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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001061-MR

JOSEPH EDWIN BROWN INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF GEORGE W. MORRIS, JR. — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 05-CI-00573

CHERYL M. MCLAMB INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF GEORGE W. MORRIS, JR.; THE UNKNOWN SPOUSE OF CHERYL M. MCLAMB; LINDA HALL; AND THE UNKNOWN SPOUSE OF LINDA HALL — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,[1] SENIOR JUDGE.

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

PAISLEY, SENIOR JUDGE: Joseph Edwin Brown, individually and as the purported Administrator[2] of the Estate of George W. Morris, Jr., appeals from an order of April 27, 2006, of the Pulaski Circuit Court that made final and appealable two prior orders of the court. The first of these orders, entered on September 13, 2005, denied Brown's petition for declaration of rights and ordered DNA testing to determine whether Brown was Morris's natural son. The second order, entered on February 27, 2006, denied his motion for attorney's fees and expenses made pursuant to Kentucky Revised Statutes (KRS) 412.070. This appeal addresses two issues: (1) whether a determination of Brown's paternity by an Administrative Law Judge (ALJ) for purposes of awarding him Social Security benefits should have constituted conclusively "clear and convincing proof" of paternity for purposes of inheriting from an intestate decedent under KRS 391.105; and (2) whether Brown is entitled to recover attorney's fees and costs under KRS 412.070.

On November 13, 1997, George W. Morris, Jr., died intestate. He was survived by two children born of his prior marriage, Cheryl M. McLamb and Linda Hall. Shortly after Morris's death, Brenda Holmes filed an Application for Child's Insurance Benefits with the Social Security Administration on behalf of her minor child, Joseph Edwin Brown, who was born on September 7, 1985. According to Brenda, George W. Morris was Joseph's biological father. A hearing on her application was held before an ALJ who rendered a decision on July 26, 2001, finding that Brown was Morris's son. (The key piece of evidence relied on by the ALJ was a permit that George Morris had

[2] Brown was removed as administrator of the estate by a court order entered on February 21, 2006.

signed for installation of electrical wiring in a mobile home in Alabama. The permit stated that the property was owned by Joseph Brown, who was described as the son of George Morris.) Brown and his mother received Social Security death benefits as a result of this decision.

On July 24, 1998, Cheryl McLamb petitioned the Pulaski District Court and was appointed the administratrix of her late father's estate. Brown never received notice of this appointment because McLamb believed that her father had no children other than herself and her sister, Linda Hall. The inventory of the estate assets submitted to the court by McLamb on December 8, 1998, consisted of household furnishings, two vehicles, a trailer and a checking account, valued at a total of $16,623.96.

When he reached the age of nineteen in 2004, Brown, believing himself to be Morris's biological son, hired an attorney to assist him in locating further assets of Morris's estate. He entered into a contingency fee agreement with the law firm of English, Lucas, Priest and Owlsey, which provided that his attorneys would receive thirty-three percent of any amount recovered, as well as a $5,000.00 retainer for expenses.

Brown petitioned the Pulaski District Court to be appointed the administrator of Morris's estate. The court, apparently unaware of McLamb's earlier appointment, granted the petition and appointed Brown as the administrator of Morris's estate on September 29, 2004. The earlier probate had never been closed and, after the payment of some debts, it reflected an insolvent estate. Brown requested the appointment

of a warning order attorney to locate Morris's other children. The warning order attorney notified Hall and McLamb of the probate action in November, 2004.

Meanwhile, Brown discovered that he was the beneficiary of bonds from Morris valued in excess of $100,000.00 and that he was the titleholder to a trailer previously owned by Morris. Based on what Morris had told him, Brown also believed that Morris had owned real property located in Alabama as well as a lock box. Brown, with the assistance of his attorney, located the lock box, the contents of which were slated shortly to escheat to the State of Alabama. Brown through his counsel hired an attorney in Alabama who instituted ancillary probate proceedings for the purpose of securing an order to open the lock box. It was found to contain over $6,000.00 as well as various receipts and copies of bonds. Brown also instructed the attorney in Alabama to locate the real property which he believed Morris had owned there. Brown paid $1,600.00 for a survey and title search. When the property was located, Brown paid back taxes in order to prevent foreclosure, and he located a buyer willing to pay $80,000.00 for the real estate. Hall and McLamb were kept apprised of these activities.

