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IN THE
COURT OF APPEALS OF INDIANA

CYNTHIA INGLING and THOMAS GROSE,	)	
Appellants-Respondents,	)	
vs.	)	No. 20A04-1001-ES-25
MELISSA GROSE, PERSONAL REPRESENTATIVE OF THE ESTATE OF RONALD W. GROSE,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Stephen R. Bowers, Judge
Cause No. 20D02-0906-ES-23

August 12, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

The plaintiffs initiated a will contest. The trial court set their will contest bond at $10,000. The plaintiffs did not post bond as ordered but instead filed a motion to correct error requesting that the bond be reduced. The trial court denied their motion and dismissed their claim. The plaintiffs allege the trial court abused its discretion by setting bond at $10,000 and consequently erred by dismissing their action. We agree. The Indiana Code provides that will contest bonds are "conditioned for the due prosecution of the proceedings and for the payment of all costs if in the proceedings judgment is rendered against the plaintiff." Ind. Code § 29-1-7-19. This Court has previously explained that "costs" cover only filing fees and statutory witness fees. We thus conclude the trial court abused its discretion in setting bond at an unsubstantiated $10,000. We reverse and remand for reinstatement of the plaintiffs' claim.

Facts and Procedural History

Ronald W. Grose died in January 2009. An instrument purporting to be his last will and testament was admitted to probate shortly after his death. Soon, however, Ronald's daughter Cynthia Ingling and son Thomas Grose initiated a will contest. Cynthia and Thomas filed a petition on March 5, 2009, alleging that their father's will was invalid. They did not post a will contest bond in connection with their petition.

A series of continuances followed, but on October 9, Ronald's estate requested dismissal of the action due to the contestants' failure to post a bond. The trial court responded by issuing a bond order. The order was entered on October 13 without a hearing. It set bond at $10,000 and directed the contestants to post bond within thirty

days. The order provided that if the bond was not timely filed, the will contest would be dismissed. The order did not specify how the bond amount was determined.

The contestants did not post bond. Instead, approximately one week before the bond due date, they filed a motion to correct error requesting that the bond be reduced. They argued in part that the trial court issued no findings to support its bond calculation. The estate moved to strike the contestants' motion. The parties agreed to a continuance, and the trial court extended the bond deadline to December 13. The contestants failed to post bond by the new deadline, so on December 14 the estate moved to dismiss the contestants' motion to correct error. A hearing was convened two days later. The contestants indicated they were willing and able to post the $10,000 bond that day, but the trial court denied the contestants' motion to correct error and dismissed their claim. The court explained in part:

> It is December 16, 2009, the bond has not been filed although you've represented to the court that your clients have the funds to do so today, I think the deadline must mean something, particularly given the number of extensions that have been granted.
>
> Additionally, I want to address the question of the amount of the bond. While the *Zelek*[*v. Jankowski*, 598 N.E.2d 596, 597 (Ind. Ct. App. 1992), *trans. denied*] case stands for [the] proposition that a bond may not be based solely upon the attorneys fees that may be incurred by the estate, I find nothing in that case and nothing in the statute that requires the court to make findings of fact to support why a particular bond was established unless a request is made for findings of fact and conclusions of law. Generally that is not a requirement of decisions of the court in matters that are left to the court's discretion.
>
> In this case given the size of the estate, which according to the inventory, is in excess of 1.1 million dollars, the ten thousand dollar bond was a conservatory [sic] amount in any event.

Tr. p. 9-10. The contestants now appeal.

Discussion and Decision

The contestants argue that the trial court abused its discretion in setting the will contest bond at $10,000. The estate responds in part that the contestants waived review of the issue by failing to raise it until their motion to correct error.

I. Waiver

The estate argues initially that any alleged error in the trial court's setting of bond has been waived for failure to object prior to the motion to correct error.

Generally speaking, a party may not raise an issue for the first time in a motion to correct error. *Troxel v. Troxel*, 737 N.E.2d 745, 752 (Ind. 2000).

Here, however, the trial court did not convene a hearing when it set bond. The contestants were therefore afforded no initial opportunity to challenge the trial court's order. Moreover, the contestants requested the bond reduction in advance of the bond deadline and before the trial court had rendered a final, appealable judgment. We find the contestants raised their objection in a timely manner, and even though it was presented for the first time under the heading "motion to correct error," the issue was placed squarely before the trial court during the proceedings and not waived for purposes of appeal.

For these reasons we proceed to the merits.

II. Will Contest Bond

The contestants argue that the trial court abused its discretion in setting a $10,000 will contest bond.

The Indiana Code provides that any person contesting the validity of a will must file a bond in order to pursue the will contest:

> At the time of filing a verified complaint [contesting the validity of a will], the plaintiff in the action, or some other person on the plaintiff's behalf, shall file a bond with sufficient sureties in an amount approved by the court, conditioned for the due prosecution of the proceedings and for the payment of all costs if in the proceedings judgment is rendered against the plaintiff.

Ind. Code § 29-1-7-19. The posting of a bond by the will contestant is mandatory. *Wiley v. McShane*, 875 N.E.2d 273, 275 (Ind. Ct. App. 2007), *reh'g denied*. The filing of the bond is neither jurisdictional nor a condition precedent to the filing of a complaint, but a contestant's failure to file the bond may result in dismissal of the proceedings. *Harper v. Boyce*, 809 N.E.2d 344, 348 (Ind. Ct. App. 2004). The bond posted is to compensate for due prosecution of the will contest proceedings and for payment of all costs if the contestant of the will should not prevail. *Zelek v. Jankowski*, 598 N.E.2d 596, 597 (Ind. Ct. App. 1992), *trans. denied*. The amount of the bond is to be determined by the trial court, and the trial court's determination is reviewed for an abuse of discretion. *Wiley*, 875 N.E.2d at 275.

"[T]he bond required under IC 29-1-7-19 is not intended to compensate the Estate for any and all expenses and/or delay losses that it might incur because of an unsuccessful will contest; rather, it is to cover costs." *Id.* at 277. "Costs" is a term of art with specific legal meaning. *Id.* at 276. Costs include only filing fees and statutory witness fees. *Id.* Statutory witness fees are five dollars per day plus mileage. Ind. Code § 33-37-10-3; *Wiley*, 875 N.E.2d at 276 n.4. "Costs" do not include items such as

deposition transcription, acquisition of medical records, and photocopies. *Wiley*, 875 N.E.2d at 276. Nor do costs include attorney fees. *Id.*

Here the trial court set a will contest bond of $10,000. The court did not issue explanatory findings when it set the bond, though it later noted that "given the size of the estate, . . . the ten thousand dollar bond was a conservatory [sic] amount." First, to the extent the trial court may have calculated bond simply using the value of the subject estate, the court's bond determination was predicated on an erroneous view of the law. The above-cited authority makes clear that the amount of bond is derived from anticipated "costs," and costs include no more than filing fees and statutory witness fees. The size of the decedent's estate should for the most part be irrelevant. Second, we have difficulty justifying ad hoc the $10,000 bond as representing filing fees and statutory witness fees. There is no indication in the record that these costs will total upwards of $10,000. For the foregoing reasons, we conclude that the trial court abused its discretion in imposing the $10,000 bond. *Cf. Zelek*, 598 N.E.2d at 597 (finding trial court did not abuse its discretion in setting bond at $2500). We reverse the trial court's order dismissing the case and remand for reinstatement of the contestants' claim. We further direct the trial court to evaluate costs and set bond consistent with this opinion. *See Wiley*, 875 N.E.2d at 277-78.

Reversed and remanded.

NAJAM, J., and BROWN, J., concur.