2018 IL App (1st) 172139-U

No. 1-17-2139

Order filed August 10, 2018

FIFTH DIVISION

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

In re ESTATE OF ELLIOT NASH, Deceased,	)	Appeal from the
	)	Circuit Court of
(Davina Pierce, Independent Administrator,	)	Cook County.
	)	
Petitioner-Appellant.)	)	No. 16 P 1749
	)	
	)	Honorable
	)	Daniel B.Malone,
	)	Judge Presiding.
	)	

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *HELD*: Where an estate's contingency fee agreement ceased to exist upon the death of the decedent and there was no evidence in the record of a contingency fee agreement executed by the independent administrator of the estate, we must vacate orders of the probate court regarding the amount of fees to be awarded to the attorney who pursued a personal injury suit on behalf of the decedent and the estate. We remand the case for further proceedings.

¶ 2 Petitioner-appellant, Davina Pierce, as independent administrator for the estate of Elliot Nash, appeals the circuit court's order denying her motion to approve attorney fees equaling 40% of the gross recovery on an action for personal injuries originally brought by the decedent. The fees were set forth in a contingency fee agreement executed by Nash prior to his death. Petitioner contends the circuit court erred in limiting the distribution of attorney fees to a one-third recovery pursuant to Cook County Circuit Court Rule 6.5(1)(d) (eff. Sep. 29, 2011), as the rule was an invalid exercise of the circuit court's rule making authority. Based on the following, we vacate the orders of the probate court relating to the attorney fees and remand the case for further proceedings.

¶ 3 FACTS

¶ 4 In 2011, Elliot Nash hired the Law Offices of Mark L. Karno and Associates (Karno firm)[1] to pursue a personal injury claim against Glenshire Nursing and Rehabilitation Center, Inc., related to violations of the Nursing Home Care Act (Nursing Home Act) (210 ILCS 45/1-101 *et seq.*) (West 2010)) occurring between August 2009 and July 2010. Nash signed a written contingent fee agreement with the Karno firm whereby the Karno firm would receive 40% of any recovery resulting from the lawsuit. On August 12, 2011, the Karno firm filed a lawsuit on behalf of Nash in the law division of the circuit court of Cook County (personal injury action). However, on November 10, 2013, while the personal injury action was pending, Nash died.

¶ 5 On May 6, 2014, the court, in the personal injury action, appointed petitioner, Nash's niece, as the special representative for the estate "to prosecute all claims on behalf of the estate for all damages that may or could have been caused to the heirs-at-law and next-of-kin of the

[1] Nash also retained the Law Offices of Donald W. Fohrman and Associates pursuant to a referral agreement. We refer to the collective attorneys as the Karno firm.

decedent by virtue of the instant lawsuit." Petitioner was given leave to file an amended complaint and to substitute as a party plaintiff in the personal injury action filed on May 6, 2014. On November 6, 2015, the personal injury action settled for $170,000. On February 8, 2016, the law division court entered an order approving the settlement, awarded attorney fees to the Karno firm in the amount of $68,000, which represented 40% of the recovery, and $14,384.04 in costs, awarded additional costs and expenses borne by the administration of the estate, and allowed the equal distribution of the remaining $81,786.95 to Nash's six heirs. The order provided that petitioner and the Karno firm "believe the settlement offer is fair and reasonable in compensation for the personal injury claim herein." The order additionally stated that "[d]istribution of the proceeds of the settlement amount is subject to further order of the Probate Court."

¶ 6 On March 21, 2016, petitioner, through the Karno firm, filed a petition for letters of administration in the probate court. With the consent of the heirs, on April 11, 2016, the petition was granted and petitioner was appointed as the independent administrator of Nash's estate. On January 24, 2017, petitioner filed various documents: a "Final Report of Independent Representative;" "Receipts and Approval on Closing of Decedent's Estate in Independent Administration" issued by the heirs; and a "Receipt and Report on Distribution on Closing." The filings reported to the probate court that Nash's total estate consisted of the settlement in the personal injury action and that the proceeds of the settlement had been distributed to the heirs in accordance with the February 8, 2016, order of the law division court. Petitioner sought an order closing the estate and discharging her of her duties. On February 3, 2017, the probate court denied petitioner's requests to close the estate and to be discharged. The order instead directed the Karno firm to seek an amendment of the February 8, 2016, law division court's order which

approved the settlement to reflect, "in accordance with local rule 6.5," an award of attorney fees of 33⅓ % and "[a] corresponding increase in each heir's distributive share."

¶ 7 In response, on June 30, 2017, petitioner filed a motion to award attorney fees "pursuant to attorney-client agreement" and attached the contingency fee agreement between the Karno firm and Nash. No other fee agreement was submitted to the court. The record does not contain a contingency fee agreement between the Karno firm and petitioner. In her motion, petitioner sought to enforce the 40% contingency fee which was set forth in the contingency fee agreement executed by Nash. Petitioner argued that Rule 6.5(1)(d) did not apply to the facts of the case,[2] improperly changed substantive Illinois law, failed to provide procedural mechanisms for a court to exercise its discretion in determining reasonable attorney fees, and unconstitutionally infringed on the parties' right to contract and due process. The motion was uncontested by the heirs.

