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Bailey v. Bailey Respondent's Brief Dckt. 38760

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE ESTATES)
OF)
CAROL BAILEY and)
FRANCIS ANDREW BAILEY,)
Deceased.)
_____)

Case No. CV-06-6496

RESPONDENT'S BRIEF

Appeal from the District Court of the

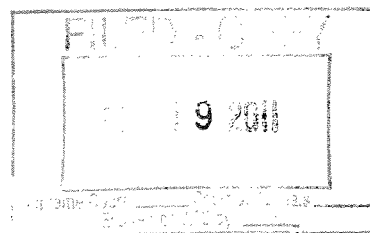
Seventh Judicial District of the State of Idaho

in and for Bonneville County

Honorable Jon J. Shindurling, District Judge, Presiding

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STATEMENT OF THE CASE

Respondent concurs with Appellant's statement of the case

ISSUES PRESENTED ON APPEAL

The only additional issue to be discussed is the payment of respondents' attorney fees on appeal.

ARGUMENT

I. WHETHER THE COURT ERRED IN DETERMINING THAT TIME RECORDS FOR WORK PERFORMED ARE REQUIRED TO ESTABLISH WHETHER ATTORNEY FEES ARE REASONABLE

The awarding of attorney fees is a matter within the discretion of the trial court and should only be subject to reversal on appeal when there has been an abuse of that discretion. "An abuse of discretion standard requires this Court to inquire as to: (1) Whether the Trial Court correctly perceived the issue as one of discretion; (2) Whether the Trial Court acted within the outer boundaries of its discretion and consistently with the legal standards applicable with to the specific choices available to it; and (3) Whether the Trial Court reached its decision by and exercised of reason." *Farmers Insurance Exchange v. Tucker*, 142 Idaho 191, 193, 125 P.3d 1067 (2005); *Sun Valley Shopping Center, Inc. v. Idaho Power Company*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

In this case on appeal, after significant issues of contention and a trial between the personal representative and the respondents, the respondents requested a final accounting be provided by the personal representative and his attorney. This final accounting contained a line item reflecting the attorney fees paid by the estate to the personal representative's attorney or claimed as owing to the personal representative's attorney. After the trial court requested

additional information to support the claimed attorney fees, appellant provided a written agreement entered into between the personal representative and his attorney at, or prior to the time the estate was opened. In this agreement, the personal representative agreed to pay his attorney whatever the attorney deemed was a reasonable fee.

Appellant claims the trial court erred when it denied the award of fees pursuant to I.R.C.P. 54(e)(3)(A). Appellant suggests that I.R.C.P. 54(e)(3)(L) is the more appropriate standard and under that standard the trial court should have allowed the award of the claimed fees in the final accounting. However, appellant ignores the language of both I.R.C.P. 54(e)(1) and I.R.C.P. 54(e)(3) that any award of attorney fees is discretionary with the court. Rule 54(e)(1) states: “In any civil action the court may award reasonable attorney fees....” This language recognizes that attorney fees are not awarded or approved as a matter of right, but are left to the discretion of the trial court. I.R.C.P. 54(e)(3) also recognizes the discretionary nature of attorney fee awards when it states “In the event the court grants attorney fees to the party....”. This language clearly states that the award of attorney fees under I.R.C.P. 54(e)(3) is discretionary. The trial court starts its review of the possible award of attorney fees by first of all determining if fees should even be allowed.

Presuming the trial court determines that fees may be allowed, the next element reviewed in determining whether an award of attorney fees is permissible under both I.R.C.P. 54(e)(1) and I.R.C.P. 54(e)(3) is whether the fees are reasonable.

The question of what constitutes a ‘reasonable’ attorney fee involves a discretionary determination by the trial court. *Spidell v. Jenkins*, 111 Idaho 857, 727 P.2d 1285 (Ct.App.1986). In exercising this discretion, the court must act consistently with the applicable legal standards listed in I.R.C.P. 54(e)(3).

Associates Northwest v. Beets, 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct.App.1987).

Kelly v. Hodges, 119 Idaho 872 876, 811, P.2d 48, 52 (Ct.App. 1991)

The Rule does not require the court to blindly accept the amount provided by the attorney nor does it allow a blanket award of fees without more proof or information as to the reasonableness. In this case, appellant did not provide any information to satisfy the trial court that the claimed fees were reasonable. Without providing this information, the trial court, in its discretion, could, and did determine that there was insufficient information to award the payment of attorney fees.

Appellant further suggests the trial court erred in relying on I.R.C.P. 54(e)(3) to deny the claim for attorney fees. Appellant claims that the trial court should have analyzed the claim using I.R.C.P. 54(e)(8). Rule 54(e)(8) states:

The provisions of this Rule 54(e) relating to attorney fees shall be applicable to all claims for attorney fees made pursuant to section 12-121, Idaho Code, and to any claim for attorney fees made pursuant to any other statute, or pursuant to any contract, to the extent that the application of this Rule 54(e) to such a claim for attorney fees would not be inconsistent with such other statute or contract.

