COURT OF APPEALS
DECISION
DATED AND RELEASED

November 15, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3304

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

In the Matter of the Estate of Elsie P. Showalter, Deceased:

RUDY KOPECKY,
Personal Representative,

Appellant,

v.

NANCY LAMAR,
MICHAEL VERMEY and
JOHN VERMEY,

Respondents.

APPEAL from a judgment of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Reversed and cause remanded with directions.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

ANDERSON, P.J. Rudy Kopecky, the personal representative of Elsie P. Showalter's estate, appeals from a judgment of the trial

court reducing the amount of attorney's fees by thirty-five percent. We conclude that the trial court arbitrarily reduced the attorney's fees in this case and that Attorney Daniel P. Fay was denied a fair hearing as to the reasonable value of his fees. Accordingly, we reverse the judgment of the trial court and remand for a new hearing.

Kopecky signed a retainer agreement with the Law Firm of Daniel P. Fay, S.C., as the attorney in the matter of the estate of Showalter. The hourly rate was to be $140 per hour for Fay's services, $100 per hour for his associates, and $70 per hour for paralegal time. The agreement also provided:

> It is also understood and agreed that the final bill rendered by the Firm shall, in addition to reflecting the time expended, take into account any of the factors prescribed by the State Bar of the State of Wisconsin and be considered as guides when determining the reasonable fees for legal services ….

Kopecky requested $49,136.83 on behalf of Fay for fees. At the final account hearing, Nancy Lamar, Michael Vermey and John Vermey, beneficiaries of the estate and the respondents on appeal, were present. There were no objections to Fay's fees for legal services. However, the court sua sponte determined that it would not approve the request because there was no documentation. At the hearing, Fay stated:

> [M]y computer produces an itemization of what was done and what the amount charged is for. It's in the computer and it internally computes the amount of time then puts the final figure, so to some extent you have to back figure it. I should—I will try and produce the hours. The problem I have, your Honor, is on May

> 1st of '93 the old computer system went to bed, so I will do the best that can I [sic], but be aware.

The court stated:

So counsel is clear, if there's a sum per hour times some hours I would want to be able to know both of the factors within the formula, how many hours, how much per hour and then the other is simply the multiplication, and the same with the expenses, because again, I want everybody to have a clear understanding of what the charges are.

The court set the matter for hearing in September 1993 so that Fay could provide documentation of his fees. Fay subsequently submitted copies of his monthly billing statements. The statements, however, did not reflect the hourly rate or the time spent.

At the September 1993 hearing, the court described the purpose as follows: "to allow the parties, any of the parties if they wished to either agree or disagree or challenge or not challenge any of the charges in that area." The beneficiaries voiced criticism they had concerning Fay's billing. The court held: [T]he personal representative and his attorney, while establishing the necessity of the general legal work that was done, have not proven that the final charge for Attorney Fay's legal services is reasonable. The Court finds that billing as submitted, based on the record that has been presented is imprecise and is inadequate in terms of reasonableness.

The court approved sixty-five per cent of the fees submitted. Kopecky appeals.

The beneficiaries raise the issue that the personal representative does not have standing to appeal because he cannot demonstrate that the

probate court's final judgment bears directly and injuriously upon the interests of the estate. We disagree. Kopecky's obligation to Fay is governed by their fee agreement. Kopecky paid Fay's fees from the estate. Because Kopecky will be required to reimburse the estate for the reduced attorney's fee amount, he is an appropriate appellant. *See* ***Laus v. Braasch***, 274 Wis. 569, 572-73, 80 N.W.2d 759, 761 (1957) ("An attorney's claim for services is normally against the executor or administrator, and the court allows some or all of a fee paid or incurred only as a credit on the account.").

We independently review attorney's fees when challenged on appeal. ***Herro, McAndrews & Porter, S.C. v. Gerhardt***, 62 Wis.2d 179, 184, 214 N.W.2d 401, 404 (1974). The proper factors to consider when determining the reasonable value of attorney's fees for services rendered are:

> [T]he amount and character of the services rendered, the labor, the time, and trouble involved, the character and importance of the litigation, the amount of money or value of the property affected, the professional skill and experience called for, and the standing of the attorney in his profession; to which may be added the general ability of the client to pay and the pecuniary benefit derived from the services.

Id.[1]

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[1] Section 851.40, STATS., provides:

> **Basis for attorney fees. (1)** Any attorney performing services for the estate of a deceased person in any proceeding under chs. 851 to 879, including a proceeding for informal administration under ch. 865, shall be entitled to just and reasonable compensation for such services.
>
> **(2)** Any personal representative, heir, beneficiary under a will or other interested

At the August hearing, the trial court stated:

> I could not find it, to see the bill by particularly Attorney Fay, the $49,000 bill, and I find it not to be in the file. Therefore, I do not approve even one penny of the expenses incurred relative to the attorney. At this point I can't approve something that I don't know. In fact, to approve something in that manner would be clearly reversible. *I can indicate the very few times I've had to deal with particularly attorney fee issues, also most -- I can't remember one where I have approved simply the bill. There's always been a reduction based on my own evaluation of the law and the facts of the particular case.* It may be that this $49,000 fee is totally appropriate. Certainly the heirs aren't objecting to it, but I'm not going to approve it until I see it. [Emphasis added.]

The trial court's statement gives us pause because it suggests that the court approached the issue of reasonable attorney's fees with a made-up mind. This is improper and serves as one of the bases for our reversal. *Compare* ***State v. J.E.B.***, 161 Wis.2d 655, 674, 469 N.W.2d 192, 200 (Ct. App. 1991) ("[I]t is improper for a court to approach sentencing decisions with an inflexibility that bespeaks a made-up mind."), *cert. denied,* 503 U.S. 940 (1992).

(..continued)

> party may petition the court to review any attorney's fee which is subject to sub. (1). If the decedent died intestate or the testator's will contains no provision concerning attorney fees, the court shall consider the following factors in determining what is a just and reasonable attorney's fee:
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> (a) The time and labor required.
> (b) The experience and knowledge of the attorney.
> (c) The complexity and novelty of the problems involved.
> (d) The extent of the responsibilities assumed and the results obtained.
> (e) The sufficiency of assets properly available to pay for the services, except that the value of the estate may not be the controlling factor.

Fay argues that "no objections were filed, and while the court may have appropriately allowed oral objections to be made at the hearing, the stating of those objections gave rise to the necessity of an adversary hearing." We agree with Fay and conclude that he was not aware that the September hearing would be an evidentiary hearing on the reasonable value of his legal services. Therefore, he was not prepared to present evidence or witnesses to support his bill. *See* ***Wengerd v. Rinehart***, 114 Wis.2d 575, 582, 338 N.W.2d 861, 866 (Ct. App. 1983) (denial of a hearing would raise a serious due process question). We agree with Fay that if he was required to prove the reasonableness of every aspect and entry of his billing, he would have needed his entire file to show the work done and perhaps the testimony of his office staff as to the work completed. Therefore, we conclude that the court was arbitrary in setting fees at sixty-five per cent of those which were paid.

It is impossible from the record before us to conduct an independent review to determine the reasonableness of attorney's fees. We remand this case to the trial court for further proceedings, *see generally* ***Cuccio v. Rusilowski***, 171 Wis.2d 648, 492 N.W.2d 345 (Ct. App. 1992), in order to provide Fay with the opportunity to present evidence to support his fees. Furthermore, we conclude that on remand, the appellant has the right to substitution of judge pursuant to § 801.58(7), STATS., to insure a completely unbiased hearing.

By the Court.—Judgement reversed and cause remanded with directions.

Not recommended for publication in the official reports.