¶ 8 On July 28, 2017, after a hearing, the probate court denied the motion, finding that it was required to follow Rule 6.5(1)(d). In so doing, the probate court acknowledged its belief that "[i]f [attorneys] do additional work that they think warrants extra fees, they should be allowed, but *** that provision does not appear in the current rule." The probate court additionally stated:

> "You know, the settlement is very reasonable. The settlement amount is very reasonable. You're talking about a difference of $11,000. I understand where you're coming from. The client is not objecting. It's—you're caught in the middle. At the same time, I'm caught by I have to follow the law. If I didn't—I mean if I had discretion, I would exercise it in your favor, but I don't. I think 6.5(d), it states, 'It shall not exceed the one-third.' "

[2] Petitioner has abandoned this argument on appeal.

The transcript of the hearing reveals petitioner referenced the validity of Nash's contingent fee agreement with the Karno firm, but made no mention of a subsequent written contingency fee agreement entered into by herself and the Karno firm. The July 28, 2017, order included a finding, pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), that there was no just reason for delaying an appeal of the order. This appeal followed.[3]

¶ 9 ANALYSIS

¶ 10 Petitioner contends that the circuit court erred in determining that the Karno firm should receive a fee limited to 33⅓ % of the recovery and denying her motion to award the full amount of fees as set forth in the contingency fee agreement. She maintains that Rule 6.5(1)(d) is an invalid exercise of the circuit court's rule making authority as it impinged upon the contractual agreement as to the fees.

¶ 11 Illinois Supreme Court Rule 21(a) provides that "a majority of the circuit judges in each circuit may adopt rules governing civil and criminal cases which are consistent with these rules and the statutes of the State, and which, so far as practicable, shall be uniform throughout the State." Ill. S. Ct. R. 21(a) (eff. Dec. 1, 2008). Moreover, "[the circuit] court may, from time to time, make all such rules for the orderly disposition of business before them as may be deemed expedient, consistent with law." 705 ILCS 35/28 (West 2010). In addition, subject to the Supreme Court Rules, courts may make rules regulating their dockets, calendars, and business. 735 ILCS 5/1-104(b) (West 2010). The supreme court, however, has instructed that local court rules must be procedural in nature, and cannot modify or limit the substantive law. *Leonard C. Arnold, Ltd. v. Northern Trust Co.*, 116 Ill. 2d 157, 167 (1987). The validity of a circuit court

[3] In the absence of a brief filed by appellee, we considered this case on the record and appellant's brief only and oral argument was held in this matter.

rule is a question of law we review *de novo*. *People v. Bywater*, 358 Ill. App. 3d 191, 196 (2005), *rev'd on other grounds*, 223 Ill. 2d 477 (2006).

¶ 12 Pursuant to these authorities, the circuit court enacted Rule 6.5, which sets forth various procedures as to the disposition of "cases involving actions for wrongful death or for personal injury brought by a representative on behalf of a decedent's estate." Cook Co. Cir. Ct. R. 6.5(1) (eff. Sep. 29, 2011). As relevant here, subsection (1)(d) of the rule provides:

> "(1) The procedure to be followed in cases involving actions for wrongful death or for personal injury brought by a representative on behalf of a decedent's estate shall be as follows:
>
> ***
>
> (d) Except as otherwise limited by rule or statute, attorneys' compensation shall not exceed one-third of the recovery if the case is disposed of in the trial court by settlement or trial. If an appeal is perfected, the compensation to be paid to the attorney shall not in any event exceed one half of the recovery." *Id.*

¶ 13 Petitioner argues Rule 6.5(1)(d) invalidly modifies substantive Illinois law by limiting contractual contingency fee agreements without allowing a court to consider the reasonableness of the fees agreed to by the contracting parties. Petitioner additionally argues that such a limitation violates the parties' rights to contract and due process.

¶ 14 When interpreting Rule 6.5(1)(d), we apply the principles used to interpret statutes. See *People v. Marker*, 233 Ill. 2d 158, 164-65 (2009) (the interpretation of supreme court rules is guided by the same principles that apply to construing statutes); *Premier Electrical Construction Co. v. American National Bank of Chicago*, 276 Ill. App. 3d 816, 834 (1995) (a local court rule has the force of a statute and is binding on the circuit court and parties). As with a statute, a

court's goal in interpreting a local rule is to ascertain and give effect to the drafter's intentions by applying the plain and ordinary meaning to the language used. *Marker*, 233 Ill. 2d at 165.

¶ 15 As to the applicable actions, the plain language of Rule 6.5(1)(d) imposes a ceiling on an attorney's right to compensation to 33⅓ % of any recovery, unless otherwise limited by rule or statute. The rule does not include an exception where the parties contracted for a fee in excess of 33⅓ % of any recovery.

