>, "bweaver@davisboydlaw.com" <bweaver@davisboydlaw.com>, "devans@davisboydlaw.com" <devans@davisboydlaw.com>, Jeanne Poafpybltty <jeannep@mullenwylie.com>

Hey Steven: Hope you're doing well. I just wrote checks to everyone for a partial distribution that I had been trying to do and just got the okay for. I will be distributing \$17,500 to each of us and I need to let the law office know if you want the money wired to you or mailed.

Julie's lawyer is costing all of us a lot of money with the constant Motions he is filing for all the nonsense. He wants to take my deposition and, of course, Julie's will be taken too. In addition, you might want to plan to make a trip back here because they will probably want to take yours and Matt's.

Miss talking to you and seeing how you're doing after all these years, but under the circumstances it is what it is.

Love,
Jeanne

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**-Excerpt from June 29, 2018 hearing
transcript**

1 you pull up the telephone conversation? Also,
2 as I mention before we look at the telephone
3 conversation, that one of the reasons was the
4 residence was valued a little bit lower than
5 the tax assessed value, and that caused some
6 heart burn, as we -- as we've been over. Well,
7 as indicated in the Memorandum and in the
8 spreadsheet, Your Honor -- Reese, can you --
9 before we get that, go to Exhibit E, the
10 spreadsheet. And I understand that, Your
11 Honor. If I were to get something back and the
12 person in charge, the asset that they were
13 getting went down substantially, I would be a
14 little suspicious too. I mean, just from --
15 just looking at a piece of paper, that would --
16 that would make me a little suspicious also.

17 MR. TALL: May we be clear, Your Honor, on the date
18 of this spreadsheet?

19 THE COURT: Sure. What date was the spreadsheet
20 done or sent to everyone? Do you recall?

21 MR. DAVIS: This was sent, I think, in January or
22 February of 2000 ---

23 THE COURT: '16.

24 MR. DAVIS: --- '16, months before Ms. Irving hired
25 Mr. Tall. Actually, this -- no. This -- this



29

**-Defendant's March 8, 2015 email,
responding to beneficiary request for Estate
information**

PLAINTIFF'S
EXHIBIT

#2 2-17-15 PM

From: jeanne p [mailto:jep0814@yahoo.com]
Sent: Sunday, March 08, 2015 11:56 AM
To: Julie Irving
Cc: strothgeb77@gmail.com
Subject: Re: hello

HELO TO YOU: Sorry. I got Steven's email (with your input) and have been trying to get a table together to give you some details, but I have been very busy at work and have not had time to finish it. I will get it to you this week.

What I can't understand is I talked to you on the phone every other week and the last time I spoke to you we had a nice conversation about the Guardian ad Litem meeting you were about to have and I gave you some good suggestions for that meeting. You also thanked me and I've never heard from you again like I dropped off the face of the earth. Then I get this long email from Steven (with some suggestions from you I'm sure).

The reason I have not given you any details recently is because there are no details to give. There are 2 debts, i.e., the house and the equity line that need to be paid off before the estate can be settled. If it was similar to your mother's estate, the timeframe would be a year I'm sure, but that's not set in stone. With as many properties as your father had and these two debts, the one-year period does not necessarily hold true. Like you already know, I have one property on the market and it has been on the market for 2+ months. As you also know, because you are trying to sell your house, the winter months are not a good time for people to be buying anything. It's cold and people wait to come here starting around March. Then people start coming, the restaurants start hiring, the businesses open back up, etc. Steven knows that from living here for years. I have contacted John and asked me when the next units come up for lease expiration. The next one is June and I have told him to put it on the market right away at that time. There are two more in December and I have told him the same thing about those.

These two debts have to be paid off because they are the debts of the estate. There is nothing I can do about that. Your father left me in a mess with all this and I'm trying to do the best I can to resolve it. He stopped paying on his life insurance a long time ago because he said he didn't feel like paying for it anymore is what he told me so he let it go. So there is no life insurance to pay any debts. He tried to refinance the house, but Wells Fargo told him his debt to income ratio was not good so they couldn't do it.

I'm working every day, don't live an extravagant lifestyle, don't go on trips, don't go to fancy restaurants — I'm just living one day at a time like I'm supposed to. Anything I need to pay for of my own comes out of my personal account, that's the way it's always been. I have always treated all of you like my own ever since you were young and feel like you think I'm doing something wrong. I have a meeting with the lawyer on the 17th and will see what he says at that point and will let y'all know. I haven't talked to his office much because there is nothing to say. I'm waiting for the property to sell so I can pay off this debt. The \$5,000 you wanted me to give Steven for the car that he never got took \$20,000 out of the bank account.

The rents here aren't high like they are in the DC/Virginia area. I have to keep some kind of cushion in the bank in case an AC unit goes down or something else happens that needs to be fixed. I have found a plumber that does a good job and doesn't rip me off like some people. I try to keep expenses down as much as possible. I'm doing the best that I can. I found 3 letters that your dad wrote to Matt in July and August of 2013 when he was so disgusted with him. In one of the letters he mentioned about how much he helped y'all with paying for college for you and Steven and you receiving the \$10,000 a couple of years ago, how he supported Steven when he couldn't find a

JT 1
R2173

job, and how much he kept doing for things over and over for Matt and wasn't going to do it anymore. When I send you the property information next week, I'll send you a copy of the letters.

Right before he got really sick and you called that Sunday to talk to him because you weren't feeling well and he had just gone to lay down, I debated on whether to have him call you back. But I gave him the phone and you started telling him how you weren't feeling well. He had been feeling bad for a couple of days at that point and he didn't feel like talking. You got upset because you told me he wasn't interested in you and you not feeling well and you told me **YOU WERE NEVER GOING TO TALK TO HIM AGAIN AND THAT IF ANYTHING HAPPENED TO HIM YOU DIDN'T WANT ANYTHING.** You were extremely mad -- do you remember that? I do. I never told him about that because I knew it would only hurt his feelings and he wasn't trying to hurt you in any way, he was just feeling terrible at the time. Not long after that, he got worse.

So, I'm sorry I didn't respond sooner to Steven's email. I will get information together this week and send it to both of you.

TJ 2
R2174

30

**-Plaintiff's letter to Estate of February 8,
2016**

Julie Irving
157 Mattox Ave.
Colonial Beach, VA 22443

February 8, 2016

Ms. Becky Weaver, Probate Paralegal to Bret H. Davis
Davis & Boyd, LLC
1110 London Street, Suite 201
Myrtle Beach, SC 29577

Re: Estate of Donald Rothgeb

Dear Ms. Weaver:

Thanks for your last email. I've taken some time, here, to respond.

Maybe I can get the Estate to understand my position. So far, I've asked the Estate, twice, in writing, if it has any objection to allowing quarter share distributions of what remains, as assets of the Estate.

In two written responses, the Estate has offered no explanation of any objections to my proposal. The Estate has not been direct with me.

I'll try again, in this letter to make it clear:

1. I want fairness for all four Estate Beneficiaries.
2. I want the Estate, and its lawyers, to recognize and steer clear of conflicts of interest.

Even though the Estate hasn't said so, I believe that the Personal Representative does object to my idea of quarter share final distributions. If, following quarter share final distributions (distributions which will allow all Beneficiaries to have some cash), Beneficiaries want to make a play for full ownership of one property, or another, the Beneficiaries can work it out among themselves. We won't need any Estate structure, and also its added expense.

Even though the Estate hasn't said so, I believe that the Estate wants to use Estate money to cater to the Personal Representative's preferences. The meeting you're proposing for February 12 will be financed 1/2 by my brothers and me.

The custom distribution proposals you have sent to me have been crafted by the Estate, using my brothers' and my distribution assets to fund 1/2 of the work.

I don't like the idea of modifying my father's distribution plan, prior to estate closure. If, however, the Personal Representative will continue to resist my call for quarter share final distributions, will you folks, at least, consider the following:

R2176

1. Have the Estate lawyers start taking a neutral position. No longer will they give advice to the Personal Representative about how she might achieve some distribution preferences; preferences which are simply what the Personal Representative (only one of four Beneficiaries) wishes to accomplish, personally, for herself.

2. Have the Estate make substantial cash distributions to all Beneficiaries. That way, all of us have funds, where each of us can choose to seek professional advice. Also, this will eliminate the Estate continuing to use what belongs to four Beneficiaries, when it decides to take action, in favor of the Beneficiary preferences of the Personal Representative.

Please give me a prompt reply to this email. I don't think the current idea of February 12 meeting is a good one, without some fairness/conflict considerations.

Sincerely,

Julie K. Irving
Julie Irving

A

- Excerpt from February 2016 trial transcript**
- Letters of Jack Scoville dated April 8, 2015 and October 6, 2015**
- Excerpts from Defendant's May 4, 2018 Memo**
- Excerpt from June 29, 2018 hearing transcript**

A I'M WITH YOU, BUT I WAS REFERRING TO THE TIME UP TO WHEN MR. SCOVILLE WAS INVOLVED. I WANTED HIM TO SEE THE BANK STATEMENTS AND SEE THE MONEY THAT CAME IN AND THE MONEY THAT WENT OUT. I WANTED MR. SCOVILLE TO SEE WHAT HAD HAPPENED UP UNTIL THE TIME THAT HE GOT INVOLVED. I DON'T WANT TO MAKE THE COURT'S DETERMINATION FOR IT, JUDGE, AS YOU WELL KNOW.

JUDGE PADGETT: WHAT BOTHERED ME THOUGH AS YOU CAN TELL, WAS YOU MADE THE DECISION THAT MRS. SCOVILLE WAS SATISFIED WITH THE INFORMATION THAT YOU SENT IT HIM.

A HE WAS.

JUDGE PADGETT: THAT'S HEARSAY. MR. SCOVILLE HAS GOT TO BE HERE TO TESTIFY.

A OKAY.

JUDGE PADGETT: MR. BOYD, YOU NEED TO BE WRAPPING THIS UP GUYS.

MR. BOYD: YES, SIR.

Q DID YOU PROVIDE ALL THE INFORMATION HE REQUESTED?

A YES.

Q I UNDERSTAND THAT IT'S YOUR IMPRESSION AS A RESULT OF THE INTERACTION WITH MR. SCOVILLE THAT

THE QUESTION. GO AHEAD, MR. BOYD.

Q WHAT WAS YOUR IMPRESSION OF THE STATE OF THE AFFAIRS AS IT RELATED TO RELATIONS OF THE PR AND THE BENEFICIARIES AT THAT TIME WHEN MR. SCOVILLE COMPLETED HIS TASK?

A BASED ON THE LETTERS I RECEIVED FROM MR. SCOVILLE THAT'S BEEN ADMITTED INTO EVIDENCE, I THOUGHT ALL MATTERS HAD BEEN RESOLVED.

Q IN FACT, YOU AT ONE POINT DRAFT A SETTLEMENT AGREEMENT, DID YOU NOT?

A YES.

Q WILL YOU TAKE A LOOK AT THAT?

A YES. THIS IS AN AGREEMENT AMONG BENEFICIARIES UNDER SECTION 6232912.

Q DID YOU DRAFT THAT DOCUMENT TO ENCOMPASS THE TERMS OF THE DISCUSSION WITH MR. SCOVILLE?

MR. TALL: YOUR HONOR, WE ARE NOW EXAMINING THE WITNESS BASED UPON SOMETHING THAT WAS NEVER SHARED WITH ME IN DISCOVERY --

MR. BOYD: YOUR HONOR, HE'S HAD THIS DOCUMENT.

MR. TALL: LET ME TAKE A LOOK AT IT.

MR. BOYD HAS IN THE PAST INDICATED THAT THERE WERE REAMS AND REAMS OF PAPER. I

MABRY COURT REPORTING

PEPPER M. MCCARTHY (843) 957-7653

MABRYCOURTREPORTING@GMAIL.COM

R2180

AND JUST GET ON?

A --THE DATES OF THIS JANUARY 20TH, JANUARY 29TH, FEBRUARY 8TH, FEBRUARY 11TH.

Q DID THE JANUARY 29TH COMMUNICATION COME FROM YOU OR SOMEBODY ELSE IN YOUR OFFICE?

A NO. THESE ARE THE LETTERS FROM MS. IRVING. SHE IS RAPID FIRING SENDING THESE LETTERS OUT.

Q WHAT ABOUT THE E-MAIL THAT'S DATED JANUARY 29TH?

A YES. IT WAS SHOWN THAT THE PRINTOUT, THE SPREADSHEET WAS REVISED TO SHOW THE REPAIRS THAT HAD BEEN MADE, BEEN ATTRIBUTED, WHICH IS ALWAYS THE CASE. WHICH WOULD, YOU KNOW, HAVE BEEN SHOWN ON THE FINAL ACCOUNTING DOCUMENTS.

Q DID YOU REALLY INTEND THAT AS A REVISION OF THE DOCUMENTS OR HOW WOULD YOU ASSESS THAT?

A TO BE HONEST WITH YOU, THIS WAS PREPARED BY BECKY AT MY OFFICE. WE JUST WANTED TO SHOW HOW THINGS WERE GOING TO BREAK DOWN BASED ON THAT LETTER THAT WE HAD GOTTEN FROM MR. SCOVILLE. THERE WAS NO INTENT TO HIDE ANYTHING OR NOT DO ANYTHING. WE'RE TRYING TO MOVE THIS THING ALONG. WE SAID, "HERE ARE THE PROPERTIES. THESE ARE THE VALUES THAT WE HAVE GOTTEN, YOU KNOW, LET'S GET THIS RESOLVED." THERE'S BEEN A LOT OF QUESTIONS ABOUT THIS DECEMBER 10TH E-MAIL AND

MABRY COURT REPORTING

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R2181

Jack M. Scoville, Jr.
Attorney at Law
A Professional Association
1001 Front Street
Post Office Drawer 1228
Georgetown, South Carolina 29442

TELEPHONE: (843) 546-1130
FAX #: (843) 546-0726
EMAIL: jscove@aol.com

April 8, 2015

Bret H. Davis, Esquire
Davis & Boyd, LLC
P.O. Box 70517
Myrtle Beach, SC 29572

RE: The Estate of Donald Rothgeb

Dear Mr. Davis:

I have been retained by the children of Donald Rothgeb to represent them in all matters related to their father's estate. In reviewing the probate file, it appears that the Personal Representative, Mrs. Poafpybitty, has yet to file an accounting. There have been several emails from her to my clients, but this correspondence has raised more questions than it has answered.

It appears that Mrs. Poafpybitty is selling off assets of the estate to pay off the mortgages on Mr. Rothgeb's residence. While the Will states that the Personal Representative should pay all secured debts of the estate, it further states the Personal Representative has discretion in this matter. Finally, the Will specifically states that anyone taking mortgaged property is to take that property subject to the mortgage.

What is Mrs. Poafpybitty's justification for selling income producing properties to pay off these mortgages?

The second issue concerns her occupancy of the residence. Under the terms of the Will, she has only a one-quarter interest in this property. Is she paying rent to the estate for this occupancy? If not, will the children get credit in the final distribution for the rent?

The third issue concerns the liquid assets of Mr. Rothgeb at the time of his death.

JI 245

R2182

April 8, 2015
Bret H. Davis, Esquire
Page Two

He sold a condominium a few months before he died, but there is no amount shown on the Inventory and Appraisement for any cash, bank accounts, etc. Given his cash flow and the sale of the condominium a few months before his death, we find it hard to accept that he did not have substantial liquid assets at the time of his death. What was the status of his bank accounts, etc., at the date of death?

Fourth, Mrs. Poafybitty has not presented any accounting, bank statements, etc., concerning the income derived from the rental properties and the expenses of caring same during the time of the administration. The fact that she has now requested an extension to file the accounting is very troubling to us.

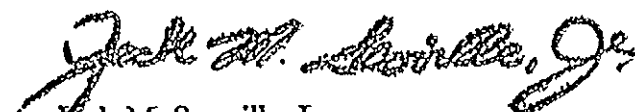
Fifth, Mrs. Poafybitty has not allowed the children access to their father's personal effects. This should be done asap.

We must insist upon an immediate accounting for this estate. If Mrs. Poafybitty has been handling the estate properly, she would have an estate account set up. The statements from this account should be easy to reproduce for our inspection. Hopefully everything is in order, and we can rapidly proceed to distributing the assets and closing the account. However, please be advised that if we have not received an accounting within ten days of the date of this letter, we intend to petition the Probate Court to relieve Mrs. Poafybitty as Personal Representative.

