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, P.C.,

Appellee.

UNPUBLISHED
January 8, 2002

Nos. 215371; 216741
Oakland Probate Court
LC No. 77-129354-SE

Before: Zahra, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

In these consolidated cases, Charlotte Rosenberg, the personal representative of the estate of Jack Rosenberg, appeals as of right the probate court's final order allowing fees (Docket No. 215371) and the probate court's order compelling compliance with its order increasing escrow (Docket No. 216741). We affirm both orders.

In 1979, Charlotte Rosenberg retained Rubenstein, Isaacs, Lax & Bordman, P.C. to represent the estate. Rubenstein, Isaacs, et al. represented the estate in a suit against Rosenberg Brothers and Friendship Companies, performed services related to a federal estate tax return audit, and performed other services for the estate. The estate paid Rubenstein, Isaacs, et al. almost $300,000 for work performed on its behalf, but stopped its payments in 1981. On September 24, 1984, Rubenstein, Isaacs, et al. filed a petition for costs and attorney fees related to its representation of the estate between October 1, 1981 and September 30, 1983. After an evidentiary hearing, the probate court awarded Rubenstein, Isaacs, et al. $167,510.97 for its legal services performed for the estate. On appeal, this Court remanded the case because of an erroneous factual finding by the probate court. *In re Rosenberg Estate*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 1997 (Docket Nos. 174934 and 180744). On remand, the probate court conducted an evidentiary hearing and subsequently entered a final order allowing fees for Rubenstein, Isaacs, et al. in the amount of $167,510.97. After this final

order had been entered, the probate court entered an order compelling the estate to comply with a prior order to increase the escrow amount to secure the payment of any fees awarded to Rubenstein, Isaacs, et al. from the estate.

On appeal, Charlotte Rosenberg first argues that the probate court did not have the authority to conduct an evidentiary hearing on remand when this Court did not specifically mandate an evidentiary hearing. We disagree. "The power of a lower court on remand is to take such action as law and justice require that is not inconsistent with the judgment of the appellate court." *McCormick v McCormick*, 221 Mich App 672, 679; 562 NW2d 504 (1997). In the instant case, this Court ordered the probate court to take the following actions on remand:

> 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. [*In re Rosenberg Estate*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 1997 (Docket Nos. 174934 and 180744), slip op at 2.]

This Court did not order the probate court to reopen the proofs and conduct an evidentiary hearing, but it did not prohibit the probate court from taking this action to determine the reasonableness of fees. Therefore, the probate court's decision to conduct an evidentiary hearing was not inconsistent with this Court's remand order.

Charlotte Rosenberg cites *Meadowlanes Limited Dividend Housing Ass'n v City of Holland (After Remand)*, 176 Mich App 536; 440 NW2d 71 (1989), aff'd in part, rev'd in part on other grounds 437 Mich 473 (1991), on remand MTT (Docket Nos. 89792, 103246, 55933, April 2, 1993), for the proposition that a lower court must make a decision that the existing trial record is insufficient before considering new evidence on remand. We disagree. This Court's opinion in *Meadowlanes* does not support the proposition for which it is cited. In *Meadowlanes*, this Court recognized the lower court's discretion to take actions it deems necessary on remand, as long as those actions are in compliance with the appellate court's remand order. This Court stated:

> The order remanding this case back to the tribunal did not mandate that the tribunal rehear the case or consider other evidence. It was apparently the decision of the tribunal that enough facts were available to it on the record to comply with the order of remand. We have no reason to disagree with this assessment. We find that the remand order of this Court has been complied with. [*Id.* at 542.]

This decision does not limit a lower court's discretion on remand. Rather, it reaffirms the lower court's discretion to do what it deems appropriate when the appellate court does not provide

specific instructions on remand. Charlotte Rosenberg offers no authority to suggest that a lower court may not consider additional evidence on remand when the appellate court does not specifically mandate such action. Because considering additional evidence was proper in the context of this Court's remand in the instant case, the probate court did not exceed the scope of its authority in conducting an evidentiary hearing.

