

NOTICE

Decision filed 12/09/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2011 IL App (5th) 110104-U

NO. 5-11-0104

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<i>In re</i> ESTATE OF GERALD W. WEILAND, SR.,)	Appeal from the
Deceased)	Circuit Court of
)	White County.
(Sharon J. Weiland and Gerald W. Weiland, Jr.,)	
)	
Respondents-Appellants,)	
)	
v.)	No. 07-P-8
)	
Michael J. Wenzel, Executor,)	Honorable
)	Mark R. Stanley,
Petitioner-Appellee).)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Stewart and Wexstten concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court's award of attorney fees, in particular charges for secretarial assistance at a rate of \$150 per hour, is manifestly erroneous when no evidence was presented regarding the secretaries' skill, efficiency, education, or specialized duties.
- ¶ 2 Sharon J. Weiland and Gerald W. Weiland, Jr., beneficiaries under the will of Gerald W. Weiland, Sr., appeal from an order of the circuit court of White County concerning the administration of the decedent's estate. Their appeal presents two issues: whether the circuit court erred in awarding attorney fees and costs in the amount of \$30,066.10, in particular the \$150-per-hour charges for secretaries, and whether the circuit court erred in awarding executor's fees of \$12,938.75, or one half of the attorney fees. For the reasons that follow, we vacate the circuit court's order and remand the cause for further consideration.

¶ 3 Gerald W. Weiland, Sr. (decedent), died testate on February 8, 2007. At the time of his death, the decedent was unmarried and had two biological children, Sharon Weiland and Gerald W. Weiland, Jr. (Jerry), and one adopted child, Randy Morris. The decedent's will provided for \$10,000 bequests to be paid to Randy Morris, St. Polycarp's Church, and St. Leonard Catholic Church. The remainder of the estate, after payment of claims and costs of administration, was to be divided between Sharon and Jerry. The will named the decedent's friend, Michael J. Wenzel, as the executor. Wenzel hired Robert Michael Drone, an attorney with Conger and Elliott, P.C., to represent him in the administration of the decedent's estate.

¶ 4 The decedent's estate was opened in February 2007, and Wenzel began his duties as executor. Wenzel catalogued the decedent's estate, sold personal property, settled claims and debts against the estate, and kept an accounting. In August 2007, Randy Morris and St. Leonard Catholic Church received their \$10,000 bequests. While St. Polycarp's Church was written a check for \$10,000, drawn on Jerry's personal account, it was not cashed, allegedly at the request of Jerry. By the end of 2007, the only obstacles to closing the estate were the outstanding obligation to St. Polycarp's and the payment of executor's and attorney fees. At that time, \$20,645.50 was sought for attorney fees, \$410.70 for costs, and \$10,322.75 for executor's fees. The estate's balance was \$31,176.56. The estate was not closed in 2007; the reasons for this are unclear from the record but appear to be due, at least in part, to the beneficiaries' change of counsel and the status of St. Polycarp's bequest.

¶ 5 Because the estate remained open until 2008, tax obligations became due and owing. In order to meet these obligations, the executor undertook the sale and liquidation of additional estate assets, most notably the decedent's real property. In October 2009, the executor filed his final report with the court and sought to close the

estate. The beneficiaries filed an objection to the final report on December 15, 2009, arguing that the attorney and executor's fees were excessive. Hearings on the issue of fees were held on June 22, 2010, August 3, 2010, and September 21, 2010.

¶ 6 During the hearings, Drone provided the only evidence relevant to his firm's billing practices or its secretaries; the secretaries themselves did not testify. Drone provided the following information. Conger and Elliott, P.C., is an established estate planning and probate firm in Carmi, Illinois. In this firm, estates are administered under the direction of an attorney and staff members assist the attorney. Drone testified that there are three staff members who work on estates: Sandra Mears, Lee Ann Staley, and Vicky Haught. Sandra Mears had been with Conger and Elliott for more than 45 years and had handled hundreds of estates and prepared federal and state estate tax returns, state inheritance tax returns, and individual tax returns for both individuals and estates. Lee Ann Staley had been with the firm for about 12 years and had worked on estates for 10 years. She, too, had filed tax returns with state and federal governments and had worked on "dozens" of estates. Both Staley and Mears attended income tax school each year. Haught had been with Conger and Elliott for approximately seven years and was the firm's bookkeeper and worked on their pension plan. Occasionally she worked with Staley and Mears on estates. She had also attended income tax school.

