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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE SUPERVISED ESTATE OF RONALD M. UNGER, DECEASED) No. 12A02-0812-CV-01173

APPEAL FROM THE CLINTON CIRCUIT COURT
The Honorable Linley E. Pearson, Judge
Cause No. 12C01-0802-ES-023

October 9, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Tim Unger, Kent Unger, and Jason Unger, as co-executors of the supervised estate of Ronald Unger ("the Estate"), filed a petition in Clinton Circuit Court for the allowance of partial co-executors' fees and attorneys' fees. Over the objection of the surviving widow of the decedent Ronald Unger, Brenda Sue Unger ("Brenda"), the trial court granted the petition. Brenda appeals and argues that the trial court abused its discretion in awarding partial fees to the co-executors in the amount of $70,000 and to the attorneys in the amount of $150,000.

We reverse and remand.

Facts and Procedural History

Ronald Unger ("Ronald") executed his Last Will and Testament on April 16, 2003. On June 22, 2007, Ronald entered into a prenuptial agreement with Brenda, which provided in relevant part:

> Brenda hereby waives and releases any and all rights and claims of every kind, nature and description that she may acquire as Ronald's surviving spouse in his estate upon his death, including but not by way of limitation, any and all rights in testacy under Indiana statutes, I.C. § 29-1-2-1 and following, and any and all rights of election to take against Ronald's Last Will and Testament under Indiana statutes, I.C. § 29-1-3-1 and following, any and all rights of to [sic] a survivor's or other allowance under Indiana statutes, I.C. 29-1-4-1 and following, and under any law amendatory thereof or supplementary or similar thereto, and the same or similar laws of any other jurisdiction, and Brenda waives the right to act as personal representative of Ronald's estate. This provision is intended to and shall serve as waiver and release of Brenda's right of election in accordance with the requirements of said statutes.

Appellee's App. pp. 7-8. Immediately after signing this agreement, Ronald and Brenda were married. Less than a year later, on January 22, 2008, Ronald died. On February 15, 2008, Ronald's estate was opened, and Ronald's sons from his previous marriage, Tim

Unger, Kent Unger, and Jason Unger, were appointed as co-executors of their father's estate.

On May 9, 2008, Brenda filed a Petition to Revoke Unsupervised Administration of the Estate along with an Election to Take Against the Will by Surviving Spouse. Attached to her Election to Take Against the Will was a copy of a complaint Brenda had filed against the Estate in circuit court seeking to set aside the prenuptial agreement and requesting damages.

The co-executors hired attorneys Michael E. Douglas ("Douglas") and Robert M. Shaffer ("Shaffer") to handle the administration of the Estate and to defend the Estate against Brenda's complaint. On November 5, 2008, the Estate filed a Petition for Allowance of Partial Fees to Co-Executors and Attorneys, requesting the trial court to approve partial payment of attorney fees to Douglas and Shaffer in the amount of $150,000 and partial payment of co-executors' fees in the amount of $70,000. Brenda filed an objection to this petition on November 26, 2008, claiming that the fees were excessive and unsupported by sufficient documentation.

The trial court held a hearing on the petition for fees and the objection thereto on November 26, 2008. Two witnesses testified for the Estate: Shaffer testified regarding the work he had performed for the Estate and why he and Douglas were requesting $150,000 for partial payment, and Gene Robbins ("Robbins"), a local attorney experienced in probate and estate matters, testified that the requested fees were, in his opinion, reasonable. Brenda called no witnesses and presented no evidence, but did cross-examine the Estate's witnesses and argued to the trial court that the requested fees were excessive and unsupported. After taking the matter under advisement, the trial court entered an order granting the Estate's petition for fees on December 1, 2008. Brenda now appeals.

Discussion and Decision

Brenda[1] claims that the trial court erred in granting the Estate's petition for both attorneys' fees and co-executors' fees. Pursuant to the relevant statute, if a testator does not provide for the compensation of the personal representative and the attorney performing services for the estate, the trial court may award "just and reasonable" fees. Ind. Code § 29-1-10-13 (1999); see also Ford v. Peoples Trust & Sav. Bank, 651 N.E.2d 1193, 1194 (Ind. Ct. App. 1995), trans. denied. The amount of fees to be awarded is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. Id. (citing In re Estate of Meguschar, 511 N.E.2d 307, 310 (Ind. Ct. App. 1987), trans. denied).[2] Moreover, we recognize that trial courts have a particular expertise in determining the value of the services rendered. Id. In determining a reasonable amount of fees, the trial court may consider several factors, including: the