On May 12, 2005, Brown filed a petition for settlement of the estate of George W. Morris, Jr., pursuant to KRS 395.510, in Pulaski Circuit Court. McLamb filed an answer denying that Brown was the child and heir of Morris, and requesting paternity testing and Brown's removal as administrator of Morris's estate. Brown then filed a petition for declaration of rights, arguing that the determination of paternity by the administrative law judge for purposes of awarding Social Security benefits satisfied the

provisions of KRS 391.105 which allow a child born out of wedlock to inherit from an intestate father if there has been an "adjudication of paternity after the death of the father based upon clear and convincing proof."

The circuit court refused to accept the ALJ's adjudication as clear and convincing proof of paternity, and ordered instead that Brown submit to a DNA test with his purported half-sisters. The DNA test results indicated that there is a likelihood of only 8.3% that Brown is related to McLamb and Hall. Brown withdrew from the action and submitted a motion for payment of attorney's fees and expenses under KRS 412.070. The circuit court denied the motion and this appeal followed.

KRS 391.105 provides in relevant part as follows:

> (1) For the purpose of intestate succession, if a relationship of parent and child must be established to determine succession by, through, or from a person, a person born out of wedlock is a child of the natural mother. That person is also a child of the natural father if:
>
> . . .
>
> (b) In determining the right of the child or its descendants to inherit from or through the father:
>
> . . .
>
> 2. There has been an adjudication of paternity after the death of the father based upon clear and convincing proof[.]

Brown argues that, under our case law, the Pulaski Circuit Court erred in not accepting the ALJ's finding of paternity because a circuit court's judicial review of the findings of fact of an administrative agency supported by substantial evidence of probative value must be accepted as binding by the reviewing court. *See e.g. Burch v.*

Taylor Drug Store, Inc., 965 S.W.2d 830 (Ky.App. 1998) (circuit court reviewing award of benefits by the Kentucky Unemployment Insurance Commission). But the circuit court in this case was not acting in an appellate capacity, reviewing the actions of an administrative agency for error. As a jurisdictional matter, the paternity determination by the ALJ in Brown's case was not susceptible to appellate review by the circuit court, nor, accordingly, was the circuit court bound to accept the ALJ's findings of fact if supported by substantial evidence.

Brown further contends that the ALJ applied Kentucky law and the "clear and convincing" standard to find paternity. This contention is clearly refuted by the ALJ's written decision, in which he outlined the different ways in which paternity may be established for the purpose of obtaining social security benefits. The ALJ specifically stated that he had **not** utilized the standard established by Kentucky's intestacy statute:

> For example, in section 416(h)(2)(A) [of the Social Security Act], a child will be deemed a "child" if the child would be eligible to claim the decedent's property under the intestacy laws of the state in which the insured individual was domiciled at death. **Because the Administrative Law Judge has decided this case on the basis of Section 416(h)(3)(C)(i)(I) which is unrelated to state law**, it is not necessary to address other circumstances which might apply.

There was no abuse of discretion in the circuit court's refusal to accept the ALJ's determination as "clear and convincing" evidence of paternity. We agree with the trial court that "[t]he cost of such [DNA] testing and the small delay it will entail is far outweighed by the conclusiveness it will provide."

The next argument on appeal concerns whether the circuit court erred in refusing to grant Brown's motion for an award of attorney's fees and expenses pursuant to KRS 412.070, which provides as follows:

> (1) In actions for the settlement of estates, or for the recovery of money or property held in joint tenancy, coparcenary, or as tenants in common, or for the recovery of money or property which has been illegally or improperly collected, withheld or converted, **if one (1) or more of the legatees, devisees, distributees or parties in interest has prosecuted for the benefit of others interested with him, and has been to trouble and expense in that connection, the court shall allow him his necessary expenses, and his attorney reasonable compensation for his services, in addition to the costs**. This allowance shall be paid out of the funds recovered before distribution. The persons interested shall be given notice of the application for the allowance, provided, however, that if the court before whom the action is pending should determine that it is impracticable and too expensive to notify all of the parties individually, then by order of said court, personal notice may be dispensed with and in lieu thereof, notice of the application shall be given by an advertisement pursuant to KRS Chapter 424.