¶ 7 Drone testified that Lee Ann Staley does not have a secretary; she types her own letters, makes her own phone calls and copies, and faxes her own documents. Drone did not know how much Conger and Elliott paid any of the three secretaries but estimated it was less than \$20 per hour for Staley and Haught. He did not offer an estimation for Mears's rate of pay. Other secretaries at Conger and Elliott were paid less than Staley, Haught, and/or Mears. Aside from their annual attendance at tax

school and experience doing various tax returns, no evidence was presented regarding Mears's, Staley's, or Haught's skills, efficiency, or education.

¶ 8 Drone testified that when his firm obtains representation of an estate, they first meet with the client and discuss the fee arrangement. Notably, Conger and Elliott charges \$175 per hour for Drone's time and \$150 per hour for staff. Typically, work on an estate is done "under [Drone's] direction." That is to say, work is done by the staff and then reviewed by Drone. The work is charged under the staff because they bill "at a lower rate." The executor's final reports show that Drone billed 41.5 hours through 2009, the majority of which were spent in court or preparing for hearings. During the same time, the secretaries billed 122.8 hours.

¶ 9 Conger and Elliott's time sheets are simple, four-column documents listing date, person (by initials), task, and the amount of time the task took. Some entries are simple and list only one task, for example, "12/04/07, LAS, Receipt of bill and paid the same; 0.10." Other entries, however, are not as clear: "5/11/07, LAS, Receipt of Fax from First Bank regarding loan pay off amounts; call to First Bank regarding same; call to Unicare regarding premium being paid for health insurance; preparation of letter to Unicare enclosing death certificate; call to First Bank regarding sending back Unicare automatic payment for May; call to Tim Cook regarding VA being notified of G. Weiland death; Tom needs discharge papers and he will take care of it; call to Mick regarding coming in to the office and paying off loans; 2.00."

¶ 10 During the pendency of this action, the executor filed three supplemental final reports, which included additional attorney and executor's fees. On February 17, 2011, the circuit court granted the request for fees and entered an order setting attorney fees and costs at \$30,066.10 and the executor's fees at one half the attorney fees, or \$12,938.75. In deciding the attorney fees, the court considered the size of the

estate, the work done and the skill with which it was performed, the time required, the success of the efforts, and the good faith and efficiency with which the representation was performed. "[T]he Court finds the attorney's [*sic*] fees and costs requested to be fair and reasonable compensation for the work performed. In this case the work involved was much more difficult than a normal estate due to all the conflict and interference by the [beneficiaries]." It is from this order that the beneficiaries appeal.

¶ 11 The first issue on appeal is whether the circuit court's award of attorney fees, in particular the charges for the secretaries, is manifestly erroneous. The appellants make numerous arguments in support of their position, namely: (1) the secretaries' time sheets are vague and lack sufficient detail, (2) the services rendered were secretarial in nature and are not separately reimbursable, and (3) \$150 per hour, per secretary, is not justified by the evidence in the record.

¶ 12 The Illinois Probate Act of 1975 provides that an attorney for a representative is entitled to reasonable compensation for his services. 755 ILCS 5/27-2 (West 2010). The reasonableness of the fees depends on the facts and circumstances of each case. *In re Estate of Bitoy*, 395 Ill. App. 3d 262, 272 (2009). There is no hard-and-fast rule for determining what is a reasonable award in each case. *In re Estate of Bitoy*, 395 Ill. App. 3d at 272. The factors to be considered in determining "reasonableness" include the size of the estate, the work done and the skill with which it was performed, the time required, and the advantages gained or sought by the services or litigation. *In re Estate of Bitoy*, 395 Ill. App. 3d at 272. The circuit court has the necessary skill and knowledge to decide what is fair and reasonable compensation for legal services. *In re Estate of Bitoy*, 395 Ill. App. 3d at 272. The number of hours expended is an important factor in this determination, and the circuit judge will generally have the experience needed to make a reasonable approximation of the time

various matters should require. *In re Estate of Bitoy*, 395 Ill. App. 3d at 272-73. For a reviewing court to alter a fee allowance made by a trial court, the reviewing court must be able to find that the circuit court's determination is manifestly or palpably erroneous. *In re Estate of Bitoy*, 395 Ill. App. 3d at 273. A plain case of wrongful exercise of judgment would be necessary to justify a reversal. *In re Estate of Bitoy*, 395 Ill. App. 3d at 273.

