

STATE OF MICHIGAN
COURT OF APPEALS

In re THOMAS J. HOGAN TRUST.

PAUL W. SAWYER,

Appellant,

v

THOMAS J. HOGAN,

Respondent-Appellee,

and

JAMES E. HOGAN, MARY ANN HOGAN-
WILSON, and THERESA CHARBONNEAU,

Petitioners-Appellees.

UNPUBLISHED

May 27, 2004

No. 242530

Macomb County Probate Court

LC No. 00-166589-TV

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Paul W. Sawyer appeals as of right the probate court order reducing his attorney fees to \$75,000 plus costs and requiring him to return \$335,435 to the Thomas J. Hogan Trust. We affirm.

This action stems from appellant's representation of petitioners in an action to be installed as co-successor trustees of the Thomas J. Hogan Trust. Petitioners, the children of Thomas J. Hogan's (Hogan) first marriage and residual beneficiaries of the trust, filed the action after they learned that their father had suffered a severe and debilitating stroke. Apparently, petitioners feared that Hogan's second wife would divest them of their inheritance under the trust. The parties settled the litigation and, on June 27, 2001, the probate court formalized the agreement in an order modifying the trust. That order included a clause providing for the parties' attorney fees to be paid out of the trust and in accordance with the parties' respective attorney fee agreements. Unbeknownst to Hogan, appellant's fee agreement with petitioners called for a contingency fee of four percent of the trust corpus, or almost \$400,000. When Hogan learned of the amount being paid to appellant, he filed this action for return of funds.

Appellant first argues that the probate court lacked jurisdiction to modify the June 27, 2001, stipulated order modifying the trust. Whether a lower court had subject-matter jurisdiction is a question of law that this Court reviews de novo. *WA Foote Memorial Hosp v Dep't of Public Health*, 210 Mich App 516, 522; 534 NW2d 206 (1995).

A trust is an estate, MCL 700.1104(b), and attorney fees for services on behalf of an estate are subject to the probate court's scrutiny. *In re Irwin Estate*, 162 Mich App 522, 527; 413 NW2d 37 (1987). MCR 8.303 makes clear that the probate court must approve attorney fees in all cases. *Id.* at 527, n 2. MCR 8.303, renumbered MCR 5.313 effective January 1, 2002, provides as follows:

A) Reasonable Fees and Costs. An attorney is entitled to receive reasonable compensation for legal services rendered on behalf of a personal representative, and to reimbursement for costs incurred in rendering those services. In determining the reasonableness of fees, the court must consider the factors listed in MRPC 1.5(a). The court may also take into account the failure to comply with this rule.

Irwin's construction of the rule remains viable under MCR 5.313, and an attorney is only entitled to reasonable fees for services performed on behalf of an estate. Additionally, MRPC 1.5(a) provides that an attorney must not charge unreasonable fees.

Although appellant's argument that a court may not retroactively modify a stipulated order absent fraud, mutual mistake, and other defenses to contract is well supported,¹ appellant overlooks the fact that the probate court did not need to modify its earlier order to reduce his fees. That order provided for the parties to pay their respective attorney fees from the trust according to the parties' individual fee agreements. But because all attorney fees must be reasonable under MCR 5.313 and MRPC 1.5, the June 27, 2001, consent order already contained, by implication, the term "reasonable" in front of the term "legal fees." Thus, the probate court's reduction of appellant's fees required no modification of the June 27, 2001, order.

Even assuming that the fee reduction did require a modification of the order, the probate court was well within its authority to do so. Appellant's argument is essentially that the June 27, 2001, consent order bound the probate court, and now binds this Court, to enforce the terms of his fee agreement with appellants regardless of the terms of that agreement. Using this logic, this Court would be bound to enforce this agreement even if the terms were unethical, which the probate court found them to be. This Court will not enforce an unethical agreement. *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 189; 650 NW2d 364 (2002). To the extent appellant's agreement with petitioners called for unreasonable fees, the probate court and this Court have the jurisdiction to refuse its enforcement.

¹ See, e.g., *Dana Corp v Appeal Bd of Michigan Employment Security Comm*, 371 Mich 107; 123 NW2d 277 (1963); *Staple v Staple*, 241 Mich App 562; 616 NW2d 219 (2000); *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347; 605 NW2d 360 (1999).

Appellant next contends that the probate court abused its discretion by not considering the fact that the fee agreement was on a contingency basis and by determining that the attorney fees were unreasonable. This Court reviews a probate court's determination of reasonable attorney fees for an abuse of discretion. *In re Adams Estate*, 257 Mich App 230, 236; 667 NW2d 904 (2003).

The existence of a contingency fee agreement is only one factor to be considered by a court when determining reasonableness of attorney fees. *Irwin, supra* at 527. Contrary to appellant's assertion, the probate court specifically considered the contingency fee agreement as a factor in determining the reasonableness of appellant's fees, recognizing that the \$45,000 "engagement fee" altered the risk-shifting effect of the typical contingency-fee agreement. Moreover, whether appellant's clients actually "recovered" anything is doubtful. Petitioners' power to act under the June 27, 2001, order was severely restricted. Further, the petitioners gave respondent's wife unfettered access to a \$25,000 per month special checking account that is now the subject of further litigation. The probate court properly considered evidence for each of the factors listed in MCR 1.5(a), and did not abuse its discretion by determining that appellant's fees were unreasonable.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kathleen Jansen
/s/ Michael J. Talbot