STATE OF MICHIGAN

COURT OF APPEALS

IN RE MICHAEL MARTIN, a legally incapacitated person.

MARY MARTIN, Guardian and Conservator of MICHAEL MARTIN, a legally incapacitated person,

Appellee,

v

LEETA M. MARTIN and PATRICIA MAJOR,

Appellants.

UNPUBLISHED
April 6, 1999

No. 207623
Allegan Probate Court
LC No. 87-044115 CG

Before: Holbrook, Jr., P.J., and Murphy and Talbot, JJ.

PER CURIAM.

This is the fifth time that this Court has heard an appeal involving this estate.[1] The present dispute involves the probate court's denial of appellants' petition for attorney fees and costs incurred by the law firm of Hess & Hess, P.C. ("the law firm") from September 1, 1993, to March 21, 1996, in the amount of $114,032.35. We reverse and remand.

This Court reviews an award of attorney fees for abuse of discretion. *B & B Investment Group v Gitler*, 229 Mich App 1, 15; 581 NW2d 17 (1998). "A probate court has broad discretion in determining what amount constitutes reasonable compensation for attorney services." *In re Martin (After Remand)*, 205 Mich App 96, 109; 517 NW2d 749 (1994), rev'd on other grounds 450 Mich 204; 538 NW2d 399 (1995). The court must make an independent review and determine what constitutes a reasonable attorney fee on the basis of the record of the case, with the burden of proving the reasonableness of the award placed on the party claiming compensation. *In re Condemnation of Private Property for Highway Purposes*, 209 Mich App 336, 339; 530 NW2d 183 (1995). In *In re Martin (After Remand), supra*, we ordered the probate court to determine appellants' attorney fees under the "reasonableness" standard set forth in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973).

Because we have previously held that appellants may charge their reasonable attorney fees against the estate, *In re Martin*, 200 Mich App 703, 722-723; 504 NW2d 917 (1993), and because appellants' current petition includes attorney fees and costs related to the petition to withdraw life support from Michael Martin ("Michael") in the probate and appellate courts, we find that the probate court abused its discretion when it refused to award appellants *any* attorney fees. We disagree with the probate court's conclusion that because appellants ultimately prevailed in this matter, the estate was not benefited by appellants and their attorneys. "Were we to hold otherwise, we would be saying that attorneys who advocate the termination of Michael's life may be paid for all their reasonable services out of his estate but those who advocate keeping him alive may not." *Id*. at 722. Further, because we previously ruled that appellants were entitled to attorney fees for work performed before September 1, 1993, in view of appellants' successful appeal to our Supreme Court in 1995, reasonable compensation for trial and appellate work performed after that date are justified. It would be illogical and an abuse of discretion to deny any attorney fees and associated costs for work performed during this time period.[2] Accordingly, we remand this case to the probate court to determine appellants' reasonable attorney fees and costs.

We will next briefly address the specific findings made by the probate court that should be considered in determining reasonable attorney fees on remand. First, the probate court did not abuse its discretion in limiting the law firm's fee to the hourly rate of $100 as set forth in the fee agreement or in deducting the law firm's costs related to seminars. We addressed these issues in regard to appellants' previous request for attorney fees. See *In re Martin (After Second Remand)*, unpublished opinion per curiam of the Court of Appeals, decided September 19, 1995 (Docket Nos. 161299, 161431). Second, the probate court did not abuse its discretion in refusing to award the law firm its fees incurred to collect the fees in the present case. Appellants' attempt to collect "fees for fees" is contrary to Michigan law. See *In re Sloan Estate*, 212 Mich App 357, 363; 538 NW2d 47 (1995). Third, we disagree with the probate court's conclusion that attorney Daniel Hess' charge for driving his brother to the oral argument before our Supreme Court did not benefit the estate. Daniel Hess was appellants' attorney of record and may have contributed to oral argument preparation. As a result, we conclude that his time spent on the day of oral argument was not necessarily an unreasonable charge. Fourth, we disagree with the probate court's determination that the law firm acted in bad faith when it requested fees in excess of appellee's agreement to pay appellants' attorney fees up to $20,000, or when it sent a letter to Michael's hospital which prompted the probate court to enjoin appellants. We previously held that appellants could request fees in excess of the agreement, and we also dissolved the probate court's injunction. *In re Martin, supra* at 720-724. Because appellants prevailed on those two issues, we do not find any bad faith in their actions that would justify a reduction in their attorney fee request.

Finally, we decline to grant appellants' request that a different judge determine attorney fees on remand. This Court will reassign a case to a new judge on remand where "it would be unreasonable to expect the trial judge to be able to put previously expressed views out of his mind without substantial difficulty," *Ireland v Smith*, 214 Mich App 235, 251; 542 NW2d 344 (1995), aff'd and modified 451 Mich 457; 547 NW2d 686 (1996), or when failure to reassign the case would present an appearance of impropriety, *Sparks v Sparks*, 440 Mich 141, 163; 485 NW2d 893 (1992). We disagree with appellants' contention that Judge Greig was unable to follow the clear directives of this

Court on previous appeals, because we affirmed his previous award of attorney fees. See *In re Martin (After Third Remand)*, unpublished per curiam opinion of the Court of Appeals, decided February 9, 1996 (Docket Nos. 161299, 161431). We are confident that Judge Greig will be able to determine reasonable compensation with this Court's current opinion and directive that entitlement to attorney fees exists for work performed on behalf of the estate from September 1, 1993, to March 21, 1996, based upon appropriate proofs.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy
/s/ Michael J. Talbot

[1] The underlying facts of this case appear in *In re Martin (After Remand)*, 450 Mich 204, 208-214; 538 NW2d 399 (1995).

[2] The record reveals that during the time period September 1, 1993, to March 21, 1996, appellants' counsel provided representation during a six-day trial, prepared appeals to this Court and our Supreme Court, sought stays of execution of orders of the probate court and this Court, and responded to a petition of certiorari in the United States Supreme Court filed by the appellee.