Please call me if you have any questions or need to discuss this matter.

Hopefully our concerns will be cleared up by Mrs. Poafybitty providing the necessary information to us in a timely fashion.

Very truly yours


Jack M. Scoville, Jr.

JMSjr/mmww

cc: Julie K. Irving
Steven Rothgeb
Donald Rothgeb

J1 246

R2183

Jack M. Scoville, Jr.
Attorney at Law
A Professional Association
1001 Front Street
Post Office Drawer 1238
Georgetown, South Carolina 29442

TELEPHONE: (843) 546-1130
FAX # (843) 546-0726
EMAIL: scorac@aol.com

October 6, 2015

Bret H. Davis, Esquire
Davis & Boyd, LLC
P.O. Box 70517
Myrtle Beach, SC 29572

RE: Real Estate Distribution
The Estate of Donald Rothgeb

PLAINTIFF'S
EXHIBIT

H3 2.17.17
PM

Dear Bret:

My clients have had time to reflect on the distribution of the estate assets. Apparently Mrs. Poafpybitty intends to keep Dr. Rothgeb's personal residence as part of her distribution. It is unfortunate that she has not included the children in the discussions about all of this because we feel that it is certainly what Dr. Rothgeb would have wanted.

The children want the following properties:

Steven: South Bay Lakes, TMS 1912801286
Julie: Deerfield Plantation, LT 489 PH11PTATMS
Matt: The house where he is now living.

I suggest we have all of these properties appraised at the expense of the estate so we will get an accurate present fair market value for distribution purposes.

Secondly, there is no reason not to distribute these properties at this time because the time for filing claims has expired and to do so will minimize future costs to the estate for maintaining these properties.

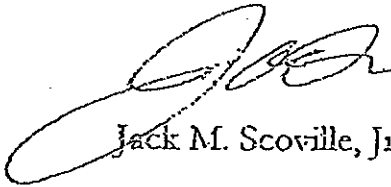
Please respond within ten days of the date of this letter so that we might move forward with winding up the estate expeditiously.

R2184

October 6, 2015
Bret H. Davis, Esquire
Page Two

With kindest personal regards, I remain

Very truly yours



Jack M. Scoville, Jr.

JMSjr/mmww

cc: Julie K. Irving
Steven Rothgeb
Donald Rothgeb

R2185

Shortly following the one year anniversary of the Decedent's passing, the Plaintiff, along with her two brothers, hired an attorney, Jack Scoville, Esquire, to represent them in connection with the Estate. After counsel for the Estate exchanged extensive and exhaustive information about all estate matters with Mr. Scoville, Mr. Scoville concluded that an action to remove the Personal Representative, which he previously threatened, was not in order (pages 60, 114, 115, and 176 of the Trial Transcript). Instead, Mr. Scoville and counsel for the Estate worked out a division of the Estate properties. See Exhibit "D", which is a letter from Mr. Scoville dated October 6, 2015 that sets out the agreement to divide the Estate assets. Counsel for the Estate recommended using the tax assessed values for the division of assets. Mr. Scoville, on behalf of the Plaintiff and her two brothers, instead wanted all estate properties to be appraised. The Defendant, through her counsel, agreed to have the properties appraised for purposes of division of the Estate assets. Mr. Scoville and counsel for the Estate then agreed on an appraiser. Thereafter, the mutually agreed upon appraiser began to appraise all the Estate properties.

For some unknown reason to the Defendant, around the time that the appraisals were finished and it came time to divide the estate properties up and make distributions to close the Estate, the Plaintiff fired Mr. Scoville and reversed her position on what the Estate had understood had been an agreement for the division of assets and a path to closure of the Estate proceedings (pages 348, 350, 351, 373, and 374 of the Trial Transcript). The Plaintiff was provided with the appraisals for the properties that she

would receive. She later requested copies of the appraisals for all the properties and was provided with those appraisals by the Defendant or counsel for the Estate.¹ Subsequent to receiving this information, the Plaintiff began insisting to the Estate's counsel that all properties be deeded equally to all four of the Estate's beneficiaries. Counsel for the Estate learned from a phone conference with the Plaintiff and from her testimony at trial that the Plaintiff was advised by someone that she could demand this action and that after such action was taken she would then be in control of the Estate assets (pages 372, 373, and 525 of the Trial Transcript). It appears that Plaintiff then sought to use this control (with her and her brother's collectively having a seventy-five (75%) percent interest in the Estate properties) to do what she wanted and not what anyone else wanted to do, with the Estate properties. The Plaintiff claimed that the reason she wanted to have all the properties deeded to all the beneficiaries was because the appraised value for one of the properties that was supposed to go to the Defendant (the marital residence) had gone down substantially since the original inventory, yet the Plaintiff failed to acknowledge that the appraised value for a property that she was to receive also went down substantially. See Exhibit "E", which is a spreadsheet discussed at trial which shows a comparison of the changes in the Estate properties' respective appraised values. Plaintiff's insistence on gaining control of the Estate is consistent with testimony from the Defendant concerning her controlling personality, her

¹ It is important to note that prior to the Plaintiff retaining the services of her current attorney, she had received all the pertinent information related to the Estate. Despite what counsel for the Plaintiff may contend, it was not ever necessary for the Plaintiff to retain her current counsel to obtain any information related to the Estate.

the trial and which indicates that Steven wanted the property that he agreed to receive as part of the agreement made by his attorney, Mr. Scoville.

Despite the overwhelming evidence that the Defendant worked in good faith to administer the Decedent's Estate in the way that the Decedent prescribed in his Will, the Court issued a ruling that is irreconcilable with the facts of the case. The ruling is also irreconcilable with the existing statutory law, the existing case law, and the plain and unambiguous terms of the Decedent's Last Will and Testament. The rogue nature of the Court's ruling is, from the Defendant's perspective, inexplicable. Not only does it misinterpret and misapply the facts in this matter, it also takes a broad leap over the time tested and predictable principles of probate law that make up our current system of estate administration in the various probate courts of South Carolina. The time tested laws of our State are indispensable in forming an anchor or basis from which not only fiduciaries, but also their legal counsel assisting them, can rely. While judges have a certain amount of discretion, they cannot, lest our entire legal system would fail, completely disregard the plain language set forth in the statutes and case law of our State. The Court's ruling in this matter has done just that; it has basically ignored all that we hold resolute in probate law and has instead imposed its own independent judgment in a manner that disregards the Defendant's testimony, the testimony of Defendant's probate counsel, the testimony of the neutral appraiser, the testimony of the Estate's CPA, the testator's intent, and the relevant existing statutes and case law.

him so he could finish the Estate tax returns.⁴ This slowed down the Estate administration. It also caused the other beneficiaries to lose losses that could have been passed through to their individual 1040 tax returns.

During the telephone conference between the Plaintiff and counsel for the Estate and his paralegal (which was recorded by the Plaintiff without consent), counsel for the Estate made just about every conceivable plea to resolve the Estate. The Plaintiff was unmoving and not interested in settling the Estate except for the one way which was for all the beneficiaries to own all the estate properties together, which was and continues to be a terrible and extremely shortsighted idea. It would cause the Defendant and Matthew Rothgeb to own their residences with three other people. It would also leave open mortgages against the properties, and it would force the Defendant and the Plaintiff and Steven to own property with Matthew who has a history of incarceration and drug abuse. It is hard to understand how the Court could surmise that such an idea is a reasonable solution, especially when the Decedent's Last Will and Testament specifically provides differently.

A quick review of the transcript of the telephone conference on February 12, 2016 between the Plaintiff and the Estate's counsel (see page 3 of the transcript of the call) shows that counsel for the Estate implored the Plaintiff to try and find a way to resolve the Estate. The Estate's counsel suggested making an "adjustment" to the proposed distributions if the Plaintiff did not like what she and her brothers had agreed to receive through their attorney, Mr. Scoville. The Plaintiff was unmoving and completely

⁴ The Plaintiff continues to refuse to provide this information

1 what you had when you went to school. We had
2 pancakes. All right. So the pancakes on the
3 side of Ms. Irving being difficult. We
4 obviously found out from her testimony that she
5 felt like she couldn't get along with Ms.
6 Poafpybitty. All right. She established that,
7 right, that she could not get along with Ms.
8 Poafpybitty. Okay. Well, I tried to get along
9 with her. And indicated in this telephone
10 transcript that I couldn't get along with her
11 and satisfy her. Okay. So, then she hires an
12 attorney, Mr. Scoville, she couldn't get along
13 with Mr. Scoville.

14 **MR. TALL:** Objection, Your Honor. There's nothing
15 in the transcript that indicates anything about
16 the relationship between Ms. Irving and Mr.
17 Scoville other than they parted company.

18 **MR. DAVIS:** Okay.

19 **THE COURT:** I understand. I understand your -- your
20 objection, but I'm gonna allow Mr. Davis to --
21 to characterize it as he sees it. Because this
22 is a lawyer's argument, this is not a testimony
23 in court.

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

25 **THE COURT:** Go ahead, Mr. Davis.



1 the responsibility in that, Your Honor. This
2 is not entirely on the PR. Frankly, this case
3 was moving along, I think with all due course
4 that could have been accomplished under the
5 circumstances when Ms. Irving retained counsel,
6 started demanding additional appraisals, and
7 I'm not gonna go back through all those
8 discussions, Bret covered them extensively, but
9 that's the issue, Your Honor. That is the
10 issue. That is where this case ran off the
11 rails. And that is not entirely on the
12 Personal Representative. How was Ms.
13 Poafpybitty supposed to respond? Was she just
14 supposed to pack up and go home, Your Honor,
15 because she had a disgruntled beneficiary that
16 was very difficult to deal with? I think under
17 the law the answer is clear. She was appointed
18 the Personal Representative by the testator,
19 not Ms. Irving. We -- yes, we have a duty of
20 good faith, fair dealing, all the things that
21 Your Honor talked about. But the inmates do
22 not run the asylum. Somebody has to be in
23 charge. And the law is clear. It's the
24 Personal Representative. Lastly, Your Honor,
25 I'll cover this point. I've understood Your



B

**-Excerpt from Defendant's May 4, 2018
Memo**

The South Carolina Probate Code includes multiple sections that provide that the legal fees incurred by the Personal Representative are an expense of the Estate.⁵ Section 62-3-720 is particularly applicable in this case. It provides:

"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."

This case is an action brought by the Plaintiff claiming that the Personal Representative took action that she should not have taken or failed to take action that she should have taken. If Section 62-3-720 does not apply in this case, then when would it apply? The answer is, essentially, never. There is ample evidence that the Personal Representative acted appropriately and in good faith in the administration of the Estate.⁶ There is also ample evidence that the Personal Representative acted appropriately in defending the action brought by the Plaintiff. There was no finding or

⁵ 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. Section 62-3-720 provides that a personal representative in prosecuting or defending an action is entitled to have her legal fees paid from estate funds.

⁶ Section 68-8-102(4) of the South Carolina Probate Code states that "'Good faith' means honesty in fact." In Delaney v. Caspro, Inc., No. 9:14-cv-4355-DCN 2015 (citing Rutherford v. Cannon, No. 8:09-cv-2137, 2010), the U.S. District Court for the South Carolina Beaufort Division, states that "although the term 'bad faith' is not defined in the Federal Rules of Civil Procedure, courts have held that the term 'bad faith' connotes an action taken without any colorable legal or factual basis." Black's Law Dictionary (Sixth Edition) provides that bad faith is "[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. It goes on, citing Stall v. Williams, Ind. App., 367 N.E.2d 1120, 1124, that [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." There was no credible evidence plead or presented at the trial in this case to indicate that the Defendant acted in bad faith under any of these definitions.

conclusion that the Personal Representative misappropriated any Estate funds, that she misrepresented any information related to the Estate, or - significantly - that she has acted in bad faith in defending this action. Therefore, as discussed herein, under unequivocal statutory law as it has been interpreted by our courts, the Defendant is entitled to have her legal fees paid in this matter. Moreover, during the pendency of the Estate administration, as the Court's file reflects, and as the testimony adduced at trial indicated, the Defendant, as Personal Representative complied with all the statutory requirements imposed upon her as the Personal Representative of the Estate

As set forth in S.C. Code Ann. 62-3-704, personal representatives are required to file the will for probate, send notice to creditors, file an inventory and appraisement, deal with creditor claims, and file estate closing documents. As the Court record reflects, the Decedent died on January 26, 2014. Thereafter, the Defendant took the following actions in compliance with her statutory requirements: 1) The Defendant filed the Decedent's Last Will and Testament with an application for probate on March 7, 2014 (with the Defendant being appointed as Personal Representative effective the same date), 2) Information for Heirs and Devisees was sent out on March 26, 2014 (with an accompanying Proof of Delivery), 3) Notice to Creditors was published on March 14, 2014, 4) an Inventory and Appraisement was filed on July 11, 2014, 5) the only creditor claim in the Estate was resolved on August 7, 2014, and 6) Estate closing documents were filed on June 3, 2016, which were later amended and filed on February 15, 2017, as requested by the Court. In summary, there are simply no requirements set

C

-Excerpt from March 2, 2018 Court Order

Personal Representative's actions, and if necessary, take corrective actions, for the protection of the Estate and its interested persons.

G. SUBSTANTIVE FINDINGS.

In its conclusions, upon review of the evidence and the facts, the Court has found the following:

1. The Decedent, Donald M. Rothgeb, loved all of the devisee/family members deeply. His clear intention was to treat all equally.
2. Though the Decedent gave his wife, Jeanne Poafpybitty, as Personal Representative, certain latitude with the division of his assets, that privilege is not absolute, especially where the Court determines, as it has in this case, that there has been an abuse or obstruction of what the Decedent had intended.
3. The Court finds, in this case, that Ms. Poafpybitty has intentionally inhibited and delayed the closing of this Estate, and unreasonably prolonged the division of assets. Though this Estate is substantial in value, the Court finds that it could have been, and should have been, settled much earlier. The concept of diligent administration supports this conclusion.
4. The Court finds Ms. Poafpybitty to have unreasonably withheld information

pertinent to the beneficiaries, and requested by them. What information was provided, was often incomplete and/or confusing, both before and after retention of counsel by the beneficiaries.

5. Based upon all of the evidence and testimony, the Court finds that Ms. Poafpybitty, a 25% beneficiary, used her position, as Personal Representative, to manipulate at least one substantial asset, if not more assets to her, using her position to unjustly enrich herself, at the expense of the other beneficiaries. The Court finds that Ms. Poafpybitty's testimony and presentations, describing what she considered to be faithful performance, were neither sincere nor credible.

6. A review of what has been presented is convincing that Ms. Poafpybitty has not acted reasonably, for the benefit of all devisees. Ms. Poafpybitty has not, in this litigation, been defending or prosecuting an action in the Estate's best interests. Ms. Poafpybitty's goal has been the surviving spouse/beneficiary using her Personal Representative status to improve her lot in the Estate. In particular, Ms. Poafpybitty's decision to launch expensive Counterclaims against Ms. Irving was a wasteful exercise of fiduciary power.

D

D

**-Excerpt from June 29, 2018 hearing
transcript**

1 to think that I would make a decision on behalf
2 of the Estate to come to trial, to come to the
3 hearing without my -- without my appraiser when
4 Ms. Irving's appraiser is gonna be here. But
5 having said that, we have tried -- I didn't
6 give Mr. Cromartie any additional work to do
7 because I didn't want to, Your Honor. I'm
8 trying to minimize the cost ultimately to this
9 Estate and to all the beneficiaries. What I
10 would say about some of the things that have
11 happened since the trial, and the reason for
12 the Motion, as Your Honor knows, there was the
13 e-mail that was forwarded by Ms. Irving the
14 Plaintiff. We didn't know about it, but it --
15 it happened and we -- we knew about it very
16 soon because the Court forwarded it to us with
17 Your Honor's stipulation that you had not read
18 it. And -- and, Your Honor, we don't -- I --
19 I -- I -- when the Court says you haven't read
20 it, I -- I don't question that, Your Honor.
21 And we are comfortable that you have not read
22 it. I would note that we never saw the
23 attachments to the actual e-mail that Ms.
24 Irving sent to the Court because when the Court
25 replied -- or I should say when Ms. Johnson



E

E

-Excerpt from March 2, 2018 Court Order

administrative efforts have been consistently diligent, prompt and have been supportive of what she believes the Estate beneficiaries have desired. At trial, Ms. Poafpybitty testified about being unaware of what reasonable grounds Ms. Irving could have had for taking the actions Ms. Irving has taken. According to Ms. Irving, these presentations by Ms. Poafpybitty have not been credible, in light of evidence provided to the Court record. Prior portions of this Order outline much of this evidence, which the Court has accepted.