The reliance on Rule 54(e)(8) is misplaced. This Rule applies to situations involving disputing parties who are involved in actions to enforce the terms of the contract between them. In those cases, there is additional contract language for the payment of attorney fees by the non-prevailing parties of those disputes. Appellants cite *Zenner v. Holcomb*, 147 Idaho 444, 210 P.3d 552 (2009) as support for their position. However, the *Zenner* case involved a contract between disputing parties that called for payment of “actual fees” to the prevailing party if the contract

were disputed as opposed to “reasonable fees”. Based on the language in the contract, the appellate court held that the “reasonableness” criteria would be inconsistent and therefore the criteria of Rule 53(e)(3) was not applicable. This is not applicable to this action before this Court. In this current case, there is no contract between the disputing parties. The contract appellant wants to use to avoid the Rule 53(e)(3) criteria is between the personal representative and his attorney, not between the personal representative’s attorney and the other beneficiaries. The respondents are not a party to this agreement. The agreement referenced by appellant may be binding and enforceable on the personal representative, but it is not binding on, and cannot be used against, the respondents who were not parties to the agreement. The trial court did not error in refusing to only rely on this retainer agreement between the personal representative and his attorney when reviewing whether to award the claimed attorney fees.

Because the underlying action is a probate of an estate, the trial court reviewed the probate code for direction in awarding attorney fees. The statute that applies for the payment of attorney fees in probate actions is Idaho Code §15-3-720.

“If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorney fees incurred.”

Idaho Code §15-3-720.

Appellant wants the court to just accept the appellant’s attorney’s own assessment as to the value for the services claimed to have been provided without any inquiry into the reasonableness. If this were an issue just between the personal representative and his attorney, it might be acceptable to rely on the language of the agreement in allowing the attorney to set the

amount. However, in this case, the personal representative wants his attorney fees paid by the estate which will directly affect all beneficiaries. If the personal representative wants his attorney fees paid by the estate, the claim for those fees is subject to Idaho Code §15-3-720 and it is within the court's discretion to determine whether the claimed fees are reasonable. Rule 54(e)(3) is used by a court to assist it in determining the reasonableness of fees and involves a discretionary determination by the court. *Daisy Manufacturing Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 262, 999 P.2d 914 (Ct. App 2000). "A court is permitted to examine the reasonableness of the time and labor expended by the attorney under I.R.C.P. 54(e)(3)(A) and need not blindly accept the figures advanced by the attorney...." *Id* at 262, citing *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct.App.1985). If the court is to award attorney fees under Rule 54(e)(3), than it must have sufficient information at its disposal concerning the factors Rule 54(e)(3). Some of these factors can only be provided by the attorney.

We believe it is incumbent upon a party seeking attorney fees to present sufficient information for the court to consider factors as they specifically relate to the prevailing party or parties seeking fees. Streeter has failed to do this, therefore, we find no error in the denial of a fee award to Streeter.

Hackett v. Streeter, 109 Idaho 261, 264, 706 P.2d 1372 (Ct. App. 1985).

In *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 86 P.3d 475 (2004), the appellate court overturned a district court award of attorney fees because the district court was without sufficient information concerning the 54(e)(3) factors. In that case, Texas Refinery was precluded from an award of a specific amount of attorney fees because it chose not to provide time sheets to support the claimed fees. Because there was no underlying, supporting

information for the claimed fees, the district court could not determine the reasonableness of the claimed fees.

In this case, appellant's attorney wants the court to rely solely on his claim that the fees are reasonable as satisfaction of the 54(e)(3) factors. However, the trial court used its discretion to review the information provided and to determine that this claim was insufficient to satisfy the Rule 54(e)(3) factors and, following the holding in *Texas Refinery*, determined that it could not award the claimed fees. The court did not abuse its discretion by not blindly accepting the requested attorney fees presented by personal representative's attorney without more information. The trial court used its discretion to disallow the requested fees because there was no information to assist the trial court to find that the claimed fees were reasonable using the Rule 54(e)(3) factors.

In this case, it was incumbent on appellant and appellant's attorney to present sufficient information for the court to consider the reasonableness of the fees claimed. Because that did not occur, the court could not enter a finding awarding the claimed fees. There was no error in denying the claimed fee.

