STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF JACK ROSENBERG, Deceased

CHARLOTTE ROSENBERG, Personal Representative of the ESTATE OF JACK ROSENBERG, Deceased,

Appellant,

v

RUBENSTEIN, ISAACS, LAX & BORDMAN,

Appellee.

UNPUBLISHED
July 15, 1997

No. 174934; 180744
Oakland Probate Court
LC No. 77-129354-SE

Before: Gribbs, P.J., and Young and Caprathe*, JJ.

PER CURIAM.

This consolidated appeal involves appellee Rubenstein, Isaacs, Lax, & Bordman's (Rubenstein) petition for unpaid attorney fees accrued while representing the Estate of Jack Rosenberg (Rosenberg) from late 1981 through 1983. The probate court awarded Rubenstein $167,510.97, plus interest, costs, and attorney fees incurred. Rosenberg appeals from that award in case 174934. The probate court also awarded Rubenstein $9,295.50 in sanctions against both the Rosenberg Estate and its former attorney, James Hudnut. Rosenberg and Hudnut appeal from the order granting sanctions in case 180744. In case 174934 we set aside the fee award of $167,510.97 and remand the case to the probate court to determine whether the total fee charged against the Rosenberg estate was reasonable. We affirm the award of sanctions in case 180744.

I.

Rosenberg first argues that the probate court erred by not dismissing Rubenstein's request for attorneys fees under the doctrine of res judicata and MCL 700.564(4); MSA 27.5564(4). We disagree. The duty to account under MCL 700.563(1); MSA 27.5563(1) falls only on the personal

* Circuit judge, sitting on the Court of Appeals by assignment.

representative of the estate, not on the legal counsel representing the estate. Any amounts paid to attorneys were only required to be accounted for by the final accounting. MCL 700.563(2); MSA 27.5563(1).

II.

Rosenberg next argues that the probate court erred in its findings of fact because the court did not take into account that $300,000 in fees had already been paid to Rubenstein's firm prior to its suit for the additional $167,510.97 in fees. We agree, and remand to the probate court for reconsideration of the amount of attorney fees awarded in light of the amounts already paid and other relevant factors.

When determining whether Rubenstein's request for $167,510.97 in fees was reasonable, the probate judge noted that Mrs. Rosenberg testified that Mr. Rubenstein had originally estimated that the total fees charged against the estate in this matter would not exceed $150,000. The probate judge pointed out that the difference between the $167,510.97 sought by Rubenstein and his original estimate was "a mere twelve percent." The probate judge's findings did not take into account the fact that Rosenberg's estate had already paid Rubenstein legal fees of almost $300,000. Thus Rubenstein was requesting a total of around $467,500 in fees, not just the $167,510.97 figure considered by the probate judge. The probate judge's numerical comparison was not consistent with the evidence and clearly erroneous. *In re Powell Estate*, 160 Mich App 704, 710; 408 NW2d 525 (1987).

On remand, we direct the probate court to determine whether the total amount of compensation sought by Rubenstein (approximately $467,500) was reasonable under the circumstances of this case, then use that determination as a basis for deciding what additional fees beyond those already paid, the Rosenberg estate may owe to Rubenstein's firm. When determining the reasonableness of the lawyer's charges, the court should consider the factors set forth in *In re Krueger Estate*, 176 Mich App 241, 248; 438 NW2d 898 (1989), including but not limited to the amount of time spent, the amount of money involved, the character of the services rendered, the skill and experience necessary, and the results obtained.

III.

Rosenberg argues that the probate court erred by finding that Rubenstein did not have a duty to withdraw from representing the estate at an earlier date because of the dispute over fees. We find no error. There was conflicting evidence on the point at which the fee dispute could no longer be resolved by the parties. There was evidence that Rubenstein withdrew once it became apparent that the parties could not resolve this dispute in late 1983. The probate court's findings were not clearly erroneous. *In re Powell Estate, supra*, 160 Mich App 710.

IV.

Rosenberg contends that the probate court did not properly consider evidence that the fee agreement between the parties placed a cap on the fees at $150,000. We find no error. There was nothing in the record that conclusively established that both parties agreed that the fees would be limited

to $150,000. This cap was never mentioned in the written fee agreement. At most, the evidence showed that appellant was only given an estimate of what the estate should expect to pay. The parties also left open the possibility that the fee agreement might have to have been changed in the future due to unanticipated complications. The probate court did not clearly err by refusing to limit appellee's total fees to $150,000. *In re Powell Estate*, *supra*, 160 Mich App 710.