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[1] The Estate argues that Brenda has no standing to challenge the trial court's award of fees because she is not an heir of the Estate due to the prenuptial agreement, which has yet to be set aside. We might be inclined to agree with the Estate but for the fact that the Estate did not challenge Brenda's standing before the trial court. The Estate may not now challenge Brenda's standing for the first time on appeal. See Burcham v. Metro. Bd. of Zoning Appeals, 883 N.E.2d 204, 210 (Ind. Ct. App. 2008) (citing Fam. Dev. Ltd. v. Steuben County Waste Watchers, Inc., 749 N.E.2d 1243, 1255 n.10 (Ind. Ct. App. 2001)). The Estate also claims that Brenda is not a real party in interest. Again, however, the Estate did not present this argument to the trial court, and it is therefore waived. See id.

[2] The Estate claims that Brenda is appealing from a negative judgment, citing Estate of McClenahan v. Biberstein, 671 N.E.2d 482, 485 (Ind. Ct. App. 1996). However, the appellant in that case was the party who filed the petition to determine executor and attorney fees. Id. at 484. Here, the Estate filed the petition for fees, not Brenda. Brenda merely filed an objection thereto. Therefore, we review the trial court's decision for an abuse of discretion. See Ford, 651 N.E.2d at 1194 (citing Meguschar, 511 N.E.2d at 310).

labor performed, the nature of the estate, difficulties in recovering assets or locating devisees, and the peculiar qualifications of the administrator. Id. In addition, the trial court may consider the guidelines for determining legal fees set out in Professional Conduct Rule 1.5.[3]

As explained by the court in Meguschar:

> Thus, several factors can be taken into account when determining fees, the key apparently being that they *be reasonably commensurate to the time and work involved.*
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> [W]hile the award of attorney's fees in trust and probate matters is largely within the discretion of the court, such fees must bear a reasonable relation to the amount of services actually rendered and the reasonable value of the services. The size of the estate is a factor to be considered in determining reasonableness of fees for clearly the degree of responsibility assumed by the attorney, and oft-times the difficulty of the matters involved and the skill required to perform the necessary tasks, are directly related to the size and complexity of the estate. Nevertheless, we agree with the Ohio Court of Appeals that *reasonable fees cannot be arrived at solely by the application of a percentage formula to the value of the gross estate*.

511 N.E.2d at 311 (citing In re Love's Estate, 206 N.E.2d 39, 45 (Ohio Ct. App 1965)) (emphasis added). Although we will not require that fees conform to an hourly rate, fees must still bear a reasonable relation to the amount of services actually provided and the reasonable value of such services. Ford, 651 N.E.2d at 1196. An extraordinary amount

[3] These guidelines are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. Ford, 651 N.E.2d at 1194.

of fees may be equivalent to an equivalent hourly rate that is unreasonable. See id. at 1095.

A. *Attorneys' Fees*

Brenda first argues that the attorneys' fees awarded by the trial court were excessive and unsupported by the evidence. Specifically, she notes that Shaffer testified that he estimated that he had spent approximately 150 hours working on the Estate's matters, yet his half of the award of attorney fees is $75,000. This is an equivalent to an hourly rate of $500, whereas Shaffer testified that his standard hourly rate was $165. Brenda argues that charging over three times the standard hourly rate is unreasonable. Under the facts and circumstances of this case, we are inclined to agree.

We acknowledge that Shaffer testified regarding the work he performed for the Estate, which included: opening the Estate, appointing the co-executors, filing tax returns, winding down the decedent's business affairs, hiring appraisers, leasing farmland, hiring a broker to sell real estate, preparing court documents, taking depositions, and participating in mediation. Although Shaffer testified that both he and Douglas performed some of this work together, there was no testimony regarding how much both attorneys spent working on the Estate. Importantly, Shaffer and Douglas presented no time records to the court. And although Shaffer eventually estimated that he had spent 150 hours working on the Estate, there was no evidence, estimated or otherwise, regarding how much time Douglas had spent working on the Estate. Shaffer also testified that he often spent entire days on nothing but Estate work, to the exclusion of other client matters, but he also testified that there was no specific case that he had been unable to take on because of his representation of the Estate.

