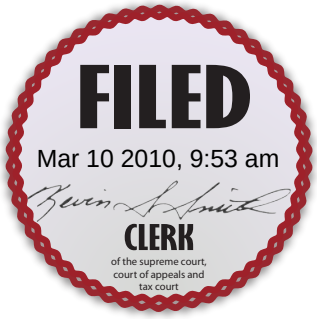

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IN THE
COURT OF APPEALS OF INDIANA

JANETTE P. HAWKINS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 37A03-0909-CV-437
	)	
SAMANTHA JOSLYN, as Personal Representative of the Estate of NICOLE H. THOLL, Deceased,	)	
	)	
Appellee.	)	

APPEAL FROM THE JASPER CIRCUIT COURT
The Honorable John D. Potter, Judge
Cause No.37C01-0812-ES-601

March 10, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Janette Hawkins appeals the trial court's award of $31,250.00 in attorney fees to Andrew Yoder, an attorney hired by her ex-husband, Michael Tholl. We reverse and remand.

Issue

Hawkins raises three issues, which we consolidate and restate as whether the trial court properly ordered the Estate of Nicole Tholl ("the Estate") to pay $31,250.00 to Yoder.

Facts

Hawkins and Tholl were divorced in 1996. After their divorce, Hawkins had legal and physical custody of their daughter, Nicole Tholl. As of September 2008, Tholl had a child support arrearage of $13,594.00 and had failed to pay other medical and education expenses incurred on Nicole's behalf.[1]

On November 20, 2008, eighteen-year-old Nicole was killed in an automobile accident in Rensselaer. The driver of the other automobile was Taylor Risner.

On December 6, 2008, Tholl entered into a contingency fee contract with Yoder. The contract specifically provided, "I Michael Tholl, requests [sic] and authorizes [sic] Murphy Yoder Law Firm, P.C., and ("Lawyer") to represent him in all matters arising out of the accident occurring on 11-20-08, at Rensselare [sic]., against Taylar [sic] Risner." Appellant's App. p. 48. Pursuant to the agreement, Tholl agreed to pay Yoder 25% of any settlement or recovery and 40% if the case proceeded to trial. The agreement also

[1] On June 9, 2009, Tholl acknowledged he owed Hawkins $17,477.51.

provided, "If Client makes no recovery, Client owes Lawyer nothing for legal services or expenses." Id. at 48. The fee agreement allowed either party to terminate the contract at any time and required the client to pay "all out of pocket expenses and legal services based on quantum meruit" if the relationship was terminated before recovery. Id. at 49. The agreement was signed by Tholl "AS ADM. OF THE ESTATE OF NICOLE." Id.

On December 9, 2008, Tholl filed a "verified petition for appointment of administratrix [sic] and for issuance of letters of administration for the sole purpose of maintaining an action for wrongful death." Appellee's App. p. 1. The trial court granted Tholl's petition that day, appointing him the administrator of the Estate "for the sole purpose of bringing an action concerning the decedent's alleged wrongful death." Appellant's App. p. 4. That same day, Yoder sent a letter to Hawkins stating:

> I believe that Mike and yourself have not had the best relationship since the divorce. Mike hired me to make sure that the estate is handled properly so that the parties can settle this peacefully and without much court intervention. Since Nicole passed intestate, the parents, as heirs would be entitled to a 50-50% split. I believe that Mike may owe back child support to yourself in an amount possibly over $10,000. The settlement of this obligation will be addressed. Before any of the proceeds would be distributed, there would be a Court Order or stipulation regarding said division. This would protect all parties involved.
>
> Mike hired me to make sure that the process is orderly and fair. I know that this is a difficult time for the entire family. In any event, if you would like me to amend the pleadings to make you a co-administrator, I would talk to Mike regarding the same. . . .

Id. at 50.

On December 10, 2008, a State Farm Insurance Companies ("State Farm") representative spoke with Hawkins's husband, Thomas Hawkins. State Farm insured Risner and offered the Hawkinses policy limits of $100,000.00. A follow up letter confirmed this conversation. The Hawkinses were also informed by Indiana Farm Bureau Insurance ("Farm Bureau"), their automobile insurance carrier, that they were entitled to a $25,000.00 death benefit based on the terms of their policy.