2. In response to Steven Rothgeb's financial inquiries in March, 2015, Ms. Poafpybitty offered the following, in her March 8, 2015 written reply: "Anything I need to pay for my own comes out of my personal account, that's the way it's always been."⁴² Following a time when financial Estate accountings were actually produced, the devisees could see that mortgage payments, real estate tax, insurance payments and utility payments, associated with Ms. Poafpybitty's personal residence, were all borne by the Estate funds, and not personally assigned to Ms. Poafpybitty.

3. In compliance with directives of this Court, during a Motion Hearing on May

⁴² Plaintiff's Exhibit 2 (paragraph 5)

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C.R.P.

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27, 2016, Ms. Poafpybitty filed a final Estate distribution proposal, together with final accountings on June 3, 2016. Through litigation discovery, Ms. Irving inquired as to whether Ms. Poafpybitty's distribution proposals, in late 2016, included property values which had been listed in the June 3, 2016 final accountings. Rather than offer a direct and open response, to Ms. Irving's discovery request, the Estate, under Ms. Poafpybitty's direction, offered objection, claiming that Ms. Irving's request was ambiguous and unclear⁴³. No doubt, as Court presentations display, the parties have been engaged in a spirited contest. This does not, however, relieve Ms. Poafpybitty of her fiduciary duty to the Estate's interested persons. No matter what the contesting issues are, it is an exercise of bad faith for the Estate to refuse direct and transparent replies to basic Estate administration questions, especially when, as here, Ms. Poafpybitty and her team argue that property valuation and distribution authority lie solely within Ms. Poafpybitty's discretion. The subject discovery request sought, reasonably, to inquire about Ms. Poafpybitty's position for current distribution values, these being among the most contested of administration issues. Rules which support the discovery process, exist so that parties may fairly prepare for hearings and Court presentations. Following a period of litigation,

⁴³ Plaintiff's Exhibit 10

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COPG

R2202

and Mr. Burgess' December 2016 real property appraisal, did Ms. Poafpybitty form a different opinion from what the Estate had previously listed in its June 3, 2016 Court filings? Could Ms. Irving prepare for litigation on valuation issues, by learning about Ms. Poafpybitty's potentially changed position, following Mr. Burgess' work? The Estate's discovery response prevented a reasonable sharing on valuation issues. Defendants' response to Plaintiff's seventh request for Admissions was unreasonable.

4. Three days before trial, on February 14, 2017, the Estate filed a final accounting proposal, described in this Court's Order of November 10, 2017. Listed as an Estate expense was the sum of \$50,000.00 for legal services. At trial, during testimony in February 2017, Estate counsel testified that Estate legal expenses were likely in excess of \$70,000.00. Whether this calls into question, veracity of the Estate's February 14 filing, or whether this speaks to the Estate presenting large additional billings for the work of two attorneys, and at least one paralegal, who attended trial at Ms. Poafpybitty's direction, the record is not presently clear.

5. Following an October 28, 2016 communication, in Chambers, with the Court and counsel, a number of procedural issues were established, including that Thailand resident, Steven Rothgeb, could participate by phone or video conferencing, if any party wished to depose

F

**-Excerpts from June 29, 2018 hearing
transcript**

1 say to you, Your Honor?

2 THE COURT: That's not a proper thing to do is to
3 ask the Court.

4 MR. DAVIS: Okay. I won't do that again. That's
5 what it says to me, Your Honor, that he has
6 taken the time, met with the clients, and they
7 have come to some kind of an understanding or
8 some kind of an agreement. So I get this
9 letter after communications with Mr. Scoville.
10 We're like, okay. They say -- well, we did an
11 inventory based on the tax assessed value of
12 all of the properties. That was not sufficient
13 for them for distribution purposes. Mr.
14 Scoville requested an appraisal of all of the
15 properties. We said, Okay. We agreed on an
16 appraisal. The appraiser appraised all the
17 properties, all of them, same appraiser,
18 mutually agreed upon appraiser. When we got
19 the appraisals back and it was time to make
20 distributions to close the Estate in November
21 and December of 2015, Ms. Poafpybitty was ready
22 to close the Estate, Your Honor. It was Ms.
23 Irving that kept the Estate from being closed.
24 It was Ms. Irving that kept the Estate from
25 being closed. All right. Let me -- Reese, can



1 appraisals, not the Personal Representative.
2 The Personal Representative was going to use
3 the tax assessed values. So then we complied
4 with their request and now it's being held
5 against us. That's just not fair, Your Honor.
6 That's simply not fair. All right. Again,
7 he's talking about an e-mail from Steven, Mr.
8 Tall is, and -- and how Ms. -- Ms. -- he did
9 admit Ms. Poafpybitty did respond. But Ms.
10 Irving was not happy with Ms. Poafpybitty's
11 response to Steven, which is odd to counter
12 that way. And again, I ask, why didn't Steven
13 or Matt participate in the trial? Why didn't
14 they come to the trial and say whatever they
15 wanted to say? And I -- I believe they didn't
16 because they were not on the same page as Ms.
17 Irving. Of course, we've got these Affidavits,
18 which I do believe were drafted by Mr. Tall.
19 So if they really wanted to be a part of this,
20 they would have shown up for trial and they
21 would have testified, Your Honor. They did not
22 do that. Neither one of them did. Matt showed
23 up for a few minutes during trial, and he did
24 not testify. Okay. This -- this -- this is
25 the part that as a practitioner you, I get so



G

**-Excerpts from Defendant's May 4, 2018
Memo**

the trial and which indicates that Steven wanted the property that he agreed to receive as part of the agreement made by his attorney, Mr. Scoville.

Despite the overwhelming evidence that the Defendant worked in good faith to administer the Decedent's Estate in the way that the Decedent prescribed in his Will, the Court issued a ruling that is irreconcilable with the facts of the case. The ruling is also irreconcilable with the existing statutory law, the existing case law, and the plain and unambiguous terms of the Decedent's Last Will and Testament. The rogue nature of the Court's ruling is, from the Defendant's perspective, inexplicable. Not only does it misinterpret and misapply the facts in this matter, it also takes a broad leap over the time tested and predictable principles of probate law that make up our current system of estate administration in the various probate courts of South Carolina. The time tested laws of our State are indispensable in forming an anchor or basis from which not only fiduciaries, but also their legal counsel assisting them, can rely. While judges have a certain amount of discretion, they cannot, lest our entire legal system would fail, completely disregard the plain language set forth in the statutes and case law of our State. The Court's ruling in this matter has done just that; it has basically ignored all that we hold resolute in probate law and has instead imposed its own independent judgment in a manner that disregards the Defendant's testimony, the testimony of Defendant's probate counsel, the testimony of the neutral appraiser, the testimony of the Estate's CPA, the testator's intent, and the relevant existing statutes and case law.

The Court's ruling substantially missed the mark in virtually every way related to this case. More specifically, the Court ruled that Defendant took actions to favor herself over the other Estate beneficiaries and intentionally delayed the administration of the Estate. Interestingly, however, the Court did not conclude that the Defendant misappropriated any Estate assets or that she intentionally misrepresented any information related to the Estate administration, or, significantly, that she acted in bad faith in any way. Based on its findings of fact, the Court imposed extremely and unusually harsh penalties against the Defendant Personal Representative. The Court took away any commission for the Personal Representative, forced the Defendant to pay all her legal fees related not only to this action, but also legal fees incurred in the preparation of normal estate closing documents. The ruling further granted legal fees to the Plaintiff, and seeks to force the Defendant to deed all the Estate properties in equal undivided shares to all the Estate beneficiaries, and also awarded to the Plaintiff relief that she did not even seek in her Petition, the appointment of a special administrator. The removal of the Defendant as Personal Representative is, as a result, unwarranted and inconsistent with established legal principles and precedent. The Defendant Personal Representative would respectfully request that this Court reconsider its ruling and thoughtfully consider the following areas in which the Defendant believes the Court erred in this case.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE PROBATE COURT
HORRY COUNTY
CASE NO.: 2014-ES-26-00498

Julie Irving,

Plaintiff,

vs.

Jeanne Poafpybitty, Personal
Representative of the Estate of
Donald M. Rothgeb,

Defendant,

and

Jeanne Poafpybitty, Donald Matthew
Rothgeb and Steven Taylor Rothgeb,

Defendants.

MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION

PROBATE COURT
HORRY COUNTY
2018 MAY -18 PM 1:21

THIS MEMORANDUM is submitted in support of the motion for Reconsideration filed by the Personal Representative, Jeanne Poafpybitty (hereinafter "Defendant" or "Poafpybitty"), pursuant to Rule 59(e) SCRPC. The Motion for Reconsideration requests the Court to reconsider its Order dated March 2, 2018.

FACTUAL BACKGROUND

Donald M. Rothgeb (the "Decedent") died on January 26, 2014 and was survived by his wife, Jeanne Poafpybitty, and his three children from a previous marriage, Julie Irving, Matthew Rothgeb and Steven Rothgeb. After the dissolution of the Decedent's first marriage, the Defendant and the Decedent met. They began dating in or around 1978 and later married on October 3, 1989, and remained married for 25 years until the

H

**-Excerpt from Defendant's May 4, 2018
Memo**

ARGUMENT

I. The Court's Ruling is Not Consistent with the Facts Presented in this Case.

The Court ruled that the Defendant manipulated the assets and favored herself to the exclusion of the other Estate beneficiaries. This finding and conclusion is simply incorrect. As set forth in the factual background above, the Defendant consciously chose to make an informed and heartfelt decision not to take her statutorily protected elective share right as a surviving spouse. If the Defendant was so inclined to do something that was in her favor to the exclusion of the other beneficiaries, she certainly would not have forgone her right to receive a larger share of the Estate. For some reason, the Court has bought into the incorrect argument of the Plaintiff that the Defendant was on some sort of mission to mistreat the other beneficiaries. The Plaintiff was the party that took ill-advised action in this matter, and that has been corroborated by her actions when she sent *ex parte* communications to the Court (when she was represented by her current counsel) and when she posted the vulgar and offensive post on her Facebook page.

The ruling goes on to say that the Defendant withheld information from the Estate beneficiaries and sent unclear communications to them when asked for information. This is an argument that requires animation and theatrics, because it cannot be substantiated with facts.² There were countless communications between the Defendant and the Estate beneficiaries (as shown in the probably hundreds of e-mails

² It is important to note that the Plaintiff never filed a Demand for Notice in this matter as provided for under S.C. Code Ann. § 62-3-204 (1976, as amended).

I

- Excerpt from Defendant's May 4, 2018 Memo**
- Section 62-3-204 South Carolina Probate Code
and Demand form**
- Section 62-7-813 of the South Carolina Probate
Code**

ARGUMENT

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Section 62-3-204 Demand for notice of order or filing concerning decedent's estate

Any interested person desiring notice of any order or filing pertaining to a decedent's estate may file a demand for notice with the court at any time after the death of the decedent stating the name of the decedent, the nature of his interest in the estate, and the demandant's address or that of his attorney. The demand for notice shall expire one year from the date of filing with the court. The clerk shall mail a copy of the demand to the personal representative if one has been appointed. After filing of a demand, the personal representative must give a copy of the demanded filing to the demandant or his attorney. If the demand is a demand for a hearing, then the personal representative must comply with Section 62-1-401. The validity of an order which is issued or filing which is accepted without compliance with this requirement is not affected by the error, but the petitioner receiving the order or the person making the filing may be liable for any damage caused by the absence of notice. The requirement of notice arising from a demand under this provision may be waived in writing by the demandant and ceases upon the termination of his interest in the estate.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 19; 2013 Act No. 100, Section 1, eff January 1, 2014.

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF:

DEMAND FOR NOTICE IN AN ESTATE

IN THE MATTER OF:

CASE NUMBER:

(Decedent)

Decedent's Date of Death (if known):

Decedent's Last Mailing Address:

I demand receipt of a copy of the following item(s) pertaining to the above estate. By filing this *Demand for Notice, I understand that it is the responsibility of the Personal Representative to provide me with a copy of all documents he/she files in this estate. I understand this Demand shall expire one year from date of filing.

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Application for informal probate and/or informal appointment

Petition for formal probate and/or formal appointment

Information to Heirs and Devisees

Proof of Publication of Notice to Creditors

Inventory and Appraisal (including Supplementary, Amended or Corrected)

Application for Settlement

Accounting (Interim or Final)

Proposal for Distribution

Notice of Right to Demand Hearing

Any petition and corresponding order

Any hearings, Right to Appear, or Notice of Appearance

Other (specify):

Executed this ____ day of ____, 20__.

Signature:

Print Name:

Address:

Telephone (Work):

(Home):

(Cell):

Email:

Relationship to Decedent/Estate:

Attorney:

Address:

Telephone:

Email:

*A Demand for Notice requires a \$5.00 filing fee.

Section 62-7-813 Duty to inform and report

(a) Unless the terms of a trust expressly provide otherwise, while a trust is revocable the trustee's duties under this section are owed exclusively to the settlor.

(b) Unless the terms of a trust expressly provide otherwise, a trustee who accepts a trusteeship or undertakes the administration of an irrevocable trust created on or after the effective date of this article, or of a revocable trust which becomes irrevocable whether by the death of the settlor or by the terms of the trust on or after the effective date of this article, shall:

(1) within ninety days after the trustee accepts a trusteeship or undertakes administration of an irrevocable trust or a revocable trust that has become irrevocable whether by the death of the settlor or by the terms of the trust, notify the qualified beneficiaries, as defined in Section 62-7-103(12), of:

(A) the existence of the trust;

(B) the identity of the settlor or settlors;

(C) the trustee's name, address and telephone number;

(D) the right to request in writing a copy of the trust instrument; and

(E) the right to request in writing a copy of any trustee's report described in (c)(1) below;

(2) throughout the administration of the trust, keep the distributees and the permissible distributees, as defined in Section 62-7-103(21) and (25), reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, provided that the attorney-client privilege between the trustee and the trustee's attorney is not violated;

(3) upon the reasonable written request of a beneficiary, other than a qualified beneficiary, unless unreasonable under the circumstances, provide to the beneficiary a copy of the trust instrument redacted to include only those provisions of the trust that are relevant to the beneficiary's interest in the trust, as the trustee determines and, unless unreasonable under the circumstances, respond to a beneficiary's written request for information related to the administration of the trust;

(4) notify the distributees and permissible distributees in advance of any change in the method or rate of the trustee's compensation; and

(5) notwithstanding any of the above, not be required to notify any beneficiary in advance of transactions relating to the trust property.

(c) Unless the terms of a trust expressly provide otherwise, a trustee who accepts a trusteeship or undertakes the administration of an irrevocable trust created on or after the effective date of this article, or of a revocable trust which becomes irrevocable on or after the effective date of this article, shall:

(1) have a continuing duty to:

(A) keep the distributees and permissible distributees, or other qualified beneficiaries who request information in writing, reasonably informed as to the administration of the trust; and

(B) send annually, and upon the termination of the trust, a written report of the trust property which may be in any format which provides the distributees and permissible distributees, or other qualified beneficiaries who have requested in writing, with information necessary to protect their interests. The report may include a copy of the fiduciary income tax return, or copies of bank or brokerage statements, or an informal list of assets and if feasible, the market values of those assets, the liabilities, the receipts and the disbursements, including the source and amount of the trustee's compensation;

(2) upon resignation of the trustee and unless a cotrustee remains in office, send a written report as described in (c)(1) to the distributees and permissible distributees; and in the case of the death or incapacity of a trustee, the report may be sent by the trustee's personal representative, conservator or guardian.

(d) To the extent that there is no conflict of interest, the trustee's duties to inform and report under subsections (b) and (c) are deemed satisfied if the information and report are given to the beneficiary's representative as described in Sections 62-7-302 through 62-7-305.

(e) Any distributee or permissible distributee may waive the right to a trustee's report and other information described under this section and, with respect to future reports and other information, withdraw a waiver previously given.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

J

**-Excerpt from Defendant's May 4, 2018
Memo**

**-Section 62-3-1001 South Carolina Probate
Code**

between the parties). There were also numerous communications between the Plaintiff's first lawyer and counsel for the Estate and later between the Plaintiff and the Estate counsel. It took great hyperbole and animation for counsel for the Plaintiff to make the Court believe that effective and numerous communications between the parties had not taken place. It was not that communications did not take place; it was that the communications were at times not what the Plaintiff wanted to hear. It is also important to note that the Plaintiff and her brothers were represented together by the first lawyer and that only the Plaintiff (without her brothers) hired the new lawyer. This indicates that it was the Plaintiff alone that was causing the problems.