Next, Charlotte Rosenberg argues that the probate court abused its discretion in awarding Rubenstein, Isaacs, et al. attorney fees because: (1) many of the services performed by Rubenstein, Isaacs, et al. did not benefit the estate, (2) the services performed by Rubenstein, Isaacs, et al. were not reasonable or as complex as claimed, and (3) some of the services performed by Rubenstein, Isaacs, et al. were detrimental to the estate. We disagree.

An attorney is entitled to receive reasonable compensation for necessary legal services he performs on behalf of an estate or its personal representative. MCR 8.303(A); *In re Krueger Estate*, *supra* at 248. In general, the probate court has broad discretion in determining what amount constitutes reasonable compensation. *Id.* In making this determination, the court should consider, among other factors, 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. *Id.* No one factor alone is dispositive in determining attorney fees. *Id.* at 250. The party claiming the right to compensation has the burden of proof in this regard. *Id.* at 249. The probate court must review a petition for attorney fees for reasonableness with an eye toward preservation of the estate's assets for the beneficiaries. *In re Sloan Estate*, 212 Mich App 357, 364; 538 NW2d 47 (1995).

"The standard of review applied by this Court to a probate court's determination as to the amount of attorney fees to be awarded is whether the court abused its discretion." *In re Humphrey Estate*, 141 Mich App 412, 439; 367 NW2d 873 (1985). An abuse of discretion occurs when the result was "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Charlotte Rosenberg maintains that the probate court abused its discretion in awarding Rubenstein, Isaacs, et al. attorney fees because some of Rubenstein, Isaacs, et al.'s services did not benefit the estate. Legal services rendered on behalf of an estate are compensable when the services confer a benefit on the estate by either increasing or preserving the estate's assets. *In re Sloan Estate*, *supra* at 362. Charlotte Rosenberg first argues that Rubenstein, Isaacs, et al.'s services related to the claim of intentional infliction of emotional distress did not benefit the estate because the claim was personal to her. The evidence shows, however, that the claim of intentional infliction of emotional distress may have been beneficial to the estate. Erwin Rubenstein testified that the estate benefited from the emotional distress claim because it provided a means by which Rosenberg Brothers could be influenced to settle the case without litigation. Rubenstein had suggested the emotional distress claim to Charlotte Rosenberg and she signed an affidavit relating to the claim. Larry Campbell, an expert in commercial litigation and litigation services, testified that the emotional distress claim benefited the estate because it subjected Rosenberg Brothers to additional exposure to liability, which increased the potential

for an additional judgment or a better opportunity to settle the matter. Therefore, the probate court did not abuse its discretion in including Rubenstein, Isaacs, et al.'s fees for the emotional distress claim in its award of attorney fees.

Next, Charlotte Rosenberg argues that Rubenstein, Isaacs, et al.'s services related to a Racketeering Influenced and Corrupt Organizations Act (RICO) claim did not benefit the estate because the claim was meritless and was never filed. Rubenstein, Isaacs, et al. researched the RICO claim to see if the litigation could be moved into federal court. Rubenstein, Isaacs, et al. believed that moving the case to federal court under RICO would be advantageous to the estate because it would put additional pressure on Rosenberg Brothers and the state trial court was tending to rule against the estate in regard to motions. Although the RICO claim was never filed, Charlotte Rosenberg does not dispute that the work on the claim was done on behalf of the estate and was meant to benefit the estate. Because Rubenstein, Isaacs, et al.'s services in regard to the RICO claim were done to benefit the estate, the probate court did not abuse its discretion in awarding Rubenstein, Isaacs, et al. attorney fees for these services.

