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Summary of State v. Sutton, 120 Nev. Adv. Rep. 99

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Nevada Law Journal

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*In the Matter of the estate of John W. Bowlds, 120 Nev. Adv. Rep. 100
(December 29, 2004).¹*

CIVIL PROCEDURE – ESTATE, GIFT & TRUST LAW

Summary

An appeal from both parties regarding a court’s review of fee agreements between an estate and its attorneys.

Disposition/Outcome

Affirmed in part and reversed in part, and remanded with instructions. The court reversed the district court’s approval of the fee arrangement and remanded it for further consideration of the reasonableness of the law firm’s charges. The district court’s denial of the executor’s professional fees and reimbursement for fees related to retaining a second law firm was upheld, as well as the order that deducted the brokerage sales commissions over 1 percent. The court remanded this portion of its decision so that the district court could impose joint and several liability against the Crises for the excess brokerage commissions assessed against Kyle & Kyle.

Factual and Procedural History

John Bowlds died in 1999 with an estate worth over seven million dollars. The will gifted a majority of Bowlds’ estate to The American Cancer Society (ACS) (Respondents), and named his tax preparers, Cris and Cathy Cris (hereinafter “the Crises”), executors of the will. The Crises retained the law firm of Kyle & Kyle to help them administer the estate. The agreement between the Crises and the law firm, in accordance with custom and practice in Clark County, provided the firm would receive five percent of the gross value of the estate, and an additional \$250 per hour for “extraordinary fees.”

The estate’s administration was relatively straightforward, requiring satisfaction of one creditor’s claim, liquidation of highly marketable securities, and the distribution of property in two states. Instead of using their own brokers, Kyle & Kyle advised the Crises to sell the securities through three separate brokers; two charging sales commissions of 5%, and the other charging 1 percent. The executors sought approval of an amended accounting for a variety of expenses, including extraordinary administrative and accounting services, extraordinary attorney fees, the brokerage fees, and the five percent attorneys fees.

The ACS objected to the accounting, including (1) the fee arrangement with Kyle & Kyle was unreasonable, (2) the extraordinary attorney fees were unjustifiable, (3) the fees in excess of statutory fees involved services that executors typically provided, (4) the Crises breached their fiduciary duties by paying excessive brokerage fees, and (5) the Crises mishandled the estate’s federal tax returns.

¹ By Kristen T. Gallagher

Upon ACS's challenge to their accounting, the Crises retained another attorney, Cary Colt Payne, Esq., to represent them. The executors requested reimbursement for Payne's attorney fees.

The district court approved the five percent fee arrangement with Kyle & Kyle. Additionally, (1) the lower court determined that Kyle & Kyle improperly advised the Crises regarding the three separate brokerage commissions and deducted the commissions that were over 1 percent from Kyle & Kyle's attorney fees; (2) the court awarded the Crises extraordinary professional & bookkeeping fees, albeit on a reduced basis; (3) the court denied Kyle & Kyle's request for extraordinary fees; and (4) the court denied the Crises's request for reimbursement of attorney Payne's fees.

On appeal, the executors challenged the denial of extraordinary attorney fees, the fees for attorney Payne's services, and the partial denial of the non-statutory professional and bookkeeping fees. The ACS's cross-appeal challenged the lower court's grant of the 5 percent attorney fee agreement, and the court's decision to subtract the brokerage commissions only from Kyle & Kyle's attorney fees.

Discussion

1. Reasonable attorney fees in Clark County

The Crises argued the 5 percent basic fee arrangement was reasonable per se because it was based on the local custom and practice in Clark County. Specifically, they argued that typical fee arrangements range from five to eight percent. However, a local probate expert testified that because the Bowlds estate only required routine and simple administration, the fee was too high. The expert further testified that the 5 percent fee agreement was unreasonable pursuant to NRS 150.060² and SCR 155.³ Conversely, the Clark County Probate Commissioner testified on behalf of Kyle & Kyle and stated that he recommends approval of 5 percent fee arrangements over half of the time, although not believing these arrangements are per se reasonable.

² NRS 150.060(1) states, in pertinent part: Attorneys for personal representatives are entitled to reasonable compensation for their services, to be paid out of the decedent's estate. The amount must be fixed by agreement between the personal representative and the attorney, subject to approval by the court, after petition, notice and hearing as provided in subsection 2.