The ruling also contends that the Defendant intentionally delayed the administration of the Estate. This assertion is one of the most confusing of them all. The facts indicate just the opposite.³ The Defendant was prepared to distribute the Estate assets and close the Estate in November of 2015, which is when the appraisals that the Plaintiff's first counsel insisted on had been completed. It was the Plaintiff herself that keep that from happening. The Plaintiff is solely responsible for the Estate not closing, not the Defendant. Her litigation has now caused the Estate to remain open for two (2) more unnecessary years, not to mention the time that will be involved in any appeals in this matter. Moreover, there was clear testimony from Clark Parker, CPA during the trial that the Plaintiff flatly refused to provide her social security number to

³ It is important to note that the Plaintiff never filed any action pursuant to S.C. Code Ann. § 62-3-1001 (1976, as amended), which is customary if a beneficiary is concerned that a personal representative is not fulfilling their duties and filing the required probate filings.

Section 62-3-1001 Required filings with court; petition for order compelling personal representative to perform duties; court orders

(a) Within the later of: (i) the expiration of the applicable time limitation for any creditor to commence a proceeding contesting a disallowance of a claim pursuant to Section 62-3-806 (a); (ii) the time when all legal proceedings commenced for allowance of a claim have ended in accordance with Sections 62-3-804 and 62-3-806; and (iii) if a state or federal estate tax return was filed, within ninety days after the receipt or a state or federal estate tax closing letter, whichever is later, a personal representative shall file with the court:

(1) a full accounting in writing of his administration, unless the accounting is waived pursuant to subsection (e);

(2) a proposal for distribution of assets not yet distributed, unless the proposal for distribution of assets is waived pursuant to subsection (e);

(3) an application for settlement of the estate to consider the final accounting or approve an accounting and distribution and adjudicate the final settlement and distribution of the estate; and

(4) proof that a notice of right to demand hearing and copies of the accounting, the proposal for distribution, and the application for settlement of the estate have been sent to all interested persons including all creditors or other claimants of whom the personal representative is aware whose claims are neither paid nor barred, unless the notice of right to demand hearing is waived pursuant to subsection (e).

(b) If the personal representative does not timely perform his duties pursuant to subsection (a), and all interested persons have not waived the requirement pursuant to subsection (e), an interested person may petition for an order compelling the personal representative to perform his duties pursuant to subsection (a). After notice and hearing in accordance with Section 62-1-401, the court may issue an order requiring the personal representative to perform his duties pursuant to subsection (a).

(c) After thirty days from the filing by the personal representative of proof that a notice of right to demand hearing has been sent to all persons entitled to the notice pursuant to subsection (a), or at any time after the filing of the application of settlement if notice of right to demand hearing has been waived pursuant to subsection (e), the court may enter an order or orders approving settlement and directing or approving distribution of the estate, terminating the appointment of the personal representative, and discharging the personal representative from further claim or demand of any interested person. However, if an interested person files with the court a written demand for hearing within thirty days after the personal representative files proof that a notice of right to demand hearing has been sent

to all persons entitled to the notice pursuant to subsection (a), the court may enter its order or orders only after notice to all interested persons in accordance with Section 62-1-401 and hearing.

(d) If one or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding, the court, on proper petition for an order of complete settlement of the estate pursuant to this section, and after notice of hearing to the omitted or unnotified persons and other interested parties determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of the new proofs. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy proceeding constitutes prima facie proof of due execution of a will previously admitted to probate, or of the fact that the decedent left no valid will if the prior proceedings determined this fact.

(e) Notwithstanding the provisions of this section, a personal representative shall not be required to file an accounting in writing of his administration, a proposal for distribution of assets not yet distributed, or a notice of right to demand hearing if and to the extent these filings are waived by all interested persons.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 46; 1990 Act No. 521, Section 61; 1991 Act No. 143, Section 1; 1997 Act No. 152, Section 18; 2010 Act No. 244, Section 19, eff June 7, 2010; 2013 Act No. 100, Section 1, eff January 1, 2014.

K

**-Section 62-3-704 and Section 62-7-706 of the
South Carolina Probate Code**

K

Section 62-3-704 Personal representative to proceed with court sanction

A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate under the supervision of the court, as follows:

(a) Immediately after his appointment he shall publish the notice to creditors required by Section 62-3-801.

(b) Within ninety days after his appointment he shall file with the court the inventory and appraisal required by Section 62-3-706.

(c) Upon the expiration of the relevant period, as set forth in Section 62-3-807, the personal representative shall proceed to allow or disallow claims and pay the claims allowed against the estate, as provided in Section 62-3-807.

(d) Upon the expiration of the relevant period, as set forth in Section 62-3-1001, the personal representative shall file the accounting, proposal for distribution, petition for settlement of the estate, proofs required by Section 62-3-1001, and proof of publication of notice to creditors.

(e) Within the time set forth in Section 62-3-806(a), serve upon all claimants a notice stating that their claim has been allowed or disallowed pursuant to that section.

(f) The time periods stated herein for completing the above requirements are not intended to supplant any other time periods stated elsewhere in this Code. The court may on its own motion, or on the motion of the personal representative or of any interested person, extend the time for completing any of the requirements of administration contained in Article 3 [Section 62-3-1001, et seq.] including any of the above requirements, and especially including the requirement to account, under Section 62-3-1001, in cases of estates which remain significantly unadministered as of the expiration of the relevant time period, either as to the marshalling of assets or as to the allowance of claims.

(g) If a personal representative or trustee neglects or refuses to comply with any provision of Section 62-3-706 he is subject to the contempt power of the court. The probate court, after a hearing and any notice the court may require, may issue its order imposing the sentence, fine, or penalty as it sees fit and remove the personal representative and appoint another personal representative.

HISTORY: 1986 Act No. 539, Section 1; 1987 Act No. 171, Section 26; 1990 Act No. 521, Section 45; 1993 Act No. 181, Section 1608; 2013 Act No. 100, Section 1, eff January 1, 2014.

Effect of Amendment

The 2013 amendment, in subsection (c), inserted "allow or disallow claims and"; in subsection (d), substituted "accounting" for "account"; added subsection (e), relating to Section 62-3-806, and redesignated the remaining subsections accordingly; and rewrote subsection (g).

Section 62-7-706 Removal of trustee

(a) For the reasons set forth in subsection (b), the settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

(1) the trustee has committed a serious breach of trust;

(2) lack of cooperation among cotrustees substantially impairs the administration of the trust;

(3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under Section 62-7-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

HISTORY: 2005 Act No. 66, Section 1; 2013 Act No. 100, Section 2, eff January 1, 2014.

L

-Excerpt from March 2, 2018 Court Order

**-Jack Scoville letter to Estate of October 6,
2018**

3. A proposal in Mr. Scoville's October 6, 2015 letter was accepted by the Estate. All of the Decedent's real properties would be professionally appraised²⁰. Presumably, the new appraisals would assist with final estate distributions.

4. The Court has reached the following findings of fact about the proposal \ contained in Mr. Scoville's October 6, 2015 letter:

a. Mr. Scoville's letter proposal does not establish that whatever the result of upcoming real property appraisals, all parties would be bound, without review or question, by the specific appraisal results.

b. Mr. Scoville's letter proposal does not include any resolution of Estate administration issues, such as proper Estate accountings, proper Estate expenses and Personal Representative compensation.

c. Items 4. a. and 4. b., above, are particularly important, as, from time to time in Court proceedings, Ms. Irving has been criticized by the Estate for not settling matters and not following through with proposals which, the Estate asserts, had their source from Ms. Irving's own counsel, Mr. Scoville.

²⁰ Plaintiff's Exhibit 3 (third paragraph)

d. The Court finds that nothing contained in Mr. Scoville's letter of October 6, 2015, gives evidence of an Estate settlement agreement. Any hostility shown by the Estate towards Ms. Irving, because she continued to question appraisal values, Estate accountings, Estate expenses and proposals for fiduciary compensation, is an unjustified response to inquiries of an Estate's interest party.

5. A trial exhibit dated December 9, 2015 displays that Ms. Poafpybitty, through her attorneys, forwarded to Ms. Irving a proposal for the distribution of Estate real properties²¹. Mr. Scoville had been disengaged by the Decedent's children at this time, so the Estate was free to communicate directly with Ms. Irving. Included in the Estate's proposal was that Ms. Poafpybitty receive the Decedent's last residence, at a value of \$95,000.00²². This figure is less than half of the residence value listed in two sworn inventory forms, previously filed with the Court by Ms. Poafpybitty.

6. Some values for Estate real properties on Ms. Poafpybitty's distribution proposal, other than the Decedent's last residence, also differed from the values presented on the Estate's filed inventories. According to Court presentations, all of the differing values were

²¹ Plaintiff's Exhibit 9

²² Plaintiff's Exhibit 9

Jack M. Scoville, Jr.
Attorney at Law
A Professional Association
1001 Front Street
Post Office Drawer 1238
Georgetown, South Carolina 29442

TELEPHONE: (843) 546-1130
FAX # (843) 546-0726
EMAIL: scorac@aol.com

October 6, 2015

Bret H. Davis, Esquire
Davis & Boyd, LLC
P.O. Box 70517
Myrtle Beach, SC 29572

RE: Real Estate Distribution
The Estate of Donald Rothgeb

PLAINTIFF'S
EXHIBIT

H3 2.17.17
PM

Dear Bret:

My clients have had time to reflect on the distribution of the estate assets. Apparently Mrs. Poafpybitty intends to keep Dr. Rothgeb's personal residence as part of her distribution. It is unfortunate that she has not included the children in the discussions about all of this because we feel that it is certainly what Dr. Rothgeb would have wanted.

The children want the following properties:

Steven: South Bay Lakes, TMS 1912801286
Julie: Deerfield Plantation, LT 489 PH11PTATMS
Matt: The house where he is now living.

I suggest we have all of these properties appraised at the expense of the estate so we will get an accurate present fair market value for distribution purposes.

Secondly, there is no reason not to distribute these properties at this time because the time for filing claims has expired and to do so will minimize future costs to the estate for maintaining these properties.

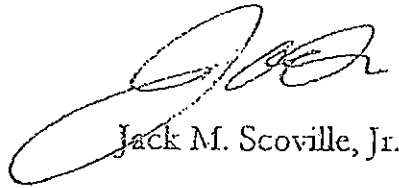
Please respond within ten days of the date of this letter so that we might move forward with winding up the estate expeditiously.

R2230

October 6, 2015
Bret H. Davis, Esquire
Page Two

With kindest personal regards, I remain

Very truly yours

A handwritten signature in dark ink, appearing to be "JMS", written over the typed name.

Jack M. Scoville, Jr.

JMSjr/mmww

cc: Julie K. Irving
Steven Rothgeb
Donald Rothgeb

R2231

M

-Excerpt from May 27, 2016 hearing transcript

-Excerpt from June 29, 2018 hearing transcript

-Excerpt from March 2, 2018 Court Order

1 JUDGE: Thank you, Mr. Tall. All right.

2 Gentlemen, Mr. Davis or Mr. Boyd, which one would
3 like to make the response?

4 MR. BOYD: Your Honor, I'll respond on behalf
5 of the respondent.

6 JUDGE: That will be fine, Mr. Boyd.

7 MR. BOYD: Your Honor, with the Court's
8 approval, I'll just argue from counsel table.

9 JUDGE: That will be fine.

10 MR. BOYD: Your Honor, there are quite a few
11 things that I just love. I love lawyers that make our
12 lives as lawyers more difficult than they have to be.
13 And I think a lot of what's going on here today, Your
14 Honor, is making things more difficult than they have
15 to be. Frankly, there's been a lot that has been said,
16 Your Honor. I looked at -- let me just say, I think there
17 is -- most of what is raised in the motion, we can
18 resolve, and in fact, we basically don't oppose, Your
19 Honor, as we discussed in chambers before the hearing.
20 But as I reviewed Mr. Tall's motion and attempted to
21 discuss it with him, frankly, there's no cite to the
22 statute. There's no cite to statute authority or case law,
23 Your Honor, that gives this Court the authority to -- I'm
24 not sure what Mr. Tall means when he asks for my
25 client to set aside her role as PR and act as an

1 individual. I don't know of any precedent or any
2 authority that would give the Court the opportunity to
3 order that, Your Honor. The fact is, she is the PR, and
4 I've seen nothing in this file -- and the Court can
5 review the file, certainly; the Court has the file before
6 it -- that would justify any sort of restraint on this PR
7 or any sort of -- any sort of other sanction to be
8 imposed upon her at this time. My client's first desire -
9 - and she does have this discretion under the will, Your
10 Honor, and I think the will was written the way it was
11 for a reason, Your Honor. It's not language that we
12 typically see. It obviously is there for a reason, Your
13 Honor. Unfortunately, the decedent's not here to
14 testify. We don't know exactly why he put that
15 language in there, but the will says what it says. My
16 client's first intent was to simply retain the residence
17 that she was residing in, to have Matt, the -- one of the
18 decedent's children, to retain the property that he was
19 residing in, and to sell the balance of the properties and
20 distribute the proceeds. That was not acceptable. Then
21 we received a proposal from the prior attorney who
22 represented the petitioner, Mr. Jack Scoville. We were
23 agreeable to that.

24 MR. TALL: Your Honor, I'm going to object. If
25 you don't have something in the record, I don't want

1 benefit that another beneficiary received. So
2 that's the best he can come up with, that the
3 reason that she breached her fiduciary duty,
4 then I can't see how the Court can find that
5 she acted in bad faith. That's simply not
6 enough. And the overriding question that I
7 would want to ask the Court and Mr. Tall is
8 what Statute section did she violate? You
9 know, we've got a Probate Code, and I don't --
10 we've got sort of like our Bible for Probate
11 Attorneys we go by. We -- we've got a Personal
12 Representative and we've got to explain to them
13 how to administer an Estate. And we've got
14 case law and we've got Statutes. What he
15 relies on is in the -- I'm trying to write down
16 what he said. I think he said implicit --
17 something an implicit rule in the Probate Code
18 of the way you deal with beneficiaries. That
19 -- that -- how can a Personal Representative
20 comply with something that they don't even know
21 what it says? So he's -- the best he's got is
22 an implicit rule in the Probate Code, we don't
23 have a specific Statute section. We've got
24 manipulation of a residence and her being unfit
25 that she'd been a resident in for 20 years



prior to the May 27, 2016 hearing. On the Personal Representative's behalf, no responses to Plaintiff's Motion, including no opposing affidavits, have been filed.

Plaintiff asked, at hearing, that her affidavit and two other sworn affidavits, timely submitted on her behalf, be recognized as uncontested. Counsel for the Personal Representative argued that his client has acted properly in the past, and that the Personal Representative agrees to treat all beneficiaries fairly. The Personal Representative also has no objection to a prompt closure of Estate administration.

Among the Personal Representative's arguments, which oppose Plaintiff's Motion, is her reference to Item IV of the Decedent's March 16, 2011 will. In this item, the will provides the Personal Representative with "sole discretion" to designate the Estate's real and personal property which will comprise shares of equal value for the four (4) equal beneficiaries. This provision, the Personal Representative asserts, permits her past actions in administration, and permits her proposed future actions to specifically distribute Estate assets, as she considers them to be appropriate.

In her Motion and Complaint, Plaintiff seeks prompt Estate closure, and the avoidance of potentially conflicting interests. Plaintiff seeks an up to date financial accounting, and an Order temporarily restricting the Estate's further expenditures and distributions.

At hearing, the Estate's counsel argued that there exists no authority for the Court to take the actions which Plaintiff seeks. Section §62-3-703 of the South Carolina Probate Code, requires a Personal Representative to act expeditiously and efficiently in administering Estate matters, consistent with the best interests of the Estate and its successors (beneficiaries). Section 62-3-704 (d) speaks of court supervision of a Personal Representative's duties, and §62-3-1001 (b) permits interested parties, such as Plaintiff, to seek judicial assistance in compelling proper

action of the Personal Representative. Section 62-3-703 also describes §62-7-804 of our Trust Code, where fiduciaries are instructed to conduct business as a prudent person would. Section 62-7-803 of the South Carolina Trust Code codifies a basic consideration, which this Court finds applicable to estates, that fiduciaries must act with impartiality, giving due regard to the respective interests of several beneficiaries. This provision is ever more important, when the fiduciary is also one of the several beneficiaries.