Charlotte Rosenberg also contends that there is no evidence that the number of depositions taken by Rubenstein, Isaacs, et al. benefited the estate. Anthony Trogan testified that a large number of depositions were taken because there were attorney-client privilege issues that had to be avoided, there were a great number of objections, they had to cover a significant length of time and a large number of different incidents and entities, the issues were complex, and there was a voluminous amount of material to explore. Rubenstein testified that the depositions were necessary because of the large number of claims and persons involved in the case. The depositions had to cover a period going ten to fifteen years into the past because Rubenstein, Isaacs, et al. was attempting to establish ownership and interest in certain contracts and transactions and there was a great deal of tracing and background that had to be developed. Additionally, Rubenstein, Isaacs, et al. was attempting to establish a pattern of conduct regarding fraud perpetrated by Jack Rosenberg's brothers. Some persons were deposed to search for, explore, and develop assets that had not been previously disclosed. Additionally, the accountants had to be deposed to explore the equity method as opposed to the cost method of accounting. Rubenstein testified that the following objectives were obtained by taking the depositions: (1) information was obtained to include a constructive trust claim in the complaint,[1] (2) a Sun Life building interest was discovered, (3) the fair market value was discovered,[2] (4) the way in which the returns were prepared as far as the equity method was discovered, and (5) the claims in the estate's complaint were proven. Expert witness Campbell opined that the fees Rubenstein, Isaacs, et al. charged the estate during the course of the litigation, including the fees for the depositions, were reasonable for the services rendered and that the services provided were reasonable and necessary. He opined that the case involved difficult issues, involved a great deal of work, and that the litigation was extremely contentious. Campbell further opined that

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[1] Rubenstein testified that a constructive trust was established by discovering that a substantial portion of the money in one of the partnerships was taken from that partnership, including the estate's funds, and used to acquire nine or ten other shopping center interests.

[2] Rubenstein did not specify the property to which he was referring.

Rubenstein, Isaacs, et al.'s services benefited the estate.[3] Charlotte Rosenberg knew about all of the depositions and was present at all but one of the depositions. We find that this evidence demonstrates that the depositions taken by Rubenstein, Isaacs, et al. were necessary and reasonable and benefited the estate.

Next, Charlotte Rosenberg argues that there is no evidence that the depositions taken by Rubenstein, Isaacs, et al. required the presence of two or three of Rubenstein, Isaacs, et al.'s attorneys. Rubenstein testified that it was necessary for a member of his firm to attend the depositions along with Trogan because of the large amount of information that was necessary to go through in the deposition. Each attorney performed a different function at the depositions. Campbell opined that it was reasonable for Rubenstein, Isaacs, et al. to assign two or three attorneys to a deposition. Charlotte Rosenberg was made aware of the number of attorneys at the depositions and approved of their presence. We find that this evidence shows that it was reasonable and it benefited the estate for Rubenstein, Isaacs, et al. to have two or three attorneys attend the depositions.

Charlotte Rosenberg further contends that the probate court abused its discretion in awarding attorney fees to Rubenstein, Isaacs, et al. because the services performed by Rubenstein, Isaacs, et al. were not complex or reasonable. First, Charlotte Rosenberg argues that the services were not complex because some of the services performed by Rubenstein, Isaacs, et al. were routine matters. Although some of the services performed by Rubenstein, Isaacs, et al. may have been routine, there was testimony that the federal tax audit was complex. Rubenstein described the litigation against Rosenberg Brothers and Friendship Companies as "[v]ery, very difficult. Very, very complex." He stated that the estate was complex because of the substantial number of interests in partnerships and closely held corporations and the tax implications of these interests. He also described the litigation as "a very difficult, hard fought, litigated matter." Trogan described the case as "complex" and very contentious. James LoPrete, an expert on the reasonableness of fees in probate cases, testified that the work involved with the estate was substantially more than a routine estate because of the tax issues involved with partnerships, real estate partnerships, and closely held businesses. LoPrete opined that the case was difficult and required "a high degree of sophistication in the tax field." Campbell opined that the case involved difficult issues, involved a great deal of work, and that the litigation was extremely contentious. We conclude that this expert testimony regarding the complexity of the services performed by Rubenstein, Isaacs, et al. was sufficient for the probate court to find that Rubenstein, Isaacs, et al.'s fees were reasonable.

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[3] Charlotte Rosenberg challenges Campbell's expert opinion which she claims was based on insufficient information because he did not closely examine all of the depositions. The record indicates that Campbell formed his opinion after reviewing depositions, pleadings, motions, interrogatories, answers to interrogatories, the opinion of the Court of Appeals, time slips, time summaries, and some of the probate accountings. Although he admitted that he only "looked at" some of the depositions without reviewing them for information, he paid special attention to other depositions. We conclude that Campbell's review of the materials was sufficient to form an expert opinion.