¶ 16 "The right of individuals to contract as they deem fit is grounded in the due process clause, which provides that no person 'shall be deprived of life, liberty or property without due process of law.' " *R.W. Dunteman Co. v. CIG Enterprises, Inc., 1*81 Ill. 2d 153, 167 (1998) (quoting Ill. Const. 1970, art. I, § 2, and citing U.S. Const., amend. V). The freedom to contract, however, "is a qualified right and is subject to the reasonable and legitimate exercise of the police power of the State." *Illinois Housing Development Authority v. LaSalle National Bank,* 139 Ill. App. 3d 985, 990 (1985). Generally, contingency fee agreements are enforceable unless the contract is unreasonable. *Leonard C. Arnold,* 116 Ill. 2d at 163. Courts typically are granted the authority to evaluate contingency fee contracts to ensure the contracts do not result in excessive fees. *Schweihs v. Davis, Friedman, Zavett, Kane & MacRae,* 344 Ill. App. 3d 493, 499 (2003).

¶ 17 The facts of this case also require this court to consider Rule 1.5(c) of the Rules of Professional Conduct. Rule 1.5(c) provides that a contingency fee agreement must be in writing and signed by the client. Rules of Prof. Conduct, Rule1.5(a) (2010). Further, it is well-established that, "when a client dies, the attorney-client relationship terminates and, thereafter, the attorney must obtain authorization from the decedent's personal representative in order to pursue the interests of the decedent. In the absence of this authorization, the attorney cannot

proceed because he no longer represents a party to the litigation." (Internal citations omitted.) *In re Estate of Horwitz*, 371 Ill. App. 3d 625, 631 (2007) (citing *In re Estate of Simmons*, 362 Ill. App. 3d 944, 946 (2005)). Additionally, "[w]hen the attorney-client relationship terminates, the contingency fee contract ceases to exist, and the contingency terms are no longer operative." *Id*. (citing *In re Estate of Callahan*, 144 Ill. 2d 32, 40 (1991)); see also *Much Shelist Freed Denenberg and Ament, P.C. v. Lison*, 297 Ill. App. 3d 375, 379 (1998) (citing *Estate of Callahan*, 144 Ill. 2d at 41 ("Where the attorney client contract terminates the contingency term, whether the attorney wins, is no longer operative.")). However, where the attorney-client representation has terminated without cause, an attorney " 'is entitled to be paid on a *quantum meruit* basis a reasonable fee for services rendered before discharge.' " *In re Estate of Horwitz*, 371 Ill. App. 3d at 631 (citing *Estate of Callahan*, 144 Ill. 2d at 38 (quoting *Rhoades v. Norfolk & Western Ry. Co.*, 78 Ill. 2d 217, 230 (1979))); *Lison*, 297 Ill. App. 3d at 379. "The attorney's claim for compensation under a *quantum meruit* theory accrues immediately after his services are terminated." *Id*.

¶ 18 Here, Nash hired the Karno firm to pursue his personal injury claim against the nursing home. Nash and the Karno firm entered into a written contingent fee agreement whereby the firm would receive as compensation 40% of any recovery. However, during the pendency of the litigation, Nash died. The Karno firm's attorney-client relationship terminated when Nash died and the contingency fee agreement ceased to exist. It appears that petitioner, as the special administrator of Nash, authorized the Karno firm to proceed with the personal injury action on behalf of the estate. Petitioner did not, however, present a written contingency fee agreement with the Karno firm which was signed by her as independent administrator or special representative of the estate. As a result, even assuming petitioner maintained the Karno firm's

representation, the record does not contain a written contingency fee agreement memorializing that relationship in violation of Rule 1.5(c). The Karno firm, therefore, may recover attorney fees under *quantum meruit* principles, but not under the contingency fee agreement.

¶ 19 The law division court approved the Karno firms fees in the personal injury action based upon the contingency fee agreement which had ceased to exist. The probate court then approved the law division's order, but only for 33⅓ % of the recovery. In her motion to obtain a 40% fee, petitioner sought only to enforce the Nash contingency fee agreement, not a separately executed written contingency fee agreement between herself and the Karno firm. The probate court was not given the opportunity to consider reasonable compensation under the relevant factors as to a *quantum meriut* recovery such as "the time and labor required, the attorney's skill and standing, the nature of the cause, the novelty and difficulty of the subject matter, the attorney's degree of responsibility in managing the case, the usual and customary charge for that type of work in the community, and the benefits resulting to the client." *Will v. Northwestern University*, 378 Ill. App. 3d 280, 304 (2007) (citing *Callahan*, 144 Ill. 2d at 44). The probate court enforced the language of Rule 6.5(1)(d) to petitioner's argument regarding the propriety of Nash's 40% contingency fee agreement. Because the orders of the probate court regarding a proper award of fees were based solely upon the contingency fee agreement that had ceased to exist, we must vacate those orders, as they relate to the fees.

¶ 20 In vacating the orders relating to the fees, we do not consider petitioner's contention regarding the propriety of Rule 6.5(1)(d). Moreover, the issue of whether Rule 6.5(1)(d) applies to attorney-fee recovery under the doctrine of *quantum meruit* is not before this court.

¶ 21 CONCLUSION

¶ 22 For the reasons stated, we vacate the February 8, 2016 order and the July 28, 2017 orders of the circuit court, as they relate to a determination of attorney fees only, and remand this cause for further proceedings consistent with this order.

¶ 23 Vacated in part; remanded.