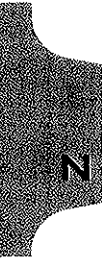
Whether or not the Personal Representative's embrace of a new residence appraisal is proper, the result does conflict, significantly, with prior estate filings, and the requirements of Section 62-3-708 of the South Carolina Probate Code, describing supplemental/corrective inventories, have not been observed.

Notwithstanding the language of Item IV of the Decedent's will, which grants the Personal Representative discretionary distribution authorities, the Court recognizes that the rights of Estate beneficiaries, and the requirements of Court administration, call out for prompt and careful action in this case. With the approach of nearly two and a half years of administration, there is no reason to further delay the proper closure of this Estate. A final accounting and distribution of remaining Estate assets, now, and in kind, is not contrary to any instructions from the Decedent. Whatsmore, all parties now appear to agree about achieving Estate termination.

Potentially, there exists continuing financial contests among the parties. The Court is satisfied that the best way to resolve any such contests is among the beneficiaries, themselves. Ms. Poafpybitty's further participation, both as beneficiary and as estate administrator, runs the risk of expensive conflicting interest, which, at this late date, and with this Estate's history, will not serve the best interests of all, and will not further any reasonable goal of the Decedent's testamentary instructions. Specifically, the Court has not found, in Item IV of the Decedent's

N

-Excerpt from June 29, 2018 hearing
transcript



1 specifically, which I will proffer, but I won't
2 refer to them specifically. They had
3 countless, countless communications, Your
4 Honor, phone calls, texts, e-mails, a lot of
5 which was presented at trial. Now, during the
6 trial Mr. Boyd held up a large binder, a 3-inch
7 binder, and said we have communications, Your
8 Honor. We made a technical mistake. We
9 believe the Court understood how what we
10 believed were preposterous the action of the
11 Plaintiff was. So we didn't feel it necessary
12 to introduce 100 or 200 exhibits of evidence of
13 communication. Obviously, that turned out to
14 be a tactical mistake. We also let up on Ms.
15 Irving out of respect for her, which turned out
16 to be a tactical mistake, Your Honor, because
17 the Court was not able to see what we believe
18 is the whole and true picture. We did that.
19 We took the high road out of respect for her
20 and it came back and did not serve us well.
21 Nonetheless, we're gonna -- we're gonna move
22 forward. To illustrate the relationship
23 between Ms. Poafpybitty and one of the
24 children, Steven, he lived there nine -- for
25 nine months after the death of his father. It



O

-Excerpt from March 2, 2018 Court Order

4. Regarding payment of her own legal expenses and costs, Ms. Irving has asked for these to be assessed, solely against Ms. Poafpybitty's Estate distribution share. As set forth, below, the Court has decided to have the Estate, itself, pay these expenses and costs. This means that the distribution shares of all devisees (including Ms. Irving) will be assessed with some of what Ms. Irving has expended for legal services.

5. In reaching its decision, the Court has exercised broad discretion, and has considered that, notwithstanding the Court's own findings of improper conduct by Ms. Poafpybitty, there has been some measure of service provided to the Estate. In this case, while the Court has authority to issue a decision with terms that are much more punitive to the Defendants than this decision provides for, the Court is satisfied that it has struck a proper balance.

I. CERTAIN ITEMS WHICH THE COURT IS AWARE OF.

So as to be clear on the issues, the Court lists, here, its awareness of the following issues that were highlighted in Ms. Poafpybitty's defense:

1. Ms. Poafpybitty, at one point during administration, decided to accept the

quarter-share devise which her husband provided for her under his Will. She decided not to pursue an Elective Share of a surviving spouse, which could have secured a one-third share distribution.

2. Ms. Poafpybitty has claimed survivorship status for a financial account of Donald M. Rothgeb in the amount of \$63,374.80. Funds from this survivorship account were made available, by Ms. Poafpybitty through loan/advancement to the Decedent's relatively illiquid Estate, during the first part of Estate administration, and then were reimbursed to Ms. Poafpybitty.

3. At Trial, Respondent Matthew Rothgeb did not testify in support of his 2016 affidavit, which affidavit was examined during the May 27, 2016 Motion Hearing. Such affidavit claimed that Ms. Poafpybitty had actively mislead Matthew Rothgeb about the sale of Estate real properties. At trial, Ms. Poafpybitty denied the claim.

4. Throughout Estate administration, Ms. Poafpybitty has permitted Respondent Matthew Rothgeb to continue residing in a modest home owned by the Decedent, and Ms. Poafpybitty did not require Matthew Rothgeb to pay any rental sum to the Estate for this privilege. No party has raised objection to this matter.

P

-Excerpt from March 2, 2018 Court Order

P

pertinent to the beneficiaries, and requested by them. What information was provided, was often incomplete and/or confusing, both before and after retention of counsel by the beneficiaries.

5. Based upon all of the evidence and testimony, the Court finds that Ms. Poafpybitty, a 25% beneficiary, used her position, as Personal Representative, to manipulate at least one substantial asset, if not more assets to her, using her position to unjustly enrich herself, at the expense of the other beneficiaries. The Court finds that Ms. Poafpybitty's testimony and presentations, describing what she considered to be faithful performance, were neither sincere nor credible.

6. A review of what has been presented is convincing that Ms. Poafpybitty has not acted reasonably, for the benefit of all devisees. Ms. Poafpybitty has not, in this litigation, been defending or prosecuting an action in the Estate's best interests. Ms. Poafpybitty's goal has been the surviving spouse/beneficiary using her Personal Representative status to improve her lot in the Estate. In particular, Ms. Poafpybitty's decision to launch expensive Counterclaims against Ms. Irving was a wasteful exercise of fiduciary power.

Q

-Excerpt from March 2, 2018

H. SOME MEASURE OF RESTRAINT IN RULING AGAINST DEFENDANTS.

In exercise of its discretion, the Court observes, that while it has ruled substantially in favor of Ms. Irving's Complaint, the following is a list of items desired by Ms. Irving, but not provided for in this Order:

1. Seeking sanctions against the Estate's counsel, Ms. Irving has claimed that counsel violated this Court's Order of June 13, 2016, by accessing tens of thousands of dollars in additional legal expenses, and in failing to disclose these expenditures, by being improperly selective in the Estate's disclosure of financial records, when these records were requested by Ms. Irving.

2. Ms. Irving has sought some form of compensation to the Estate, associated with Ms. Poafpybitty's continued, and largely exclusive, rent-free residence in a property where the Estate has, since 2014, paid for mortgage servicing, real estate tax, insurance and utilities.

3. Ms. Irving may be concerned about the Court approving all payments for estate legal services from 2014 until May 2016. During this period, Ms. Irving believes she has identified how Estate counsel have been assisting Ms. Poafpybitty, while Ms. Poafpybitty has been engaged in fiduciary misconduct.

4. Regarding payment of her own legal expenses and costs, Ms. Irving has asked for these to be assessed, solely against Ms. Poafpybitty's Estate distribution share. As set forth, below, the Court has decided to have the Estate, itself, pay these expenses and costs. This means that the distribution shares of all devisees (including Ms. Irving) will be assessed with some of what Ms. Irving has expended for legal services.

5. In reaching its decision, the Court has exercised broad discretion, and has considered that, notwithstanding the Court's own findings of improper conduct by Ms. Poafpybitty, there has been some measure of service provided to the Estate. In this case, while the Court has authority to issue a decision with terms that are much more punitive to the Defendants than this decision provides for, the Court is satisfied that it has struck a proper balance.

I. CERTAIN ITEMS WHICH THE COURT IS AWARE OF.

So as to be clear on the issues, the Court lists, here, its awareness of the following issues that were highlighted in Ms. Poafpybitty's defense:

1. Ms. Poafpybitty, at one point during administration, decided to accept the

conclusion that the Personal Representative misappropriated any Estate funds, that she misrepresented any information related to the Estate, or – significantly – that she has acted in bad faith in defending this action. Therefore, as discussed herein, under unequivocal statutory law as it has been interpreted by our courts, the Defendant is entitled to have her legal fees paid in this matter. Moreover, during the pendency of the Estate administration, as the Court's file reflects, and as the testimony adduced at trial indicated, the Defendant, as Personal Representative complied with all the statutory requirements imposed upon her as the Personal Representative of the Estate

As set forth in S.C. Code Ann. 62-3-704, personal representatives are required to file the will for probate, send notice to creditors, file an inventory and appraisal, deal with creditor claims, and file estate closing documents. As the Court record reflects, the Decedent died on January 26, 2014. Thereafter, the Defendant took the following actions in compliance with her statutory requirements: 1) The Defendant filed the Decedent's Last Will and Testament with an application for probate on March 7, 2014 (with the Defendant being appointed as Personal Representative effective the same date), 2) Information for Heirs and Devisees was sent out on March 26, 2014 (with an accompanying Proof of Delivery), 3) Notice to Creditors was published on March 14, 2014, 4) an Inventory and Appraisal was filed on July 11, 2014, 5) the only creditor claim in the Estate was resolved on August 7, 2014, and 6) Estate closing documents were filed on June 3, 2016, which were later amended and filed on February 15, 2017, as requested by the Court. In summary, there are simply no requirements set

forth in our Probate Code that the Defendant Personal Representative has not complied with.

IV. Court's Ruling Wrongfully Removed Commission for Personal Representative.

As ample testimony revealed during the trial of this matter, the Personal Representative has been consumed with the administration of this Estate for several years now. The Personal Representative was charged with numerous complex and challenging tasks in her administration of this Estate, having to rescue multiple distressed properties within the Estate that had not been adequately maintained by the Decedent during his lifetime, and deal not only with a multitude of tenant issues and requests related to the Estate's properties, but also with the numerous and oftentimes unreasonable requests and demands of the Plaintiff. If anything, the Personal Representative should be entitled to additional compensation for the extraordinary services that she has been required to provide in this Estate administration. Rather, the Court has elected to reduce the Personal Representative's Commission to \$10,000 and pay the balance of the commission to the other devisees. This would have the net effect of reducing the Personal Representative's compensation in this matter for her service to zero, and the Defendant Personal Representative does not believe that such a result is justified or warranted, or that such a harsh result is consistent with the controlling case law on this issue in South Carolina.⁷

⁷ The Court cited Sullivan v. Brown (In re Estate of Kay), 418 S.C. 400, 792 S.E.2nd 907 (S.C. App., 2016) in its e-mail letter ruling of [date]. However, in the Sullivan case the court awarded a commission of ten (10%) percent, which is twice the customary amount. The Court in this case

There is no credible evidence in the record that indicates that the Defendant failed to perform any statutorily required step in this Estate. There is also no credible evidence that the Defendant has misappropriated any Estate asset or committed any form of maladministration or fraud.

Here, the Court has provided for the appointment of a special administrator without evaluating testimony related to roadblocks and setbacks caused by the Plaintiff through her refusal to communicate, her rejection of all proposed distributions of Estate property, and her inappropriate efforts to influence the Court. The Plaintiff, not the Defendant, repeatedly inhibited and delayed the closing of this Estate, by failing or refusing to cooperate with the Personal Representative. The Plaintiff has engaged in unsolicited and *ex parte* communications with the Court, has refused to accept distribution of Estate assets in accordance with the decedent's Will, and has refused to accept alternative distribution scenarios presented by the Personal Representative. Various aspects of the testimony presented, and in particular, the telephone call recording made by the Plaintiff and played by the Personal Representative's counsel, firmly establish the harsh and adversarial nature of the Plaintiff, and the difficulty that the Personal Representative has experienced in dealing with the Plaintiff's confrontational and strong willed personality.

Plaintiff's litigious nature has further delayed the resolution of open issues in this Estate and the final distribution of the Estate's assets. These proceedings were

R

**-Excerpt from June 29, 2018 hearing
transcript**

R

1 specifically, which I will proffer, but I won't
2 refer to them specifically. They had
3 countless, countless communications, Your
4 Honor, phone calls, texts, e-mails, a lot of
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19 We took the high road out of respect for her
20 and it came back and did not serve us well.
21 Nonetheless, we're gonna -- we're gonna move
22 forward. To illustrate the relationship
23 between Ms. Poafpybitty and one of the
24 children, Steven, he lived there nine -- for
25 nine months after the death of his father. It



S

-Excerpt from February 2017 trial transcript

JUDGE PADGETT: HOW IS MY COURT
REPORTER?

COURT REPORTER: I'M FINE.

JUDGE PADGETT: MR. BOYD, DO YOU INTEND
TO CALL MR. DAVIS BACK?

MR. BOYD: I WILL RECALL MR. DAVIS
BRIEFLY. WE WOULD LOVE TO FINISH TODAY,
YOUR HONOR. MR. DAVIS IS FADING FAST.

JUDGE PADGETT: I UNDERSTAND. BUT YOU
CAN'T SAY THAT I HAVE INHIBITED YOU FROM
NOT FINISHING TODAY. I DON'T KNOW HOW
LONG MR. TALL WANTS TO EXAMINE MR. DAVIS
AGAIN, BUT MAYBE NOT? LET'S GO FORWARD.
YOU SAY YOU'VE GOT ABOUT 15 MINUTES?

MR. TALL: YES, YOUR HONOR.

JUDGE PADGETT: IT'S 5:05 NOW FOR THE
RECORD.

CROSS-EXAMINATION BY MR. TALL:

Q MS. JENE, WHO IS IT THAT TOLD YOU COULDN'T SELL
ANY MORE REAL PROPERTY WHEN MR. SCOVILLE MADE AN
APPEARANCE?

A I UNDERSTAND IT WAS MR. SCOVILLE THAT DECIDED
THAT, YOU KNOW, EVERYTHING SHOULD BE ON HOLD AND
I SHOULDN'T DO ANYTHING ELSE. I BELIEVE IT CAME
FROM HIM.

A ABSOLUTELY NOT. I'M SO WORRIED ABOUT DOING THINGS LIKE THAT I WAS PULLING BACK. SHE GOT ME ON GUARD FROM THE SECOND THE CALL STARTED AND I WAS LIKE, OKAY. I SAID, SIT BACK AND TAKE A DEEP BREATH AND JUST TAKE IT EASY. TALK THOUGH IT AND SEE IF WE CAN WORK SOMETHING OUT. BUT, NO, ABSOLUTELY NOT. I WASN'T TRYING TO BULLY HER. I FELT LIKE SHE WAS TRYING TO BULLY MS. POAFPYBITTY.

Q BRET, IS THERE ANYTHING ELSE THAT YOU WANT TO SHARE WITH THE COURT THIS EVENING --

A NO.

Q -- ABOUT YOUR EFFORTS TO ADMINISTER THIS ESTATE WITH THE PR?

A NO. I THINK WE HAVE HIT THESE THINGS PRETTY GOOD. I KNOW THE JUDGE IS READY TO GO.

MR. BOYD: NO FURTHER QUESTIONS, YOUR HONOR.

MR. TALL: I HAVE A COUPLE IF I MAY.

CROSS EXAMINATION BY MR. TALL:

Q MR. DAVIS, WOULD YOU AGREE THAT THE FOUR BENEFICIARIES OF THIS ESTATE CAN BE REFERRED TO AS DEVISEES?

A RESIDUARY DEVISEES.

Q THEY ARE DEVISEES, ARE THEY NOT?

A I WANT TO APOLOGIZE TO YOU. I'M NOT TRYING TO DO YOUR JOB, JUDGE. BRET DAVIS' OPINION IS THAT THE PR HAS NOT DONE ANYTHING WRONG. THAT'S BRET'S OPINION.

JUDGE PADGETT: YOU HAVE MADE THAT CLEAR.

A I DON'T WANT TO TRY TO IMPOSE THAT ON YOU, JUDGE. I'M HOPING YOU SEE IT THE SAME WAY, BUT I DON'T WANT TO UPSET THE COURT.

JUDGE PADGETT: I UNDERSTAND. THANK YOU, MR. DAVIS. ANY OTHER WITNESSES, MR. BOYD?

MR. BOYD: YOUR HONOR, WE REST.

JUDGE PADGETT: ANYTHING IN REPLY, MR. TALL?

MR. TALL: I DON'T HAVE A REPLY WITNESS, YOUR HONOR. I AM WONDERING IF WE CAN THINK ABOUT WHAT WE CAN DO FOR ARGUMENT. EARLIER THERE WAS A DISCUSSION ABOUT MAYBE SEND YOU SOMETHING. I WOULD LIKE TO TAKE THE MICROPHONE --

JUDGE PADGETT: I WOULD BE GLAD FOR Y'ALL TO ARGUE, BUT NOT TONIGHT. IF YOU WANT TO COME BACK, I HAVE MARCH 18 AND MARCH 31?