When Shaffer was asked how he arrived at his requested fee of $150,000, to be split between himself and Douglas, he explained that the total fee he was requesting was $300,000, to be split between himself and Douglas, and that they were then requesting one-half of the total fee. Shaffer testified that he arrived at the total fee of $300,000 by taking the total value of the Estate and applying a four-percent fee, which was approximately $294,000. Considering the litigation work the attorneys were performing for the Estate, Shaffer then came to a total of $300,000 in total requested fees. However, reasonable fees cannot be arrived at solely by the application of a percentage formula to the value of the gross estate, which is essentially what Shaffer did in the present case. See Meguschar, 511 N.E.2d at 311. The Estate also presented the testimony of Robbins, a local attorney. Robbins testified that he thought the requested fee to be reasonable. However, when pressed to explain how he would arrive at such a fee, his methodology was based almost entirely on a percentage of the value of the Estate. Again, this is improper. See id.

Shaffer testified that he would not have taken the Estate as a client if he were only able to charge his standard hourly rate of $165. With this we have no quarrel. Indeed, given the apparently complex nature of the work performed by the attorneys for the Estate, we can understand the attorneys' decision to charge a premium for their work. However, as explained above, the amount requested is equivalent to an hourly rate of

$500, which is over three times the standard hourly rate Shaffer charged. And there was no evidence regarding how much time Douglas spent working on Estate matters.

We emphasize that the fees must still bear a reasonable relation to the amount of services actually provided and the reasonable value of such services, and cannot be based solely upon a percentage of the value of the gross estate. See Ford, 651 N.E.2d at 1195-96. Under the facts and circumstances of this case, we conclude that the Estate presented insufficient evidence to support the extraordinary amount of attorney fees requested by the Estate.

Our conclusion is supported by Ford, where the court reversed an award of fees which were equivalent to hourly rates ranging from $556 to $836. Id. at 1196. "Despite the size of the estate and the undisputed experience and competence of both [the attorney and the bank]," the Ford court held that "the fees awarded were nevertheless unreasonable" because the fees did not bear a reasonable relation to the amount of services actually provided and the reasonable value of those services. Id. Further, the court noted that the amount awarded was exactly eight percent of the gross value of the estate, suggesting that the trial court arrived at its determination solely based upon multiplying the value of the estate by a percentage, which is improper. Id.

In Meguschar, the court affirmed the trial court's award of attorney fees where the attorney not only testified regarding his services, the hours devoted to the performance of such services, and the value of the services, but the total award—$12,600, or roughly 1.75% of the value of the estate or $126 per hour—was not extraordinary. 511 N.E.2d at 311-12. Here, we conclude that the trial court's award of fees is more akin to the extraordinary award reversed in Ford than the more modest award affirmed in Meguschar.

B. *Co-Executors' Fees*

Brenda also claims that the trial court erred in awarding the co-executors fees in the amount of $70,000. As Brenda notes in her reply brief, the Estate does not address Brenda's argument in its appellees' brief. The failure to respond to an issue raised in the appellant's brief is, as to that issue, akin to failing to file a brief. Khaja v. Khan, 902 N.E.2d 857, 868 (Ind. Ct. App. 2009) (quoting Cox v. State, 780 N.E.2d 1150, 1162 (Ind. Ct. App. 2002)). Although this failure does not relieve us of our obligation to correctly apply the law to the facts in the record in order to determine whether reversal is required, the appellee remains responsible for controverting arguments raised by appellant. Id. Because the Estate failed to respond to Brenda's argument regarding the co-executors' fees, Brenda must establish only that the trial court committed *prima facie* error. Id. *Prima facie* means at first sight, on first appearance, or on the face of it. Id.

Here, the co-executors did not testify regarding the work or the time they spent on Estate matters. Instead, Shaffer testified that he did not know precisely how much time the co-executors had worked on Estate matters, but did state that they were always available for such work. He later estimated that the co-executors had spent approximately 300 hours on Estate matters. He explained that he arrived at the requested $70,000 by roughly halving the requested amount of attorney fees. He also testified that $80 per hour would be a reasonable fee for the co-executors to charge. This hourly rate multiplied by Shaffer's estimate of 300 hours of work performed by the co-executors, comes to only $24,000. Yet the requested fee was almost three times this amount. Under these facts and circumstances, we conclude that Brenda has established at least *prima facie* error with regard to the trial court's award of co-executors' fees.

We therefore reverse the trial court's order awarding fees and remand for proceedings to determine reasonable fees based upon the amount and description of services actually provided and the reasonable value of such services.

Reversed and remanded.

DARDEN, J., and ROBB, J., concur.