¶ 13 We first look at the clarity of Conger and Elliott's time sheets. It is incumbent upon the party seeking recovery of fees to present detailed records maintained during the course of representation. *Sandholm v. Kuecker*, 405 Ill. App. 3d 835, 870 (2010), *appeal allowed*, 239 Ill. 2d 589 (2011). This is particularly important where only some of the staff's time is reimbursable. Here, Conger and Elliott's time sheets do not clearly illustrate what the secretaries did or how much time they spent on each task. Some entries, like the "5/17/07, LAS," list a myriad of tasks and one large amount of time; there is no breakdown of the time per task. Other entries lack detail, like "Look up claims, etc." There are even instances in the record of multiple people working on the same task with no explanation given as to why or what each person was doing.

¶ 14 Second, we turn to the issue of which of the secretaries' tasks are reimbursable. "Generally overhead office expenses, namely expenses that an attorney regularly incurs regardless of specific litigation, including telephone charges, in-house delivery charges, in-house photocopying, check processing, newspaper subscriptions, and in-house paralegal and secretarial assistance, are not recoverable as costs of litigation." *Johnson v. Thomas*, 342 Ill. App. 3d 382, 401 (2003). "Such overhead refers mainly to fixed expenses which are, therefore, already reflected in an attorney's hourly rate. [Citation.] As a result, they should not be apportioned to any single cause of action so as to constitute an additional charge." *Johnson*, 342 Ill. App. 3d at 402. The court

in *In re Estate of Bitoy* found that time spent by an assistant in court with an attorney was separately recoverable. *In re Estate of Bitoy*, 395 Ill. App. 3d at 284. In so holding, the court noted that because the attorney was entitled to fees for his presence in court, fees for his assistant were also permissible. *In re Estate of Bitoy*, 395 Ill. App. 3d at 284. Other employees' work is separately reimbursable if it is of the kind that would otherwise have to be performed by an attorney. See, e.g., *Merchandise National Bank of Chicago v. Scanlon*, 86 Ill. App. 3d 719 (1980) (work done by a law clerk); *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781 (2009) (work done by law firm's nonattorney in-house consultant).

¶ 15 In this case, the secretaries were engaged in both case-specific and general overhead duties. As to the latter, the secretaries opened and responded to mail and phone calls, faxed paperwork, made copies, and sent emails, among other tasks. Examples of the secretaries' case-specific tasks include the preparation of the estate's real estate inventory and tax returns. For those activities that are specifically attributable to this cause of action, reimbursement is allowed. Those activities, however, that are "secretarial" in nature are not reimbursable. We leave the determination of which tasks are compensable to the circuit court, based on its skills and experience. Also, the tasks Drone would have had to have done if the staff had not done them are reimbursable. We again leave the determination of which tasks are compensable to the circuit court.

¶ 16 Last, we turn to the amount of compensation for the secretaries' services. Conger and Elliott charged \$150 per hour for each secretary's time. Drone testified that two of the secretaries made less than \$20 per hour. Drone, who graduated from law school, is licensed in the State of Illinois, has published numerous articles in legal journals, and is a Martindale-Hubbell-rated member of the legal community, charged

\$175 per hour for his time. No evidence was presented as to the secretaries' qualifications, education, or skills that would entitle them to billing at a rate nearly equal to Drone's.

¶ 17 While we do not disagree with the circuit court's findings that Drone and his firm performed their legal duties in good faith and without undue delay, were successful in representing the estate, showed legal skill, and spent a considerable amount of time working on the case, the circuit court's award was unreasonable and the court wrongfully exercised its judgment in simply awarding the fees that were asked of it. Of the \$30,066.10 in attorney fees awarded by the circuit court, \$18,915 were for secretarial charges. Given that a large portion of the awarded attorney fees is attributable to Drone's staff, the excessive rate at which the staff was billed, and the fact that only some of the secretaries' tasks are eligible for reimbursement, the circuit court's award of attorney fees is manifestly erroneous.