Next, Charlotte Rosenberg argues that Rubenstein, Isaacs, et al. caused the federal tax audit to become more complex by failing to appraise the estate's real estate property. LoPrete opined that it may have been beneficial to the estate to refrain from appraising the real estate because the appraisal may have been high and it may have been advisable for the estate to just try to dispute the appraisal made by the federal government, especially in a case where there may have been undisclosed assets. Therefore, there was sufficient evidence to support the probate court's finding that Rubenstein, Isaacs, et al.'s decision not to appraise the real estate was made for the benefit of the estate and was reasonable even if it made the tax audit more complex.

Charlotte Rosenberg also argues that Rubenstein, Isaacs, et al. caused the Rosenberg Brothers litigation to become more complex by expanding the relief sought by the estate to corporate dissolutions, constructive trust theories, fraud, director liability, and other theories. Charlotte Rosenberg does not argue that these services were not done for the benefit of the estate, but merely argues that she did not initially request them. An attorney should not be limited to investigating causes of action requested by the client. It is part of a lawyer's responsibility to investigate causes of action and alternate methods of obtaining relief. Rubenstein, Isaacs, et al. informed Charlotte Rosenberg of the claims it was alleging and the relief sought. These claims were made to benefit the estate and were not objected to by Charlotte Rosenberg. We find that these services provided by Rubenstein, Isaacs, et al. were not unreasonable merely because they made the litigation more complex.

Next, Charlotte Rosenberg argues that the probate court abused its discretion in awarding attorney fees to Rubenstein, Isaacs, et al. because some of the services performed by Rubenstein, Isaacs, et al. were detrimental to the estate. Specifically, she claims that the estate suffered a loss of $45,000 in investment income because of the interest charges of the Internal Revenue Service due to Rubenstein, Isaacs, et al.'s advice not to pay the estate taxes. Although Charlotte Rosenberg wanted to pay the estate taxes, there was evidence that the estate taxes were not paid because the estate did not have sufficient funds to make the payment. Therefore, we find that the probate court did not abuse its discretion in awarding attorney fees to Rubenstein, Isaacs, et al. despite the estate's loss in investment income due to the failure to pay estate taxes.

Next, Charlotte Rosenberg argues that Rubenstein, Isaacs, et al.'s failure to appraise the real estate interests of the estate resulted in an increase in the estate tax. The estate tax examiner appraised the estate's real estate property and increased the value of various partnership interests. Both Rubenstein and Charlotte Rosenberg approved the changes in value of the interests. There is no evidence on the record what the real estate interests would have been appraised for if Rubenstein, Isaacs, et al. had had them appraised, whether the appraisals would have been different than the appraisals done by the tax examiner, or whether the Internal Revenue Service would have accepted the appraisals. Therefore, Charlotte Rosenberg's argument that Rubenstein, Isaacs, et al.'s failure to have the properties appraised increased the estate tax is merely speculation.

Next, Charlotte Rosenberg argues that the probate court's October 8, 1998 final order allowing attorney fees should be reversed because this Court erred in its prior decision in *In re Rosenberg Estate*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 1997 (Docket Nos. 174934 and 180744), when it awarded Rubenstein, Isaacs, et al. interest at a rate of

twelve percent. We disagree. We agree with Rubenstein, Isaacs, et al. that this Court is bound by its previous decision under the law of the case doctrine. The applicability of the law of the case doctrine is a question of law subject to review de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

> Under the law of the case doctrine, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. [*Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000) (citation omitted).]

Generally, "an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals." *Grievance Administrator, supra* at 260. The law of the case doctrine applies only to issues actually decided, either implicitly or explicitly, in the prior appeal. *Id.* The primary purpose of the law of the case doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. *Ashker, supra* at 13. The law of the case applies regardless of the correctness of the prior decision. *Id.* at 15. However, the doctrine does not preclude reconsideration of a question if there has been an intervening change of law that has occurred after the initial decision of the appellate court. *Id.* at 13.

In the instant case, this Court addressed this issue in its July 15, 1997 opinion:

> 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).
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> 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 [sic]; 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). [*In re Rosenberg Estate*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 1997 (Docket Nos. 174934 and 180744), slip op at 3.]

Charlotte Rosenberg does not argue that there has been a change in the law regarding this issue since this Court's July 15, 1997 decision. This issue has been explicitly decided by this Court. Accordingly, the law of the case applies and this issue may not be decided differently on appeal from the remand. Consequently, Charlotte Rosenberg's argument fails under the law of the case doctrine.