MR. TALL: YOUR HONOR, IF WE WERE HERE FOR ARGUMENT, I HAVE A CLIENT WITH A SMALL BUSINESS IN VIRGINIA THAT WOULDN'T BE --

JUDGE PADGETT: THAT'S UP TO YOU. WOULD Y'ALL LIKE TO PRESENT AN ORAL ARGUMENT OR JUST WAIVE IT AND PRESENT... AS I HAVE TOLD YOU IN CHAMBERS BECAUSE OF THE ISSUES INVOLVED I WANT A PRESENTATION OF --

MR. BOYD: I AM HAPPY TO DO WHATEVER YOUR HONOR PREFERS. I WOULD LOVE TO STREAMLINE IT IF WE CAN. IF YOUR HONOR WANTS WRITTEN SUBMISSIONS, BUT I AM ALSO HAPPY TO DO AN ORAL ARGUMENT.

JUDGE PADGETT: LET ME PUT IT TO YOU THIS WAY. I WILL LET Y'ALL CHOOSE. I WILL BE HERE OR NOT. YOU CAN PRESENT A LETTER TO ME OF THE ISSUES THAT YOU THINK ARE TO BE RESOLVED BY THIS COURT AND A PROPOSED ORDER FOLLOWING UP THOSE ISSUES. WHAT YOU WOULD LIKE THIS COURT TO SIGN IN THAT REGARD OR EITHER ONE OR BOTH OF YOU WOULD LIKE TO HAVE AN OPPORTUNITY OF AN ORAL ARGUMENT TO

PRESENT SOMETHING TO ME I WILL LET YOU MAKE THAT CHOICE.

MR. DAVIS: WE HAVE HAD TWO FULL DAYS, YOUR HONOR, OF COURT TIME. I THINK WE SHOULD JUST SUBMIT SOMETHING IN WRITING TO BE CONSIDERED.

JUDGE PADGETT: THAT'S FINE. MR. TALL, IS THAT ALL RIGHT WITH YOU?

MR. TALL: THAT'S FINE.

JUDGE PADGETT: VERY GOOD. HOW LONG DO YOU NEED TO DO THE LETTER AS WELL AS THE PROPOSED ORDERS? ARE YOU GOING TO NEED TO HAVE IT TRANSCRIBED BY THIS LOVELY LADY HERE? THE PROPOSED ORDERS WILL BE GIVEN TO ME TWO WEEKS FROM MONDAY. IS THAT ENOUGH TIME?

MR. BOYD: YOUR HONOR, I DON'T WANT TO MAKE THAT DECISION RIGHT NOW. I WOULD LIKE TO GO BACK TO THE OFFICE AND REVIEW MY NOTES. AND I WOULD LIKE TO RESERVE THE OPPOSITION IF WE FEEL LIKE WE NEED TO.

JUDGE PADGETT: IT DOES COMPLICATE IT SOME. CAN BOTH YOU AND MR. TALL DO THAT AND LET ME KNOW SOMETHING BY 5 O'CLOCK

A TREMENDOUS JOB FOR YOUR CLIENTS. I APPRECIATE THE HARD WORK THAT EACH OF YOU HAS PUT INTO IT. NOW, YOU HAVE LAID THIS MESS IN MY LAP AND THAT'S THE REASON I'M ON THE BENCH. WHEN PARTIES CAN'T COME TO A RESOLUTION AMONGST THEMSELVES SOMEBODY'S GOT TO DO IT. THAT'S WHY I AM HERE. THANK YOU.

DOES EVERYBODY KNOW WHERE WE ARE?

MR. TALL: WE ARE FINE. THANK YOU, YOUR HONOR.

BOYD: THANK YOU.

JUDGE PADGETT: WE ARE ADJOURNED AT 6:34 P.M.

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-Copies of reported cases

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352 S.E.2d 503
291 S.C. 165
Steven George AAKJER, Jr., Appellant,
v.
Steven SPAGNOLI, Respondent.
No. 0855.
Court of Appeals of South Carolina.
Jan. 12, 1987.

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[291 S.C. 168] James P. Stevens, Jr., of Stevens, Stevens, Thomas, Hearn & Hearn, of Loris, for appellant.

Thomas C. Brittain and Cynthia Graham Howe, of Van Osdell, Lester, Stewart, McCutchen & Brittain, of Myrtle Beach, for respondent.

SANDERS, Chief Judge:

Appellant Steven Aakjer brought this action against respondent Steven Spagnoli for damages arising out of an automobile accident. The jury returned a verdict for Mr. Spagnoli. Mr. Aakjer appeals. We affirm.

The accident out of which this lawsuit arose occurred at approximately 10 p.m. on April 16, 1983 in Horry County. Mr. Aakjer was traveling east on Highway 501 toward Myrtle Beach when his car ran out of gas. He got out of the car and was pushing it forward when Mr. Spagnoli's car struck him from behind.

The highway patrolman who investigated the accident testified that Mr. Aakjer told him that he was trying to push his car to a convenience store three or four hundred feet down the road. Mr. Aakjer testified that he was steering his car to the right trying to get it off the road as quickly as

possible. He estimated that forty-five seconds elapsed between the time he started pushing and when he was struck from behind. His car was still in the right hand lane of travel when it was hit.

Mr. Spagnoli testified that, although his view was unobstructed and he could see about 500 feet in front of him, he did not see Mr. Aakjer's car until just before he hit it and the accident happened in "a flash second."

One of the more hotly contested issues at trial was whether the emergency flashers on Mr. Aakjer's car were illuminated. Mr. Aakjer testified that the flashers were on. Mr. Spagnoli testified that they were not.

The highway patrolman testified that he did not recall seeing any flashing lights on Mr. Aakjer's car after the accident.

Keith Munger, a witness for Mr. Aakjer, testified that on the night of April 16, 1983 he saw a car in the eastbound lane [291 S.C. 169] of Highway 501 with its flashers on and he saw several cars pass that car without hitting it. He further testified that he saw the flashers when he was a mile from the impact site.

Eugene Fowler, who towed Mr. Aakjer's car into a service station that night, testified that all four of the emergency flashers on the car were blinking when he got to the scene.

David Keys, a witness for Mr. Spagnoli, testified that, on April 16, 1983, between 10 and 11 p.m., he "just about ran into the back of a man that was pushing his car down the middle of 501." He further testified that "[t]here was no lights anywhere on that vehicle."

Dr. Roland Barrett, a mechanical engineer, testified as an expert in accident reconstruction for Mr. Aakjer. He examined the lights from Mr. Aakjer's car and testified that "either the flashers, turn signal, or brake light was on at the moment of impact."

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Other relevant facts will be discussed as necessary throughout this opinion.

I

This lawsuit was initially tried in March 1984, resulting in a verdict for Mr. Spagnoli. The trial judge, "sitting as the thirteenth juror," granted Mr. Aakjer's motion for a new trial.

Prior to the start of the second trial, Mr. Aakjer made a motion that the trial judge prohibit testimony regarding injuries sustained by the passengers in Mr. Spagnoli's car, other pending or anticipated lawsuits arising from the accident and the fact that the case had been previously tried with a verdict for Mr. Spagnoli. The trial judge ruled that he would instruct the attorneys and witnesses not to discuss the previous trial but that he would allow the use of prior testimony for impeachment purposes. He did not definitively rule one way or the other on the first two aspects of Mr. Aakjer's motion.

Mr. Aakjer argues on appeal that his motions for a mistrial and a new trial should have been granted because "repeated references to the prior trial diverted the jury's attention from the trial of this lawsuit."

In fact, the record reveals that the "repeated references" complained of by Mr. Aakjer number, at most, only three. [291 S.C. 170] During the cross-examination of a medical doctor and of the engineer offered by Mr. Aakjer, counsel for Mr. Spagnoli asked about prior testimony. It is not at all clear that he was speaking of testimony given in an earlier trial. The jury could just as easily have understood him to have been referring to prior deposition testimony given by these two witnesses.

During the cross-examination of Mr. Keys by counsel for Mr. Aakjer, the witness answered a question with the gratuitous comment "we straightened that out on the

last case." The trial judge immediately admonished Mr. Keys to "just answer the question."

The cross-examination of a witness to test his credibility is largely within the discretion of the trial judge. *McMillan v. Ridges*, 229 S.C. 76, 91 S.E.2d 883 (1956).

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Every witness under cross-examination may be asked whether he has made any former statement relative to the subject matter of the action and inconsistent with his present testimony. *Elliott v. Black River Electric Cooperative*, 233 S.C. 233, 104 S.E.2d 357 (1958).

In our opinion, the trial judge did not abuse his discretion in allowing the cross-examination by counsel for Mr. Spagnoli of the medical doctor and engineer.

Furthermore, the references to the prior trial were so vague that Mr. Aakjer could not have been prejudiced. The jury could hardly have guessed that the entire lawsuit had been tried before, much less that the outcome had been unfavorable to Mr. Aakjer. See *JKT Company, Inc. v. Hardwick*, 274 S.C. 413, 419, 265 S.E.2d 510, 513 (1980), appeal after remand, 284 S.C. 10, 325 S.E.2d 329 (Ct.App.1984) ("An error not shown to be prejudicial does not constitute grounds for reversal.").

II

Mr. Aakjer next argues that his motions for a mistrial and a new trial should have been granted because of references made by witnesses and counsel to injuries sustained by the passengers in Mr. Spagnoli's car.

Mr. Aakjer sought damages for depression, mental anguish and mental anxiety allegedly resulting from the physical injuries which he suffered in the accident.

Counsel for [291 S.C. 171] Mr. Spagnoli cross-examined Mr. Aakjer about his knowledge of the injuries suffered by the passengers in Mr. Spagnoli's car. Counsel for Mr. Aakjer objected to this line of questioning on the ground of relevancy. The trial judge allowed the questioning for the limited purpose of showing Mr. Aakjer's mental state following the accident.

On direct examination and over the objection of Mr. Aakjer, Mr. Spagnoli gave an account of the injuries suffered by the passengers in his car.

In his closing argument, counsel for Mr. Aakjer also referred to the fact that some of the passengers in Mr. Spagnoli's car could not walk after the accident, comparing their injuries to the injuries suffered by Mr. Aakjer. The trial judge immediately called counsel to the bench and warned him to make no further references to the other injuries.

On appeal, Mr. Aakjer contends that the references to the injuries sustained by the passengers were irrelevant and served to inflame the jury and improperly divert their attention from the lawsuit at hand. We are unpersuaded by this argument.

The determination of the relevancy of evidence is largely within the discretion of the trial judge. *Crowley v. Spivey*, 285 S.C. 397, 329 S.E.2d 774 (Ct.App.1985). "Evidence which tends to make more or less probable some matter in issue and to bear directly or indirectly thereon is relevant." *Associate Management, Inc. v. E.D. Sauls Construction Co.*, 279 S.C. 219, 221, 305 S.E.2d 236, 237 (1983).

We find no abuse of discretion under the circumstances. Mr. Aakjer admitted that he felt concern for the other people hurt in the accident. Thus, his knowledge of their injuries was at least of some relevancy to the issue of whether his mental anguish was caused by his

injuries, as he alleged, or by the injuries of the other people involved in the accident.

III

During cross-examination of Mr. Aakjer, Mr. Spagnoli's attorney made at least one reference to a page in the transcript of the earlier trial. After the close of testimony that day, one juror asked the bailiff "what the book was they keep referring to." The trial judge overheard the question [291 S.C. 172] and asked the juror to repeat it. The juror did so, further noting that "[i]t's like it's already been played before, the whole thing."

The following morning, outside of the presence of the other jury members, the trial judge asked the juror if he had discussed the matter with the other jurors. The juror replied, "I was just asking about

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that just when I was called out here. I said, you know, seems like there's been some kind of book or something." The trial judge then excused the juror from the case and asked the other jurors if anyone had tried to discuss the case with any of them and whether any of them had any independent knowledge which would prevent them from giving both sides a fair trial. No juror answered in the affirmative. Mr. Aakjer moved for a mistrial. The trial judge denied the motion. The trial proceeded with an alternate juror taking the place of the juror who had been excused.

Mr. Aakjer contends that the events just related amounted to juror misconduct which tainted the entire jury and that a mistrial should have been granted.

"The question of whether or not a motion for a mistrial should be granted rests in the trial judge's sound discretion, and his ruling on such motion will not be disturbed unless abuse of discretion is shown." *Tucker v. Reynolds*, 268 S.C. 330, 334, 233 S.E.2d 402,

404 (1977). On a motion for mistrial, the moving party has the burden to show not only error but resulting prejudice. *Keller v. Pearce-Young-Angel Co.*, 253 S.C. 395, 171 S.E.2d 352 (1969).

Here, there is no showing that Mr. Aakjer was prejudiced by the conduct of the juror. Even if the members of the jury recognized that the case had been tried before, they had no way of knowing which side had prevailed. That knowledge, therefore, would have impacted equally on both Mr. Spagnoli and Mr. Aakjer.

IV

During cross-examination, counsel for Mr. Aakjer asked Mr. Keys a series of questions regarding his brother having been in the hospital on the date of the accident. These [291 S.C. 173] questions and the answers given to them by Mr. Keys appear in the record as follows:

Q. Mr. Keys, let me ask you this. I believe your brother was in the hospital, is that right, sir?

A. Yes sir.

Q. And you had been out to see him?

A. Yes sir.

Q. And you were going back to get your wife and come back to the hospital, I believe, is that right, sir?

A. Yes sir, I was planning on doing that.

The record does not reveal any testimony by Mr. Keys on direct examination regarding his brother having been in the hospital on the night of the accident.

Mr. Aakjer thereafter sought to introduce medical records, presumably to show that Mr. Keys' brother was not in the hospital on the night of April 16, 1983. The trial court ruled

that these medical records were privileged and therefore inadmissible. Later, in ruling on Mr. Aakjer's motion for a new trial, the trial judge noted that he considered the use of the medical records to be an impermissible attempt to impeach the witness on a collateral matter.

Mr. Aakjer argues that the trial judge erred in not allowing him to introduce these records to impeach the testimony of Mr. Keys.

There is no physician-patient privilege in South Carolina. *Peagler v. Atlantic Coast Line Railroad Co.*, 232 S.C. 274, 101 S.E.2d 821 (1958). We do not know of any other privilege which would be applicable here. However, this does not mean that the ruling of the trial judge to exclude the medical records must be reversed.

The trial judge further ruled that Mr. Aakjer could not introduce the medical records because it would constitute impeachment on a collateral matter. A witness may be contradicted for the purposes of impeachment only as to matters relevant to the issue. *Smith v. Henry*, 18 S.C.L. (2 Bail.) 118 (1831). Impeachment of a witness's credibility by asking questions not relevant to the case in chief with a view of obtaining contradictory or inconsistent statements is limited to cross-examination of the witness sought to be impeached. *Martin v. Dunlap*, 266 S.C. 230, 222 S.E.2d

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8 (1976). This right does not extend to putting another [291 S.C. 174] witness on the stand to contradict him as to such collateral matters. *Id.*

It is not necessary for us to determine whether the use of the medical records would have constituted impeachment on a collateral matter because it is apparent from the record that the testimony of Mr. Keys was thoroughly impeached otherwise.

Mr. Keys testified that there were no lights anywhere on the car he saw. Mr. Aakjer testified that the emergency flashers on his car were on. Mr. Munger testified that the car he saw had its flashers on. Mr. Fowler testified that when he arrived at the scene the flashers on Mr. Aakjer's car were on. Dr. Barrett testified that Mr. Aakjer's car had its emergency flashers, turn signal or brake light on when it was struck.

Mr. Keys testified in his deposition that it was raining on the night he saw the car being pushed. At trial he testified that he was not sure if it was raining or not or whether the road was wet or dry. The highway patrolman, Mr. Munger and Mr. Spagnoli testified that the night of April 16, 1983 was dry and clear.

Mr. Keys further testified in his deposition that the car he saw that night had a dark top. He testified at trial that the car "was a dark car with a light top." He offered no explanation when confronted with this inconsistency. The highway patrolman testified that Mr. Aakjer's car was red with a white top.

Mr. Keys conceded on cross-examination that he did not know whether he had seen Mr. Aakjer's car or some other car.