On December 16, 2008, Tholl took his oath and accepted his appointment as the administrator of the Estate and, on December 18, 2008, letters of administration were issued to Tholl. On December 29, 2008, Hawkins filed a petition to remove Tholl as the administrator and to appoint her as the administrator of the Estate.

On January 12, 2009, the trial court held a hearing on Hawkins's petition, at which the extent of Tholl's relationship with Nicole was highly disputed. The trial court removed Tholl as the administrator because of his "financial straits." Tr. Vol. II p. 27. The trial court declined to appoint Hawkins as the administrator because Tholl owed her money; instead, the trial court appointed an attorney, Samantha Joslyn, as the administrator of the Estate. The trial court ordered Tholl to immediately submit his petition for attorney fees to Joslyn. At the conclusion of the hearing, the trial court stated:

> Now, obviously, you know, Mr. Tholl was appointed personal representative and he did have authority to bind and contract with Mr. Yoder's firm, so that contract will pass on to the next personal representative, and leaves them to review the claim against REMC. And I don't know if there are issues with that claim, or a lawsuit or anything.

Id. at 29.

On April 17, 2009, Hawkins filed a proposed distribution of funds held by Joslyn, which included the $100,000.00 State Farm settlement and the $25,000.00 Farm Bureau insurance policy proceeds. Hawkins suggested that she and Tholl split the proceeds from the State Farm policy equally, that Tholl be ordered to pay his unpaid child support from his portion of the State Farm settlement, that they share the funeral expenses equally, that she receive the proceeds of the Farm Bureau policy, that Tholl pay Yoder's attorney fees, and that she pay her own attorney fees. According to Hawkins's calculations, she would receive $91,381.22 and Tholl would receive $28,729.53. On April 22, 2009, Joslyn requested a hearing to determine the payment of attorney fees and the distribution of the remaining settlement funds. Joslyn submitted her bill of $981.31.

On June 12, 2009, after a hearing, the trial court permitted Hawkins and Tholl each to take a partial distribution of $25,000.00 and ordered Tholl's child support arrearage to be subtracted from his distribution and paid to Hawkins. On July 6, 2009, the trial court issued an order stating that the Estate, through Tholl, entered into a contract for representation by Yoder regarding Nicole's wrongful death. The trial court acknowledged that Indiana Code Section 34-23-2-1 allows the person who had custody of a child to maintain an action for the wrongful death of that child. The trial court observed that Tholl did not comply with this statute because he was the non-custodial parent. However, the trial court concluded:

> that the efforts of the Murphy Yoder Law Firm, P.C. resulted in a pot of $125,000.00 to be poured into the estate of Nicole H. Tholl, to be divided equally between the heirs, the

> decedent's parents. The firm's actions realized a policy limits settlement with the tort feasor and obtained a medical payments settlement in the full amount from the decedent's mother's own automobile insurance policy in the amount of $25,000.
>
> The Court further finds that the 25% contingency fee is reasonable and should be awarded to the Murphy Yoder Law Firm, P.C.
>
> The Court therefore finds that the Murphy Yoder Law Firm, P.C. should be awarded 25 percent of $125,000.00 or a total of $31,250.00 for attorney fees for representation of the Estate of Nicole H. Tholl.

Id. at 14-15. Hawkins now appeals.[2]

Analysis

Hawkins argues that the trial court erred by awarding Yoder $31,250.00 in attorney fees payable by the Estate.[3] "An attorney performing services for the estate at the instance of the personal representative shall have such compensation therefor out of the estate as the court shall deem just and reasonable." Ind. Code § 29-1-10-13. "The award or denial of attorney fees is within the sound discretion of the trial court, and in the

[2] On appeal, Yoder entered an appearance on behalf of the Estate and prepared the Appellee's Brief requesting that we affirm the award of attorney fees to him from the Estate.

[3] The Estate argues, "Michael Tholl, as personal representative, entered into an agreement with Murphy Yoder Law, P.C., to hire them to prosecute a case against Taylor Risner." Appellee's Br. p. 10. It is unclear, however, whether the Estate seeks affirmation of the attorney fee award based on the pursuit of a personal injury action or an estate action. This confusion is evidenced when the Estate argues, "neither Michael Tholl nor Attorney Yoder filed a wrongful death lawsuit. Instead, Attorney Yoder and Michael Tholl opened an estate on behalf of Nicole Tholl for purposes of pursuing a wrongful death action." Id. at. 15. The Estate goes on to assert that the "25% contingency fee is standard and customary in a personal injury case." Id. at 18.