Next, Charlotte Rosenberg argues that the probate court lacked jurisdiction to enter the order compelling compliance with its order increasing escrow. We disagree. Jurisdiction is a

question of law that this Court reviews de novo. *Bass v Combs*, 238 Mich App 16, 23; 604 NW2d 727 (1999).

As a preliminary matter, Charlotte Rosenberg maintains that the probate court did not have the authority to enter an order requiring the estate to pay money into an escrow account to secure payment of fees awarded to Rubenstein, Isaacs, et al. We disagree. MCL 700.733 allows the probate court to arrange for future payment or possible payment on claims against an estate by creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise. MCL 700.733(3)(b). Therefore, the probate court had the authority to enter its May 15, 1990 order for escrow and its October 6, 1998 order increasing the amount of the escrow.

Charlotte Rosenberg argues that the probate court lacked jurisdiction to enter its order compelling compliance with its order increasing escrow because the proceedings were stayed on appeal. We disagree. After an appeal is claimed and notice of the appeal is given at the probate court, all further proceedings in pursuance of the sentence, order, judgment, or denial appealed from shall cease until the appeal is determined. MCL 600.867(1); MCL 700.35(1). Once an appeal has been filed or the Court of Appeals has granted leave to appeal from an order of the probate court, the trial court is divested of its jurisdiction to set aside or amend the order appealed from except by order of the Court of Appeals, by stipulation of the parties, or as otherwise provided by law. MCR 5.802(A); MCR 7.208(A); *Bass, supra* at 24. However, "[a]n appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders." MCR 7.209(A)(1); *Bass, supra*.

On October 6, 1998, the probate court entered an order increasing the escrow to $1 million to secure the payment of any fees awarded to Rubenstein, Isaacs, et al. On October 8, 1998, the probate court entered a final order allowing fees for Rubenstein, Isaacs, et al. in the amount of $167,510.97. On October 27, 1998, Charlotte Rosenberg filed a claim of appeal of the probate court's final order allowing fees. Rubenstein, Isaacs, et al. subsequently filed a motion to compel compliance with the probate court's order to increase escrow and on December 18, 1998, the probate court entered an order granting Rubenstein, Isaacs, et al.'s motion.

We conclude that the probate court had jurisdiction to enter the order granting Rubenstein, Isaacs, et al.'s motion to compel compliance with the order increasing escrow because Charlotte Rosenberg's filing of a claim of appeal from the final order allowing fees did not stay the enforceability of the order compelling compliance with the escrow order. The probate court's October 6, 1998 order increasing escrow was entered before the final order of fees was entered or appealed. Therefore, the probate court had jurisdiction to enter this order increasing escrow. The issue is whether the probate court had jurisdiction to compel compliance with this order after Charlotte Rosenberg appealed the October 8, 1998 final order. We find that it did. The October 6, 1998 order was properly entered. Charlotte Rosenberg's subsequent appeal of the October 8, 1998, order did not stay the effect *or enforceability* of the order of the probate court. MCR 7.209(A)(1); *Bass, supra* at 24. Therefore, although the probate court may have lacked jurisdiction to amend or set aside the final order allowing fees, it did have the authority to oversee further proceedings to enforce its order increasing escrow.

Further, even if the enforcement of the probate court's final order allowing fees was stayed, the enforcement of the order compelling compliance with the order increasing escrow

would not be stayed. In *Comerica Bank v City of Adrian*, 179 Mich App 712; 446 NW2d 553 (1989), this Court held that where Comerica Bank appealed an order regarding fees, "this Court acquired jurisdiction as to that order [the order regarding fees], but not as to the other orders and, therefore, even assuming that the properly appealed order was automatically stayed, we do not believe that the other orders were stayed." *Id.* at 730. Similarly, even if the final order allowing fees was stayed in the instant case, the order compelling compliance with the increase in escrow would not also be stayed.

Although we affirm the orders of the probate court, we find no merit to Rubenstein, Isaacs, et al.'s contention that the instant appeals are so vexatious as to justify the imposition of sanctions against Charlotte Rosenberg.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Michael J. Talbot