³ NEV. SUP. CT. R. 155(1) states, in pertinent part: 1. A lawyer's fee shall be reasonable. The 1. A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (b) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (c) The fee customarily charged in the locality for similar legal services;
- (d) The amount involved and the results obtained;
- (e) The time limitations imposed by the client or by the circumstances;
- (f) The nature and length of the professional relationship with the client;
- (g) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (h) Whether the fee is fixed or contingent.

ACS asserted, according to NRS 150.060, a district court is not required to enforce agreements between estate and attorney, and must review it for reasonableness under SCR 155. Based on the information in the record, the court could not determine if this agreement was reasonable. Although the fee agreement was customary under SCR 155(1), this factor alone did not guarantee reasonableness, and must evaluate the agreement based on NRS 150.060. Because the lower court did not review this agreement for reasonableness, the court remanded for further consideration.

2. Extraordinary attorney fees

In addition to the 5 percent arrangement, Kyle & Kyle could submit hourly charges for extraordinary fees.⁴ The court determined the district court did not abuse its discretion when it denied the request because most of the extraordinary fees the firm charged were the sort expected of probate attorneys. Additionally, because the 5 percent fee arrangement was so generous, there was little room to approve additional fees. However, the court noted that this request may have been denied because of the 5 percent fee arrangement approval, and indicated the district court can consider all relevant SCR 155 factors when approving a reasonable fee package for the estate's attorneys.

3. Assessment of Brokerage Commissions Against Kyle & Kyle

The executors' personal stockbroker, Morgan Stanley Dean Witter, was willing to liquidate the stocks for a 1 percent commission; however, Kyle & Kyle opted to split the transaction among three different companies. The brokerage commissions would have been substantially less if the executors had kept the stocks together. In fact, Mr. Cris made no attempt at negotiating a lower brokerage fee despite having experience as a licensed stockbroker and knowing that commission fees varied within the industry. Mr. Kyle testified that he chose the two brokerage houses that charged the 5 percent commission, with one of those firms serving as his personal broker, and the other serving as a former employer.

The court determined that although a personal representative of an estate may rely on advise from counsel, Mr. Cris was a licensed stockbroker for twenty years and he should not have relied on Kyle & Kyle's recommendation without further negotiation or inquiry. Further, the court commented on the executors' fiduciary duty to protect estate assets and decided that the lower court erred in failing to hold the Crises jointly and severally liable for the excess commissions.

4. Fees for the Executor's Accounting Services

The Crises appealed the lower court's reduction of their request for professional and

⁴ The arrangement provided that extraordinary fees included time spent in trial, pretrial conferences, hearing or meetings with court or court personnel, research, settlement negotiations, conferences, discovery, investigation, filing suit or activities on behalf of the client to settle his/her claims, including any ancillary probate proceedings which may be required in Louisiana (where the other parcel of property was located) or any other state.

bookkeeping fees. Pursuant to NRS 150.030,⁵ a personal representative may recover expenses for extraordinary services, but a district court holds that discretion. The court determined the district court did not abuse its discretion.

5. Fees for Alternative Counsel

The Crises argued the district court abused its discretion in denying payment of Payne’s attorney fees because NRS 132.135 allows the fees of “any attorney retained” by a personal representative of the estate. However, the court determined that SCR 178(1)(b) controlled this situation. A lawyer may only act as an advocate at trial where he is likely to be a witness when the testimony “relates to the nature and value of legal services rendered in the case.” Mr. Kyle’s testimony related to the nature of the legal services. Accordingly, there was not a conflict regarding the fee arrangement that required the Crises to hire additional counsel.

Conclusion

A basic fee arrangement is not reasonable per se, and a district court must review it for reasonableness under the guidance of NRS 150.060(1) and SCR 155. Not only will the estate’s counsel be held responsible for excessive brokerage fees, but the estate’s personal representatives will be if the executor has prior expertise in that industry.

⁵ NRS 150.030 states that further allowances may be made as the court deems just and reasonable for any extraordinary services, such as:

1. Management, sales or mortgages of real or personal property.
2. Contested or litigated claims against the estate.
3. The adjustment and payments of extensive or complicated estate taxes.
4. Litigation in regard to the property of the estate.
5. The carrying on of the decedent's business pursuant to an order of the court.
6. Such other litigation or special services as may be necessary for the personal representative to prosecute, defend or perform.