Error in the exclusion of evidence is of no avail if testimony to the same effect had been or was afterwards allowed. *Smith v. Winningham*, 252 S.C. 462, 166 S.E.2d 825 (1969). "[I]t is not error for the trial judge to exclude evidence which is merely cumulative." *Peagler v. Atlantic Coast Line Railroad Co.*, 234 S.C. 140, 170, 107 S.E.2d 15, 31 (1959).

Assuming, without deciding, that the trial judge erred in not allowing the introduction of the medical records, we conclude that this was harmless error in view of the other evidence which was admitted to impeach the testimony of Mr. Keys.

[291 S.C. 175] V

During the closing argument of counsel for Mr. Aakjer, Mr. Keys, who was in the courtroom, apparently raised his hands. Mr. Aakjer argues that the trial judge erred in not granting his motions for a mistrial and a new trial based on this conduct. We conclude that his argument on this point is manifestly without merit. See Section 14-8-250, Code of Laws of South Carolina, 1976, as amended ("[T]he Court need not address a point which is manifestly without merit.").

VI

Following the charge to the jury, counsel for Mr. Aakjer reminded the trial judge that he had not given a curative charge to the jury instructing them not to consider the injuries sustained by the passengers in Mr. Spagnoli's car. The trial judge stated that he would bring the jury back and instruct them that they were only concerned with this lawsuit and the evidence before them. He failed to do so.

Mr. Aakjer argues on appeal that the failure of the trial judge to give the promised instruction constitutes reversible error.

We previously held that the references to the injuries suffered by the passengers in Mr. Spagnoli's car were not improper in view of Mr. Aakjer's claim for damages for depression and mental anguish. Thus, the charge requested by Mr. Aakjer would not have been appropriate and the charge promised by the trial judge would not have been necessary.

VII

Mr. Aakjer next argues that the trial judge erred in charging the jury as to the

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law of sudden emergency. Mr. Aakjer contends that this doctrine is inapplicable to the facts of this case.

The trial judge charged the jury as follows:

[I]f an automobile driver, who, by the negligence of another, and not by his own negligence, is suddenly placed in an emergency, and compelled to act instantly to avoid a collision, that person may not be guilty of [291 S.C. 176] negligence, if he makes such a choice as a person of ordinary reason and prudence, placed in the same position as he might make, even though he did not make the wisest choice.

The language of this charge comes directly from the decision of our Supreme Court in *McVey v. Whittington*, 248 S.C. 447, 456, 151 S.E.2d 92, 97 (1966). The facts of that case are similar to the facts in the instant case.

In *McVey*, the plaintiff was assisting four other people in pushing a stalled car off the highway. A car being driven by the defendant ran into the rear of the car which the plaintiff was pushing causing her to be crushed between the two cars. The stalled car had a white top and the plaintiff was wearing white pants. There was testimony that the rear lights on the stalled car were on, but the defendant testified that he did not see any lights until just prior to impact. The Supreme Court held that the charge on sudden emergency was proper under these facts.

Mr. Aakjer points out that there was no evidence that Mr. Spagnoli's vision was obstructed, whereas in *McVey* there was testimony that the defendant's ability to see the lights on the stalled car was obstructed by the people pushing it. However, in the instant case, there was conflicting testimony as to whether the lights or emergency flashers on Mr. Aakjer's car were illuminated. Given this conflicting testimony and Mr. Spagnoli's testimony that he did not see Mr. Aakjer's car until just before he hit it, the charge on the law of sudden emergency was proper.

Mr. Aakjer further contends that the trial court erred in charging Code Section 56-5-2510. This section provides that "no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the roadway outside a business or residential district when it is practicable to stop, park or leave the vehicle off the roadway." This section further provides that it does "not apply to the driver of any vehicle which is disabled to such extent that it is impossible to avoid stopping and temporarily leaving the vehicle in such position."

Mr. Aakjer contends that because his car was disabled, Section 56-5-2510 was not applicable.

There was conflicting evidence on the question of whether [291 S.C. 177] Mr. Aakjer was pushing his car down the road to the convenience store or trying to push it off the road. Mr. Aakjer testified that at least forty-five seconds elapsed between the time he ran out of gas and when he was hit from behind.

The burden of proving the necessity for stopping a vehicle on the main traveled portion of a highway is on the person who makes such a stop. *Gray v. Barnes*, 244 S.C. 454, 137 S.E.2d 594 (1964).

Under the evidence in the instant case, it was up to the jury to determine whether Mr. Aakjer stopped and left his car on the roadway when it was practicable for him to have stopped it off the roadway. There was also a jury question as to whether it was impossible for Mr. Aakjer to have avoided stopping and leaving his car in such position. See *Dorsey v. Brockington*, 277 S.C. 438, 289 S.E.2d 161 (1982) ("Whether one has removed his car from the road as far as practical, or whether one is temporarily prevented from removing his car because of disability to the vehicle, are ordinarily questions for the jury where there is conflicting testimony.").

Mr. Aakjer also argues that the trial judge erred in failing to give one of his requested charges concerning the duty of motorists to use reasonable care to avoid injury to persons working on or about a

AFFIRMED.

GARDNER and SHAW, JJ., concur.

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disabled vehicle. We are convinced by our review of the charge given by the trial judge that the standard of care required of Mr. Spagnoli was adequately covered. See *Priest v. Scott*, 266 S.C. 321, 223 S.E.2d 36 (1976).

VIII

Mr. Aakjer's final argument is that "the trial judge erred in refusing [his] motion for a new trial because the totality of the circumstances and events which occurred during the trial improperly inflamed the jury and diverted its attention from the trial of this lawsuit, thereby denying his right to a fair and impartial trial."

Litigants, whether plaintiffs or defendants, are entitled to fair trials but not perfect trials. *Smoak v. Seaboard Coast Line Railroad Company*, 259 S.C. 632, 193 S.E.2d 594 (1972). "If a new trial was required every time a flaw or mere possibility of prejudice occurred, litigation[291 S.C. 178] would be unduly prolonged." *Id.* at 640, 193 S.E.2d at 598.

"Perfection in human behavior is an unrealistic expectation." *Langley v. Boyter*, 284 S.C. 162, 188, 325 S.E.2d 550, 565 (Ct.App.1984), *rev'd on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985). This principle applies as well to trial judges as it does to lesser mortals.

The record as a whole reveals that Mr. Aakjer received a fair trial, if not a perfect one. In fact, he has now had two complete trials, with two different juries reaching the same result. The irregularities he relies on clearly do not warrant granting him yet a third trial.

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386 S.E.2d 255

299 S.C. 508

The STATE, Respondent,

v.

Paul WASSON, Appellant.

No. 23104.

Supreme Court of South Carolina.

Heard Oct. 3, 1989.

Decided Nov. 13, 1989.

[299 S.C. 509] Asst. Appellate Defender
Tara Dawn Shurling, of S.C. Office of
Appellate Defense, Columbia, for appellant.

Atty. Gen. T. Travis Medlock, Asst. Attys.
Gen. Harold M. Coombs, Jr., and Amie L.
Clifford, Columbia, and Sol. James O. Dunn,
Conway, for respondent.

HARWELL, Justice:

Appellant was convicted of criminal
conspiracy, burglary in the second degree,
and grand larceny. The issue on appeal is
whether the trial judge abused his discretion
in denying appellant's motion for a mistrial
based upon the fact that during the course of
jury service, two jurors read a newspaper
article discussing the appellant's involvement
in other criminal activity.

FACTS

The jury found Wasson guilty of all three
offenses. Following the reading of

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the verdict, the trial judge, on his own motion
began to question the jurors about a
newspaper article involving Wasson that the
trial judge had heard the jurors discussing.
The newspaper article was titled "Witness
details camper thefts along a coast" and was
published by The SUN NEWS on May 21,
1987, the second day of Wasson's trial. The
article discussed Wasson's alleged extraneous

criminal activity including information that
additional burglary charges for similar crimes
were pending against Wasson and that the
police suspected Wasson's involvement[299
S.C. 510] in a theft ring and in a number of
other cases across the country. The article
also summarized testimony given during
Wasson's trial.

Three jurors stated that they had seen the
article, but only two jurors indicated that they
had read the newspaper article. The trial
judge subsequently questioned those two
jurors as to whether reading the newspaper
article had any bearing on their verdict or on
the outcome of the case. Both jurors admitted
they had discussed the newspaper article with
their fellow jurors after they had voted on the
issue of Wasson's guilt or innocence. The jury
was thereafter polled as to their verdict. All of
the jurors affirmed the verdict.

Wasson's counsel made a motion for a
mistrial on the ground that because two of the
jurors had read the newspaper article,
Wasson was irreparably prejudiced in his
ability to receive a fair trial. Wasson's counsel
argued that it was questionable as to whether
the two jurors who had read the article could
have sufficiently disabused themselves of the
information contained in the newspaper
article.

The newspaper article was admitted into
evidence. The trial judge denied Wasson's
motion for a mistrial and stated that he was
satisfied with the assurances of the two jurors
who had read the newspaper article that it did
not affect their decision. This appeal follows.

DISCUSSION

The granting or refusing of a motion for a
mistrial lies within the sound discretion of the
trial court whose ruling will not be disturbed
on appeal in the absence of an abuse of
discretion amounting to an error of law. State
v. Tuckness, 257 S.C. 295, 185 S.E.2d 607
(1971). A mistrial should not be granted

except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons. *State v. Prince*, 279 S.C. 30, 301 S.E.2d 471 (1983). "The burden on motion for mistrial because of anything occurring during trial is upon movant to show not only error, but resulting prejudice." *State v. Tuckness*, 257 S.C. at 303, 185 S.E.2d at 610.

The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial; each case must turn on its special facts. *Marshall v. U.S.*, 360 U.S. 310, [299 S.C. 511] 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959). Such prejudice may be shown where a trial judge fails to make a determination as to whether information contained in newspaper articles appearing during the trial and concerning a defendant's criminal activity which is unrelated to the crime for which he is being tried is prejudicial, thereby requiring a new trial. *State v. Salters*, 273 S.C. 501, 257 S.E.2d 502 (1979). When such newspaper articles appear during the course of the trial, the trial judge must determine if they are prejudicial and if any of the jurors have read them. *State v. Stone*, 290 S.C. 380, 350 S.E.2d 517 (1986). If so the trial judge must invoke the appropriate curative measures. *Id.*

The goal of corrective measures is to insure the defendant's right to a fair trial has not been compromised ... The determination of what curative measures are appropriate in a given case rests in the sound discretion of the trial judge. He should exhaust other methods to cure the prejudice before aborting a trial.

State v. Stone, 290 S.C. at 382, 350 S.E.2d at 518.

This case reveals that the trial judge, on his own motion, questioned the jury about the newspaper article. When two members of the jury disclosed to the trial judge that they had in fact read the

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newspaper article, the trial judge further inquired as to the effect the newspaper article had upon them and the jury panel as a whole. The trial judge clearly satisfied any duty he had to insure the impartiality of the jury. While two members of the jury had read the newspaper article, they stated that it had not affected their decision as to Wasson's guilt or innocence of the charges against him. Additionally, the two jurors stated that they had not discussed the newspaper article with the other jurors until after the verdict had been reached.

Only after the trial judge was satisfied that the jury's verdict had been reached free from any outside influences, did he deny Wasson's motion for a mistrial. The trial judge did not abuse his discretion in denying the motion for a mistrial.

AFFIRMED.

GREGORY, C.J., and CHANDLER, FINNEY and TOAL, JJ., concur.

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-Copy of reported case

**In the Matter of the Estate of Marion
M. Kay.**

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

v.

**Martha Brown and Mary Moses,
Respondents-Petitioners.**

**Appellate Case No. 2016-002337
Opinion No. 27804**

**STATE OF SOUTH CAROLINA In The
Supreme Court**

**Heard March 7, 2018
May 23, 2018**

Summaries:

Source: Justia

This cross-appeal primarily concerned the amount of compensation owed to Petitioner-respondent Edward Sullivan as personal representative (PR) of Marion Kay's estate. Sullivan filed a petition to settle the estate and sought probate court approval for his commissions as PR together with fees and costs. In response, Respondents-petitioners Martha Brown and Mary Moses, cousins of the deceased and two of multiple beneficiaries under the will, challenged his compensation as excessive, and the probate court agreed, reducing Sullivan's commissions, disallowing certain fees and costs, and awarding attorney's fees to Brown and Moses. The circuit court affirmed, and both sides appealed. In a 2-1 opinion, the court of appeals affirmed in part and reversed in part. The South Carolina Supreme Court affirmed in part, reversed in part, and remanded to the probate court. The Supreme Court affirmed the court of appeals' decision to uphold the award of \$51,300 in commissions for Sullivan's services as personal representative and the determination that Brown and Moses

were responsible for their own attorney's fees. The Supreme Court reversed the court of appeals' conclusion that Sullivan is not entitled to recover necessary expenses, including reasonable attorney's fees, incurred at the settlement hearing under section S.C. Code §§ 4-720, and remanded this case back to the probate court for that determination.

**ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS**

Appeal from Laurens County
Donald B. Hocker, Probate Court Judge

**AFFIRMED IN PART, REVERSED IN
PART, AND REMANDED**

Daryl G. Hawkins, of the Law Office of Daryl
G. Hawkins, LLC, of Columbia, for
Petitioner/Respondent.

John R. Ferguson, of Cox Ferguson & Wham,
LLC, of Laurens, for
Respondents/Petitioners.

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JUSTICE HEARN: This cross-appeal primarily concerns the amount of compensation owed to Petitioner/Respondent Edward Sullivan as personal representative (PR) of Marion Kay's estate. Sullivan filed a petition to settle the estate and sought probate court approval for his commissions as PR together with fees and costs. In response, Respondents/Petitioners Martha Brown and Mary Moses (Brown and Moses), cousins of the deceased and two of multiple beneficiaries under the will, challenged his compensation as excessive, and the probate court agreed, reducing Sullivan's commissions, disallowing certain fees and costs, and awarding attorney's fees to Brown and Moses. The circuit court affirmed, and both sides appealed. In a 2-1 opinion, the court of appeals affirmed in part and reversed in part. *In re Estate of Kay*, 418 S.C. 400, 792 S.E.2d

907 (Ct. App. 2016). We affirm in part, reverse in part, and remand to the probate court.

STANDARD OF REVIEW

A proceeding before the probate court may sound in equity or at law. *In re Estate of Holden*, 343 S.C. 267, 278, 539 S.E.2d 703, 709 (2000). Brown and Moses demanded a hearing to challenge Sullivan's compensation for his services in administering Kay's estate—an action in equity. *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). However, an appellate court still affords a degree of deference to the trial court because it was in the best position to judge the witnesses' credibility. *Lewis v. Lewis*, 392 S.C. 381, 391, 709 S.E.2d 650, 655 (2011).

A threshold issue in this case is the applicability of the "two-judge rule" to a decision of a probate judge which is affirmed by a circuit court judge. The majority of the court of appeals employed the two-judge rule in affirming, while the dissenting judge, then-Acting Judge Few, posited that the standard of review in an appeal from an equity case should not change simply because two judges have made the same factual determination, and would have applied a preponderance of the evidence standard of review in this case. We take this opportunity to clarify the appropriate standard of review in cases where the probate court's decision is affirmed by the circuit court.

What has become known as the two-judge rule had its genesis in *Townes*, wherein the Supreme Court undertook to explain the applicable standards of

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appellate review in various types of cases. In *Townes*, a master made findings of fact and conclusions of law which were concurred in by the circuit court, and the Court stated that: "In an action in equity, tried first by a master or a special referee and concurred in by the judge, the findings of fact will not be disturbed on appeal unless found to be without evidentiary support or against the clear preponderance of the evidence." 266 S.C. at 86, 221 S.E.2d at 775-76.

Both the court of appeals and this Court have applied the two-judge rule to probate cases where the circuit court judge has agreed with the decision of the probate court. See *Geddings v. Geddings*, 319 S.C. 213, 216, 460 S.E.2d 376, 378 (1995) (applying the two-judge rule where the circuit court affirmed the probate court's decision that a wife had not waived her right to invoke her elective share); *Dean v. Kilgore*, 313 S.C. 257, 260, 437 S.E.2d 154, 155 (Ct. App. 1993) ("Although *Townes* sets forth the two-judge rule for equity cases first tried by a master or special referee and subsequently affirmed or concurred in by the circuit court, we see no reason not to apply the same rule to an affirmance or concurrence of the circuit court with the probate court."). Relying on this precedent, a majority of the court of appeals held the two-judge rule applied.