It is also unclear whether Yoder was acting on Tholl's behalf or on the Estate's behalf. The complexity of Yoder's representation is demonstrated in the Estate's brief, where the Estate argues that Tholl was an heir of Nicole's Estate and "chose to hire an attorney to represent the estate to ensure that his interest was protected." Id. at 10.

absence of error or an abuse of discretion, we must affirm the trial court's decision." Daniels ex rel. Mercer v. Bryan, 856 N.E.2d 763, 766 (Ind. Ct. App. 2006).

Tholl executed the contingency fee contract with Yoder on December 6, 2008. He petitioned to be appointed the administrator on December 9, 2008, and letters of administration were not issued to Tholl until December 18, 2008. See I.C. § 29-1-10-3(a) (explaining that letters of administration shall be issued when the individual "has taken and subscribed before the clerk or any other officer authorized to administer oaths, an oath or affirmation that he will faithfully discharge the duties of his trust according to law and has given such bond as may be required and the bond has been approved by the court."). The authority to act as either a general administrator or special administrator is not automatic. See I.C. § 29-1-10-1 (describing the preference and qualifications of persons to whom letters of administration may be granted); I.C. § 29-1-10-15 (permitting the appointment of a special administrator); I.C. § 29-1-10-3 (requiring individuals to take oath prior to issuance of letters of administration). We cannot conclude that, on December 6, 2008, by simply signing the contingency fee agreement as the administrator of the Estate, Tholl was legally permitted to bind the Estate to the contingency fee agreement. This is true regardless of whether Joslyn attached a copy of the contingency fee agreement to her petition for attorney fees or whether the trial court stated in passing at the January 12, 2009 hearing that Tholl, as the administrator, had authority to contract with Yoder.

Tholl did not have the authority to act as the administrator of the Estate when he entered into the contingency fee agreement with Yoder; therefore, he could not bind the

Estate to the fee agreement.[4] Thus, we remand for the trial to determine on a quantum meriut basis what, if any, fees Yoder earned while Tholl was lawfully appointed the administrator of the Estate from December 18, 2008 until his removal on January 12, 2009. Any other fee arising out of Yoder's representation of Tholl is Tholl's sole obligation, and Hawkins is responsible for her own attorney fees.[5]

Conclusion

The trial court improperly awarded Yoder $31,250.00 in attorney fees payable from the Estate because Tholl was not authorized to bind the Estate. We reverse and remand.

Reversed and remanded.

MATHIAS, J., and BROWN, J., concur.

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[4] The Estate argues that Hawkins "never objected to the amount of the attorney fee and actually agreed that a 25% contingency fee is standard and customary in a personal injury case." Appellee's Br. p. 18. Hawkins's agreement that a 25% contingency fee is reasonable is not the same as agreeing that the Estate should pay the fee. Because of our holding today, however, we need not determine whether the 25% fee contingency agreement is reasonable. It is also unnecessary for us to determine whether Tholl, as the non-custodial parent, had standing to assert a claim for Nicole's wrongful death under the child wrongful death statute. See Ind. Code § 34-23-2-1(c) (stating that if the child's parents are divorced, an action for the wrongful death of a child may be maintained by the custodial parent); but cf. Chamness v. Carter, 575 N.E.2d 317, 320-21 (Ind. Ct. App. 1991) (concluding that a non-custodial parent has standing to pursue a wrongful death claim and that a parent's non-support of child is relevant to establishing loss and determining damages).

[5] Hawkins argues that the additional expenses she incurred, including the cost of appeal, should be returned to her from Tholl's share of the proceeds of the Estate. In the absence of a more developed argument supported by citations to authority, however, this issue is waived. See Ind. Appellate Rule 46(A)(8)(a) (requiring arguments be supported by cogent reasoning and citations to authority); Romine v. Gagle, 782 N.E.2d 369, 386 (Ind. Ct. App. 2003) ("A party generally waives any issue for which it fails to develop a cogent argument or support with adequate citation to authority and portions of the record."), trans. denied.