¶ 18 In light of the foregoing, we vacate the circuit court's order and remand the issue of attorney fees. We direct the circuit court, using its own experiences and knowledge, to determine the value of the legal services rendered by Conger and Elliott as a whole. Using its experiences and knowledge of what acceptable attorney fees should be, we direct the court to reexamine the amount of work actually done by Drone (even though it may have been billed under a secretary's time), the amount of reimbursable work done by the secretaries, and a reasonable rate for the secretaries' work. While the total award of attorney fees may not change greatly, the fees that are awarded should be for compensable work done by an attorney, or for staff's work on nonoverhead tasks. Within these guidelines, we vacate the court's current order setting fees and remand the issue for further consideration.

¶ 19 We next turn to the reasonableness of the executor's fees. An executor is

entitled to reasonable compensation for his services. 755 ILCS 5/27-1 (West 2010). Reasonableness is based on the facts and circumstances of a particular case. *Mumper v. Murphy*, 212 Ill. App. 52 (1918). Like the standard for attorney fees, the factors considered in determining "reasonableness" include the size of the estate, the work involved, skill evidenced by the work, the time expended, success of the efforts, and the executor's good faith and efficiency. *In re Estate of Thorp*, 282 Ill. App. 3d 612, 619 (1996). The most important factor in determining reasonable compensation is the amount of time expended by the executor. *In re Estate of Coleman*, 262 Ill. App. 3d 297, 299 (1994). Executors and their attorneys cannot charge for duplicated work. *In re Estate of Brown*, 58 Ill. App. 3d 697, 708 (1978). The circuit court's determination of what is fair and reasonable compensation for an executor's services will not be overturned on appeal unless it is manifestly or palpably erroneous. *In re Estate of Coleman*, 262 Ill. App. 3d at 299.

¶ 20 At the hearing in June 2010, Wenzel testified as to his duties and responsibilities as executor. He testified that he was personally involved with the administration of the estate and participated in any number of estate-related matters. When the estate first opened, Wenzel gathered the decedent's personal property and financial documents and determined the estate's assets and debts. He contracted for excavating work to be done on the farm and was present for 50% to 75% of the work. Wenzel had the decedent's land appraised in order to complete income tax returns. He helped coordinate the public auction of the decedent's farm equipment and even drove tractors to the auction site. Wenzel estimated that it took 30 days to prepare for the auction. Wenzel also had to determine proper title to certain vehicles after the beneficiaries removed them from the decedent's property. As to more administrative tasks, Wenzel testified that anytime he received money for the estate, he took it to

Conger and Elliott's offices either that day or the next day. It was important for him to turn over the financial documents immediately so that any potential problems could be resolved in a timely manner. Wenzel was personally involved in all financial aspects of the estate, from deposits to disbursements. There were days that Wenzel did not do anything related to the estate. During his testimony, which came three years after some of the events in question, Wenzel could not recall how much time he spent doing certain activities. He did not keep a written record of the time he spent working on the estate.

¶ 21 The circuit court awarded \$12,938.75 in executor's fees, or one half of the attorney fees. We find there is ample evidence to support this award. Wenzel was actively and personally involved in the estate's administration and, over three years, contributed a substantial number of hours to it. His workload was greatly increased by the actions of the beneficiaries. There is no evidence that Wenzel acted in bad faith or in an inefficient manner. The fact that he did not keep track of his time is not fatal to his claim for fees. No evidence was presented to counter Wenzel's testimony regarding his duties as executor. As such, we find that setting the executor's fees at one half of the attorney fees is not unreasonable. Because the attorney fees were determined to be unreasonable, however, the issue of executor's fees must also be reassessed on remand.

¶ 22 For the foregoing reasons, the order of the circuit court of White County is hereby vacated. The issues of attorney fees and executor's fees are remanded for consideration not inconsistent with this disposition.

¶ 23 Vacated; cause remanded.