

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:

R. SCOTT GARDNER,

Respondent.

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Supreme Court #SC97207

INFORMANT'S REPLY BRIEF

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**INFORMANT'S RESPONSE TO RESPONDENT'S
SUPPLEMENTAL STATEMENT OF FACTS**

Respondent's Brief included a Supplemental Statement of Facts (Pages 5-19). While there may be disagreement in fact and inference between Informant and Respondent, most of the differing statements of fact can be dealt with during oral argument. Respondent made two statements, however, that warrant a reply.

A. Judge Beard's second order of February 18, 2015 did not "Reverse" his first order.

Judge Beard on February 18, 2015 entered two separate orders. The first was a ruling on Respondent's initial motion for approval of partial payment of fees. The second order was a ruling on Respondent's amended motion for approval of partial payment of fees. The orders were set forth in pages 146-147 of the Appendix, page 8 of Informant's Brief, and are set forth again at this time:

- a) The Court considers the motion for approval of partial payment of fees. The motion is denied for two reasons. The first is that the motion asks for 5% of total reimbursements which exceeds the amount authorized by § 473.153 RSMo. Secondly, receiving a fee when an estate closes is a powerful incentive to encourage a PR to get the estate closed. Were the Court to authorize early payments of partial fees, this incentive would be lost. This Court desires to keep this incentive in place;
- b) The Court considers the amended petition for fees. The personal representative is authorized to pay himself an advance personal representative fee in the amount of \$15,000.00. This amount shall be deducted from the final calculation of fees due him at the close of the estate.

App. 61, 146-147 (Ex. 7) (Tr. 23-24).

Respondent, in page 6 of his Supplemental Statement of Facts, stated “based on Judge Beard’s testimony and the language of Judge Beard’s second docket entry, the second docket entry of February 18, 2015 reversed the first docket entry,” citing Judge Beard’s testimony on page 47 of the transcript. Judge Beard’s testimony, taken in full context, in no way suggests his first order, particularly the explanation of estate closure as an incentive, was reversed.

First, there is no language in the second order saying the first order was reversed in any way. The Court simply was considering a new and amended petition for fees. Respondent requested \$30,700 in that amended petition. Judge Beard awarded \$15,000.

Second, Judge Beard’s testimony, when taken in context, shows his “reversal” of his first order was only him explaining that he chose to award a partial fee of \$15,000 (not the \$30,700 requested) and not reversing his explanation for why he had denied the first motion. For a fair statement of Judge Beard’s thinking, Informant requests the Court read his entire discussion of his actions on February 18, 2015 in issuing orders on the two motions. See **App. 60 (Tr. 20, line 18) – App. 61 (Tr. 24, line 15)** and **App. 67 (Tr. 45 line 12) – (Tr. 47, line 25)**.

B. Judge Beard did not say Respondent could pay himself the personal representative fee without court order.

The second matter Informant brings to the Court's attention is that Respondent in page 8 of the Supplemental Statement of Facts stated:

Judge Beard's testimony confirmed that the personal representative has authority to pay claims without prior approval from the Court. (App. 64) (Tr. 36).

That statement, citing page 36 of the Transcript, seems to imply that Judge Beard was saying the personal representative could pay his own claim without prior approval from the Court. This is not what the Transcript testimony actually stated.

The questioning on page 36, cited by the Respondent, was as follows:

Q. Does the personal representative have the authority to pay claims without prior approval from the Court?

A. Yes

Q. And so upon expiration of six months after the date of first publication, according to 473.433, the PR shall proceed to pay all claims to which he has consented or which have been allowed. Is that correct, or do you want me to...

A. I believe the statute does say that.

Q. And the personal representative fee is a claim of the estate; correct?

A. But not one that falls in that category.

Not only does Judge Beard's final sentence on page 36 of the transcript show that he did not believe the claim of a personal representative would fit in the permissive category of claims to be paid without approval, Respondent omitted Judge Beard's further response to the question on the first four lines of page 37 of the transcript, wherein Judge Beard said:

The personal representative has to take special steps to ever pay himself with either a claim or a fee, but, yes, with those authorities, the personal representative pays all the claims and allowances. **App. 65 (Tr. 37).**

To the extent Respondent's Supplemental Statement of Facts implies that Judge Beard testified the personal representative could pay a claim to himself without Court approval, any such implication is refuted by the record.

CONCLUSION

Judge Beard's second order of February 18, 2015 did not "reverse" the sum, substance and analysis of his first order of that date regarding the desirability of maintaining an incentive for attorney fees to be awarded upon final settlement. Second, Judge Beard's testimony did not in any way imply, state or otherwise condone Respondent's payment to himself of personal representative fees as a claim that could be made without court order.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2018, a true and correct copy of the Informant's foregoing Informant's Reply Brief was served on Counsel for Respondent via the Missouri Supreme Court electronic filing system pursuant to Rule 103.08:

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CERTIFICATION OF COMPLIANCE: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this reply brief:

1. Includes the information required by Rule 55.03;
2. Brief served upon Respondent's Counsel by email pursuant to Rule 103.08;
3. Complies with the limitations contained in Rule 84.06(b);
4. Contains 1,151 words, according to Microsoft Word, which is the word processing system used to prepare this brief.



Carl Schaeperkoetter