II. THE CONTRACT WAS VALID

Appellant argues that the agreement between the personal representative was valid and therefore, no other inquiry was necessary or required by the trial court. However, as indicated earlier, it is not just a question of the validity of the agreement between the personal representative and his attorney. The respondents are not a party to this agreement. The agreement referenced by appellant may be binding and enforceable on the personal

representative, but is not binding on, and cannot be used against, the respondents who were not parties to the agreement. In addition, appellant's reliance on *Zenner*, is misplaced. The *Zenner* case involved a contract between disputing parties. In this current case, there is no contract between the disputing parties. The trial court did not error in refusing to only rely on this agreement between the personal representative and his attorney when reviewing whether to award the claimed attorney fees.

III. THE COURT ERRONEOUSLY CONSIDERED ONLY TIME INVOLVED

Appellant wants the Court to ignore I.R.C.P. 54(e)(3) factors except for Rule 54(e)(3)(L) to award fees. Rule 54(e)(3)(L) states the trial court may rely on "Any other factor which the court deems appropriate in the particular case." First of all, the use of this factor is still left to the discretion of the trial court in that it is left to the court to determine what is appropriate. In this case, the trial court used its discretion to reject the information presented as not being appropriate. This was not error.

Secondly, the court cannot consider "any other factor" of Rule 54(e)(3)(L) to the exclusion of time and labor and the other factors.

Rule 54(e)(3) lists the factors which the district court "shall consider ... in determining the amount of such fees." One factor is the "time and labor required." The district court may also consider "[a]ny other factor ... appropriate in the particular case." But the court may not focus upon such "other" factors to the exclusion of the "time and labor" and the remaining factors listed in the rule.

DeWils Interiors, Inc. v. Dines, 106 Idaho 288, 290, 678 P.2d 80, 82 (Ct. App. 1984); citing *Logosz v. Childers*, 105 Idaho 173, 667 P.2d 276 (Ct.App.1983).

The Court cannot look to the agreement between the personal representative and his attorney to the exclusion of all other factors. The trial court did not error in reviewing the Rule

54(e)(3) factors, including time and labor under Rule 54(e)(3)(A) and finding the appellant's presentation of information insufficient to award attorney fees. The court did not err when it concluded that it could not determine the reasonableness of claimed or requested attorney fees without additional information and in denying the attorney fees when no additional information was provided.

IV. COMPLIANCE WOULD HAVE REQUIRED VIOLATION OF IRPC 8.4(c)

Appellant was without the ability to submit the information requested by the court because it cannot manufacture this information and stay in compliance with I.R.C.P. 8.4(c). This does not create error on the part of the trial court. Appellant chose not to retain information that would satisfy the Rule 54(e)(3) factors. The Court did not abuse its discretion in that it gave Appellant additional opportunities to provide more information prior to denying the fee award. Appellant was unable to provide any additional information, and therefore the Court was unable to award fees as requested.

V. BILLABLE HOURS – AN OUTMODED CONCEPT

Appellant provided a significant amount of information and articles outside of the transcripts and court records. This information suggests a trend away from the standard billable hour. Regardless of whether there is a "trend" away from the billable hour, awards of attorney fees in Idaho is governed by the statutes as discussed above. The trial court made no error in adhering to the rules.

VI. QUANTUM MERUIT BILLING APPROVED

Appellant wants the Court to approve the requested attorney fees under the theory of quantum meruit. In support of this argument, appellant cites *Farrell v. Whiteman*, 146 Idaho 604, 200 P.3d 1153 (2009). However, this was not a case wherein the Court applied quantum meruit to award or approval of attorney fees. The Farrell case was a case involving a disputed agreement between two parties. It does not apply to this action.

Although quantum meruit has been used as a means of awarding equitable relief for awarding value of services rendered, it is inapplicable to the determination of awarding or approving attorney fees. As has been discussed throughout this brief, the award of attorney fees is controlled by statute. Those statutes, including I.R.C.P. 54(e)(3) provide the guidance to the court to determine, in its discretion, whether fees are warranted and reasonable .

VII. ATTORNEY FEES ON APPEAL

Respondent is entitled to attorney fees on appeal pursuant to I.C. §12-121. Appellant has sought this appeal frivolously, unreasonably and without foundation.

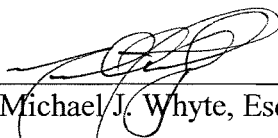
CONCLUSION

The court did not error in using its discretion when it denied the award of attorney fees because appellant failed to provide sufficient information required under Idaho Code §15-3-720 and I.R.C.P. 54(e)(3).

DATED this 15 day of December, 2011.

THOMSEN STEPHENS LAW OFFICES, PLLC

By:



Michael J. Whyte, Esq.

CERTIFICATE OF SERVICE

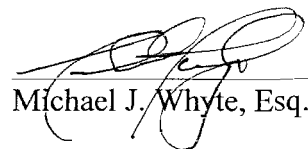
I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 15 day of December, 2011, I caused a true and correct copy of the foregoing **RESPONDENT'S BRIEF** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

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