Under the framework set out in *Townes*, prior to our master in equity system, when circuit judges referred matters to special referees or masters to make findings of fact, the limited scope of appellate review over factual findings concurred in by two judges may have been appropriate. However, we hold today that the two-judge rule has no applicability to cases wherein the circuit court, sitting in a purely appellate capacity, as here, affirms the findings of a lower tribunal. Instead, the applicable standard of review is the same as in other equity matters, and the appellate courts of this state may take their

own view of the preponderance of the evidence. Accordingly, we analyze this case through this broad lens.

FACTUAL/PROCEDURAL BACKGROUND

Marion Kay died on May 3, 2007, leaving a will that named Sullivan, her close friend and estate planning attorney, as personal representative. At the time of Kay's death, she owned a house, a ten acre parcel of land, and a one-half undivided interest in 330 acres (the Farm); the remaining one-half interest belonged to Brown and Moses. Kay left the residuary of her estate as follows: (1/4) to Lisbon Presbyterian Church, (1/4) to Lisbon Presbyterian Church Cemetery fund, and the remaining (1/2) to five beneficiaries who each received (1/10), consisting of Marla Elizabeth Heard, Bart Edward Heard, Brown, Moses, and the Presbyterian Home of

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South Carolina. Brown and Moses had believed Kay would leave them her interest in the Farm, but instead, they simply were named as (1/10) residuary beneficiaries.

The will also granted an option to Kay's neighbor, Charles Copeland, to purchase the real estate within eight months of her death "at the fair market price on the date of my death, the decision of my PR regarding the fair market price to be final." (Copeland Option). Additionally, the will provided "reasonable compensation for [Sullivan's] services rendered and reimbursement for reasonable expenses," granted him the authority to sell personal and real property, and authorized him:

To exercise all the powers in the management of my Estate which any individual could exercise in the management of similar property owned in his or her own right...to execute and

deliver any and all instruments, and to do all acts which my Personal Representative may deem proper or necessary to carry out the purposes of this my Will, without being limited in any way by the specific grants of power made, and without the necessity of a court order.

During Sullivan's administration of the estate, he learned the majority of beneficiaries preferred their interests in cash rather than a fractional ownership interest in land. Accordingly, Sullivan decided the best course of action was to negotiate a sale of the real estate, and if that failed, to file a partition action.

At the outset, Sullivan believed at least three "novel issues" posed potential impediments to his ability to convey marketable title and heavily discounted the property's value. First, Sullivan discovered that a 1973 agreement purportedly granted Brown and Moses a right of first refusal; however, he questioned whether the right was enforceable under the rule against perpetuities.¹ Second, if the right of first refusal was enforceable, he believed the Copeland Option created a competing interest in the land. Third, Brown alleged an earlier agreement—which could not be produced—entitled her to an undivided interest in five acres of the estate's property. According to Sullivan, these issues had the potential to prolong the administration of the estate. While Copeland indisputably did not exercise his option during the

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eight months following Kay's death, Sullivan believed the eight month time period was tolled until an appraiser determined the Farm's fair market value. Sullivan hired Paul Major, who appraised the Farm's value at approximately \$614,000, of which Kay's interest represented \$307,000. Sullivan

received this appraisal in February of 2008, nearly nine months after Kay's death.

Three months later, in May of 2008, Sullivan sent a letter to all the beneficiaries proposing a compromise whereby Brown would receive the five acres at no charge, Copeland would exercise his option as to approximately 46 acres of land, and Brown and Moses would release their right of first refusal but would retain the option to purchase Kay's remaining interest at the fair market value. If Brown and Moses elected not to purchase the remaining interest, Sullivan would sell it to the highest bidder. After the sale, the cash proceeds would be distributed according to the will's residuary clause.

When Brown and Moses failed to respond to the proposed settlement, Sullivan attempted another compromise a few months later in July of 2008 by arranging a meeting with church officials, Brown, Moses, and the appraiser. Again, Brown and Moses did not respond, later explaining they felt "ambushed" by having to take part in a meeting with other beneficiaries. Having exhausted repeated attempts to resolve the matter amicably, Sullivan hired his law firm to file a partition and declaratory judgment action. The parties ultimately settled whereby Sullivan sold the Farm, the lot, and the home to a cousin of Brown and Moses for approximately 94% of the 2007 appraised value. Sullivan then filed a petition for settlement in the probate court as required by the Probate Code.²

In his petition for settlement and proposal for distribution, filed approximately three years after Kay's death, Sullivan sought approval of \$93,775.00 owed for services rendered as PR.³ Sullivan notified all the beneficiaries, but only Brown and Moses sent a letter to the probate court requesting a hearing.⁴

At the hearing which ensued before the probate court, counsel for Brown and Moses argued Sullivan had received excessive compensation because he unnecessarily complicated the estate administration. Brown and Moses maintained Sullivan should have simply filed a deed of distribution instead of hiring his law firm to seek a partition order. Sullivan testified the numerous "novel issues" in the estate's administration prompted him to file a declaratory judgment action, and he defended his actions by asserting that he attempted to carry out Kay's intent by selling the real estate, thereby generating cash proceeds to distribute to the beneficiaries. To support his position, he pointed to the fact that Kay had hired him approximately four years prior to her death to negotiate a proposal with Brown and Moses to divide and sell the Farm, but Brown and Moses never responded to his requests.

After two days of testimony, the probate court found Sullivan should have executed a deed of distribution to all the beneficiaries rather than have filed a partition action. According to the probate court, Sullivan's decision to partition the property and his concern over the Copeland Option complicated what should have been a rather simple and straightforward estate administration. Finding the commissions sought by Sullivan to be excessive, the probate court reduced the amount to \$51,300.00—approximately 10% of the estate's value—directed him to reimburse the estate \$42,775.00 for commissions previously received, and awarded Brown and Moses attorney's fees under the common fund doctrine, concluding that all beneficiaries benefitted from their counsel's representation.

The circuit court affirmed the probate court, and both parties appealed to the court of appeals, which affirmed on all grounds except for the award of attorney's fees to Brown and Moses. Both parties sought certiorari from this Court. Sullivan seeks to

retain the \$93,775.00 which he paid himself as PR, approval of an additional \$13,447.05 in commissions, and fees and costs incurred at the settlement hearing. Brown and Moses seek to limit Sullivan's compensation to 5% of the estate, as provided by South Carolina Code Section 62-3-719. We now affirm in part, reverse in part, and remand for further proceedings.

ANALYSIS

I. Personal Representative's Commission

Sullivan contends the probate court's reliance on section 62-3-719 of the South Carolina Code—setting the default limit for PR compensation at 5% of the estate—is misplaced because he asserts that statute is inapplicable. Additionally, Sullivan asks the Court to adopt a new test to assist probate courts in the determination of

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reasonable compensation.⁵ In contrast, Brown and Moses assert that because the will does not define reasonable compensation, the probate court properly resorted to section 62-3-719 as a basis for determining compensation.

The Probate Code establishes a default rule for PR compensation in section 62-3-719, which provides,

Unless otherwise approved by the court for extraordinary services, a personal representative shall receive for his care in the execution of his duties a sum from the probate estate funds not to exceed five percent of the appraised value of the personal property of the probate estate plus the sales proceeds of real property of the probate estate received on sales

directed or authorized by will. . .

S.C. Code Ann. § 62-3-719(a) (2009 & Supp. 2017). However, subsection (c), an exception to the 5% default rule, states, "The provisions of this section do not apply in a case where there is a contract providing for the compensation to be paid for such services, or *where the will otherwise directs....*" (emphasis added). Sullivan contends the will's authorization of "reasonable compensation" falls within this exception. While the probate court did not specifically find that section 62-3-719(a) applied, it clearly considered the statute in arriving at its approval of \$51,300 in commissions, which represented approximately 10% of the estate.

We believe the language in the will is not sufficient to bring Sullivan's commissions within the exception expressed in subsection (c). The will merely contemplates "reasonable compensation," and absent any directive in the will, that determination was left to the probate court. Even though the probate court did not expressly find that Sullivan's actions constituted "extraordinary services," pursuant to the statute, we believe its decision to award Sullivan compensation of 10% of the estate's value is tantamount to such a finding.

Moreover, our own view of the preponderance of the evidence supports the award of \$51,300. While Sullivan testified he spent approximately 450 hours on the estate, he could not definitively answer the probate court's question as to how he charged for his services—whether it was a set percentage of the estate or based on

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his time. Sullivan discussed a number of factors he had considered in arriving at his fee, and appeared to put significant weight on the "exceptional result" he ultimately garnered for the estate through the property's sale. While we disagree with the probate court

that Sullivan simply "pull[ed] a figure out of the air" in determining compensation, the total commissions sought constituted 21% of the estate's value, a figure the probate court deemed "clearly excessive." We believe the probate court was correct in this assessment, and we affirm the reduction in Sullivan's compensation to \$51,300.⁶

II. Expenses Incurred at the Settlement Hearing

Sullivan contends the court of appeals erred in affirming the probate court's decision not to award reasonable fees and expenses incurred at the settlement hearing. Brown and Moses assert the court of appeals properly affirmed the decision by differentiating costs incurred defending the estate as PR from costs incurred by Sullivan seeking more compensation in his individual capacity.

Under the Probate Code, when a "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 (2009 & Supp. 2017). Each court below concluded that section 62-3-720 does not apply to instances where the personal representative primarily acts for the benefit of himself in procuring compensation for his services. However, under the plain language of the statute, it applies when (1) the PR defends or prosecutes, (2) *any proceeding in good faith*, whether successful or not. Here, citing a different statute—section 62-3-715(20)⁷—the court of appeals stressed section 62-3-720 was intended to apply only

this distinction erroneous as applied to Sullivan.

Once requested by Brown and Moses, it was incumbent on Sullivan to attend the settlement hearing, and he necessarily incurred attorney's fees and costs to prepare and travel to Laurens County. At that hearing, Sullivan was called upon to defend his decision to seek a partition rather than issue a deed of distribution. Additionally, he defended against Brown's claim that she was entitled to an additional five acres of property by virtue of an unproduced agreement entered into years before Kay's death. While this claim may not have been the primary reason for the hearing, Sullivan was required to defend it. Therefore, we find the hearing constituted a "proceeding" which Sullivan was required to defend within the meaning of section 62-3-720.

Section 62-3-720 also requires the proceeding be advanced in good faith. Significantly, the probate court, as affirmed by the circuit court and the court of appeals, concluded that Sullivan acted in good faith. 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 of 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 property. Moreover, prior to filing the action, Sullivan repeatedly attempted to reach an amicable solution among the beneficiaries. However, without advancing a solution of their own, Brown and Moses failed to respond to Sullivan, instead voicing their displeasure only when the end of the estate administration was in sight. Before the probate court, Sullivan testified Bart Heard, the Lisbon Presbyterian Church, and the Presbyterian Home all preferred the real

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to proceedings when the personal representative acted reasonably for the benefit of the estate as opposed to requesting approval of the PR's compensation. We find

estate be sold in order to receive cash proceeds. Moreover, Major, a forestry consultant and real estate broker, testified Sullivan reached an extraordinary result by selling the real estate in 2010 for 94% of the 2007 appraisal—at a time when real estate prices remained stagnant after severe declines during the recession.

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Bart Heard testified not only did he approve of Sullivan's charges and expenses, but he felt it would be unfair if Brown and Moses did not pay for the proceeding before the probate court because they were the individuals who had prolonged the administration of the estate. Penelope Arnold, the Director of Charitable Foundation and Church Relations for the Presbyterian Home, also testified the church did not object to Sullivan's purported compensation. Additionally, Sullivan's law firm reduced its hourly rate by about 35%, and the firm further discounted its invoices, the total of which represented approximately \$20,000.

Accordingly, because we find ample evidence demonstrating Sullivan defended the claim in good faith, we reverse the court of appeals' decision refusing to award him necessary expenses. We remand to the probate court to calculate these expenses, including attorney's fees.

III. Remaining Issues

On cross-appeal, Brown and Moses assert the court of appeals erred in holding they abandoned their argument that Sullivan should be responsible for all fees and costs incurred at the settlement hearing because he acted in his individual interest to recover additional compensation rather than in the Estate's interest in defending a claim. While we disagree that the issue was abandoned, because we hold Sullivan defended the claim in good faith, we find their argument unavailing.

Additionally, Brown and Moses assert the court of appeals erred in reversing the award of their attorney's fees under the common fund doctrine. We disagree.

Under the common fund doctrine, a court in its equitable jurisdiction may award reasonable attorney's fees to the party "who, at [the party's] own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property." *Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329 (2008). As a method of fee-spreading, the doctrine's rationale is that "one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses." *Id.* at 452, 658 S.E.2d at 329 (quoting *Johnson v. Williams*, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941)). To recover under the doctrine, there must be an express or implied contract of employment between the successful party's counsel and all individuals who hold an interest in the fund. *Johnson*, 196 S.C. at 532-33, 14 S.E.2d at 23. Moreover, if the parties' interests are adverse, the doctrine does not apply. *Bedford v. Citizens & S. Nat'l Bank of S.C.*, 203 S.C. 507, 515, 28 S.E.2d 405, 407 (1943).

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Significantly, recovery under the common fund doctrine is subject to abuse and should be exercised cautiously. *Johnson*, 196 S.C. at 532, 14 S.E.2d at 23.

While all the beneficiaries arguably benefited from Brown and Moses' efforts to challenge Sullivan's compensation, we find the beneficiaries of the estate were not united in pursuit of this cause. A majority of the beneficiaries supported Sullivan's efforts to sell the Farm and distribute the cash proceeds according to Kay's will. Furthermore, there was no express contract of employment between counsel for Brown and Moses and the other beneficiaries. Moreover, because the

beneficiaries did not acquiesce in Brown's and Moses' representation but instead commended Sullivan's performance and opined that Brown and Moses should bear the costs incurred before the probate court, we find no implied contract existed. Therefore, we conclude the common fund doctrine does not apply; accordingly, we affirm the court of appeals' decision that Brown and Moses are responsible for their own attorney's fees.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the court of appeals' decision to uphold the award of \$51,300 in commissions for Sullivan's services as personal representative and the determination that Brown and Moses are responsible for their own attorney's fees. We **REVERSE** the court of appeals' conclusion that Sullivan is not entitled to recover necessary expenses, including reasonable attorney's fees, incurred at the settlement hearing under section 62-3-720 and **REMAND** to the probate court for that determination.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

BEATTY, C.J., KITTREDGE and JAMES, JJ., and Acting Justice Amy W. McCulloch, concur.

Footnotes:

¹ The 1973 right of first refusal purportedly gave Brown and Moses the right to purchase Kay's undivided interest in the Farm. At the probate court, Sullivan testified the rule against perpetuities created potential problems as to its enforceability. Counsel for Brown and Moses argued any violation of the rule would be academic if Brown and Moses consented to the sale, which they ultimately did when the property was sold in 2010.

² Under the statute in effect at the time, "a personal representative must file with the court...a petition for settlement of the Estate...." S.C. Code Ann. § 62-3-1001(a)(3) (2009).

³ Sullivan requested approval of \$93,775.00 for commissions paid as of November 2010 and an additional \$13,447.05 in unpaid commissions for services rendered from the last payment date until the settlement hearing.

⁴ Brown and Moses did not file any pleadings.

⁵ Sullivan's eighteen-part test, which we decline to adopt, includes factors such as the time and labor required; time limitations imposed by clients; results obtained; the PR's professional education, experience, or accolades; and whether the PR is a member of the South Carolina Bar, is drawn from a Florida statute. *See Fla. Stat. § 733.617 (1973).*

⁶ Additionally, Sullivan contends the probate court's disagreement with his decision to seek a partition improperly influenced its determination to reduce compensation. Because our own view of the preponderance of the evidence supports the \$51,300 award, it is unnecessary to address this argument. *16 Jade St., LLC v. R. Design Const. Co., LLC*, 405 S.C. 384, 390, 747 S.E.2d 770, 773 (2013) (declining to address an issue after reaching a dispositive issue).

⁷ Section 62-3-715, titled "Transactions authorized for personal representatives; exceptions," concerns a personal representative's authority, not necessarily compensation. This provision states, "Except as restricted or otherwise provided by the will...a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(20) prosecute or defend claims, or proceedings in any jurisdiction for the protection of

the estate and of the personal
representative in the
performance of his duties;

S.C. Code Ann. § 62-3-715(20) (2009 & Supp.
2017).