V.

Rosenberg argues that the probate court erred in granting appellee interest at twelve percent from the date of its petition to the date of satisfaction of the judgment. While the probate court did not indicate what rate of interest applied, we find that twelve percent is the appropriate interest rate. MCL 600.6013(4); MSA 27A.6013(4).

The interest rate is controlled by MCL 700.767; MSA 27.5767 as amended by 1982 PA 412, which requires a rate consistent with MCL 660.6013; MSA 27A.6013. The substance of 1982 PA 412 is consistent with MCL 700.717; MSA 27.5717; we can discern no intent by the Legislature to repeal 1982 PA 412 by its enactment of MCL 700.717; MSA 27.5717. *House Speaker v State Administrative Bd*, 441 Mich 547, 562-563; 495 NW2d 539 (1993).

VI.

Rosenberg also argues that the court's findings on appellant's duty to pay appellee for the services of the firm of Weisman, Trogan, Young and Schloss, P.C., were clearly erroneous when there was no evidence that appellant agreed to retain that firm to serve as co-counsel. We disagree.

The evidence showed that Rosenberg was well aware of Weisman, Trogan's involvement and approved of the hiring of that firm to assist Rubenstein. The trial judge did not err by finding that Rubenstein was entitled to seek reimbursement for Weisman, Trogan's fees. *In re Powell Estate*, *supra*, 160 Mich App 710.

VII.

James Hudnut argues that he was not provided with personal notice of the hearing where the court imposed sanctions against him as a result of his withdrawal from this case. Hudnut and Rosenberg also argue that there was insufficient evidence to justify the imposition of sanctions. We disagree with both arguments.

On the facts of this case, we believe Hudnut had actual notice of appellee's request for about $10,000 in sanctions for the late filing of his motion to withdraw as counsel for the estate. Hudnut was present at the hearing when appellee made an oral motion for sanctions. Subsequent notice of the written motion, which was sent to the estate's new attorney (who was of counsel to Hudnut's firm), was a sufficient means to provide notice on the facts of this case given that Hudnut continued to work with the estate and was obviously in contact with appellant's new attorney even after he withdrew as trial counsel. *Wortelboer v Benzie Co*, 212 Mich App 208, 218; 537 NW2d 603 (1995); *Keith v Dep't of Treasury*, 180 Mich App 714, 718; 448 NW2d 491 (1989).

Nor did the probate judge err by imposing sanctions. Hudnut's motion to withdraw as Rosenberg's counsel was not brought until this case was about to be tried. Rosenberg, represented by Hudnut, had attempted to have this matter adjourned on other grounds, but was unsuccessful. It appears that the estate resorted, at the last minute, to the one motion it knew the probate court would have to grant. Under these facts, we conclude that the probate court did not err by deciding to impose sanctions. See *Ruffin v Kent*, 139 Mich App 479, 482-483; 363 NW2d 14 (1984).

VIII.

Finally, Rosenberg argues that the trial judge , who was assigned to this case back in 1990 by the State Court Administrative Office as a visiting judge, did not have the authority to act as a jurist to hear the trial in November 1993 and order that appellant and Hudnut pay sanctions because a proper order was not issued by the SCAO appointing him to hear the trial in November 1993. If any error occurred, it does not require reversal.

The parties agree that the trial judge was initially properly assigned to hear this case. Rosenberg and Hudnut only argue that a separate order for the trial was not entered. There is no question that as a retired jurist, the trial judge was qualified for the assignment. Const 1963, art 6, § 23; MCL 600.225; MSA 27A.225; *People v Fleming*, 185 Mich App 270, 274; 460 NW2d 602 (1990). The trial judge continued to be assigned to this matter by subsequent orders. The failure to obtain the proper order appears at most to have been an honest clerical mistake which does not warrant reversal. The lack of a proper order of assignment does not divest a judge of jurisdiction to hear the matter. The business of the courts is too important to permit such details of assigning judges to control jurisdiction in the matter. *Alpena Nat'l Bank v Hoey*, 281 Mich 307, 310-311; 274 NW 803 (1937). Accordingly, even if there was no order assigning the trial judge to hear the trial in November 1993, this does not affect the validity of his orders in either Docket No. 174934 or Docket No. 180744. *Id*.

In case 180744, the probate court's order granting sanctions is affirmed. In case 174934, we set aside the award of $167,510.97 and remand this matter to the probate court for further proceedings consistent with this opinion. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Robert P. Young, Jr.
/s/ William J. Caprathe