The trial court denied Brown's motion on the grounds that he was "not a member of those persons who may bring an action for the common benefit as set forth in KRS 412.070." The appellees agree, arguing that Brown is essentially a stranger to the litigation, a non-relative who will inherit nothing. They maintain that the statutory provision for attorney's fees applies only where the parties have a common interest, a suit is brought for their common benefit, and one attorney carries the entire burden of the litigation.

Brown argues that as a duly appointed administrator, he was a "party in interest." He points out that his efforts and those of his attorney resulted in the discovery of valuable assets, with full notice to the heirs.

Arguably, Brown has a right to recover attorney's fees due to his status as the estate administrator. *See* KRS 395.150. Additionally, at the time the fees in question were incurred, Brown believed himself to be a "party in interest" as a potential heir. The appellees do not dispute that they were placed on notice of Brown's activities, and that they acquiesced in his efforts to locate further assets of the estate. Under these circumstances, it appears inequitable to deny attorney's fees and costs. A similar factual situation was presented in *Skinner v. Morrow*, 318 S.W.2d 419 (Ky. 1958), where Wilbur Fields, an attorney operating under a contingency-fee arrangement, represented six persons who wrongly thought they were heirs of the deceased Mr. Skinner. Fields also later made a contingency fee contract with a woman who turned out to be a real heir. Fields's right to collect a fee from the estate for his services under KRS 412.070 was challenged by Mrs. Skinner, who argued that "substantially all of his services were rendered at a time when he did not represent anyone with a valid interest in the estate." *Skinner*, 318 S.W.2d at 427. Although this was true, the court nonetheless held that Fields was entitled to recover, explaining that

> it appears that the proceedings were commenced in good faith [by Fields], in behalf of persons who were of some kinship to Mr. Skinner and whose claims of heirship were not completely baseless. Also, Mr. Fields did represent a real heir when the judgment was entered. And the simple fact is that his services did result in a substantial benefit to the

> estate, in that half of the estate of $190,000 was recovered for the heirs. So it is our opinion that Mr. Fields is entitled to some allowance for the services in setting the will aside.

Id.

Of course, an important distinction in the case before us is that Brown's attorney, unlike Fields, did not represent a real heir. Nonetheless, we think that the reasoning in *Skinner* is applicable. There is no allegation that Brown or his attorney acted in bad faith, and their actions undoubtedly led Hall and McLamb to receive a considerable benefit.

The appellees have raised the point that the major portion of the assets recovered by Brown and his attorney consisted of real property which would not form part of the estate nor be subject to distribution by the administrator. *See Wood v. Wingfield*, 819 S.W.2d 899 (Ky. 1991). ("Not all of the property in which the decedent had an interest, however, will constitute probate property over which the personal representative has control. Real property owned solely by the decedent, for example, passes directly to the decedent's heirs or devisees upon his death[.]" *Wood,* 816 S.W.2d at 902 (citation omitted).

But the statutory language of KRS 412.070 does not limit the award of attorney's fees only to situations in which assets that have been recovered will pass into probate. We agree with Brown that the language is broad enough to encompass the situation in this case.

An award or denial of attorney's fees under KRS 412.070 is reviewed for an abuse of discretion. *Gernert v. Liberty National Bank & Trust Co.*, 284 Ky. 575, 145 S.W.2d 522, 526 (1940). "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable or unfair decision." *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994)(citations omitted). We believe that in this instance, the decision of the trial court led to an unfair outcome because the bulk of the attorney's work was performed while under the mistaken, yet not unreasonable, belief that Brown was an heir and therefore a party in interest; and because the attorney's efforts led to the recovery of property to the benefit of the appellees. Any attorney's fees to be awarded are to be limited to those incurred in the discovery and recovery of assets that benefit the appellees, not to any litigation related to Brown's attempts to establish himself as an heir.

The order denying the motion for attorney's fees is therefore reversed, and this case is remanded to the circuit court for a determination of the correct amount of attorney's fees and costs to be awarded.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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