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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE ESTATE OF:)	Supreme Court No. 45451
RUTH BIRCH,	Case No. CV-2011-7613
)	
)	
)	
Deceased,	
)	
)	
)	

APPELLANT’S BRIEF

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE**

HONORABLE BRUCE L. PICKETT, PRESIDING.

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ATTORNEY FOR RESPONDENT

ATTORNEY FOR APPELLANT

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III. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the *Opinion and Order on Appeal* from the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville in which the Hon. Judge Bruce L. Pickett, affirmed the Magistrate Courts assessment of attorney fees in the amount of \$11,559.05.

B. Statement of Facts and Course of Proceeding Below

The will of Ruth Birch was probated in late 2011. It named two of her four living children, Barry Birch (Barry) and Linda Bailey (Linda) as heirs and it disinherited Bruce Birch (Appellant) and Cheryl Simmons (Cheryl), the two younger siblings. Linda was appointed personal representative (PR). The estate consisted of real property and cash. A compromise agreement entered by the parties provided for an equal division of the Estate between the four siblings. The Agreement was approved by the Court.

Barry died in May 2014 while the Estate was pending. The Appellant inherited Barry's interest in the Estate thereby increasing his interest in the estate from 25% to 50%. In 2016, the PR filed *Petition for Order of Complete Settlement, to Determine Testacy, to Approval Final Accounting and Distribution, and to Discharge Personal Representative* to close the Estate seeking, among other things, an order requiring Appellant to reimburse the Estate for legal fees previously incurred by the Estate. For the purpose of this Appeal, the Estate's recovery of legal fees is the sole issue. Appellant filed an objection to the petition on a number of grounds, supported by memorandum. The PR filed a responsive brief arguing that the Court had equitable

authority to assess legal fees against the distributive share of an heir. Oral argument was presented to the Court. On August 18, 2016, the Court entered its *Order Granting in Substantial Part the Personal Representative's Petition For Orders Filed*. The Court concluded and found at pp 4-5, as follows:

First, the Court has equitable powers in any proceedings to contest the probate of a will. *Pederson v. Moore*, 32 Idaho 420 (1919). The Idaho Supreme Court in 1996 reiterated the equitable powers of the Court in a probate case. *Kolouch v. First Security Bank of Idaho*, 128 Idaho 186 (1996). ***In the context of the PR's claim to assess attorney's fees against Bruce Birch's interest in the estate, upon evidence of unnecessary or excessive litigation pursued by Mr. Birch, the Court has equitable power to assess fees against his interest in the estate.*** (Emphasis added).

No evidentiary hearing was held in this case. The PR presented no evidence of “unnecessary or excessive litigation” to the Court. Each of the PR’s assertions were denied and remain unproven at that time. Notwithstanding those facts, the Court “assessed” legal fees against Appellant in the amount of \$10,314.50.

Appellant filed a motion to reconsider supported by memorandum citing Idaho appellate cases which hold that Idaho judges do not have equitable authority to award attorney fees. The PR filed an opposing memorandum asserting that *Needam v. Needam*, 34 Idaho 193 (1921) had not been overturned and that the holding of the case supported the Court’s equitable assessment of legal fees. Although Appellant requested oral argument, his request for a hearing was denied by the Court.

The Court denied the motion to reconsider citing *Needam* as authority and specifically asserting that the cases cited in its August, 2016 order authorizing an equitable assessment of legal fees against the Appellant. In the order, the Hon. Judge L. Mark Riddoch stated that *Needham* is consistent with modern law but did not analyze or contrast it with the cases cited in

Appellant's memorandum.

The PR's attorney filed a *memorandum of fees and costs* (Memorandum) in September, 2016. Appellant did not object to it, because the Estate had not been determined by the Court to be a prevailing party, the Estate had not filed a motion for an award of fees and because the Memorandum failed to state a contractual or statutory basis for an award of fees. The Court did not enter an order awarding fees or costs to the Estate in the amounts set forth in the Estate's Memorandum.

The PR submitted a proposed *Closing Order and Schedule Of Distribution* (Closing Order herein) included was an offset of Appellant's interest in the estate in the amount of \$11,559.05, a dollar amount which was not earlier identified, requested or ordered. There is no record in the Court file that a copy of the proposed Closing Order was served on Appellant when it was lodged with the Court. It was, however, emailed to Appellant's personal email address by Driscoll. The Court signed the Closing Order and entered it on October 20, 2016. The *Schedule of Distribution* offset Appellant's distributive share of the Estate in the amount of \$10,413.50, as initially ordered by the Magistrate as well as by an addition \$10,521.00 leaving Appellant indebted to his sisters, Linda and Cheryl, in the amount of approximately \$4,320.00 each.

Appellant filed a *Motion to Reconsider, or Alternatively Motion to Set Aside Pursuant to Rule 60(b)* on November 2, 2016. On November 9, 2016, Appellant filed an *Amended Motion To Reconsider, or Alternatively Motion To Set Aside Pursuant to Rule 60(b)*. Appellant's *Memorandum in Support of Amended Motion To Reconsider, or Alternatively Motion To Set Aside Pursuant to Rule 60(b)* was filed on November 9, 2016. Copies of all referenced pleadings were served on the PR's attorney, Driscoll, and upon Cheryl Simmons. No objection to

Appellant's motions's to reconsider were filed by Bailey, her attorney, or Simmons.

On November 29, 2016, Appellant filed a *Second Amended Motion To Reconsider* and served the above-named parties. Later that day, the Court entered *Order Denying Motion To Reconsider, or Alternatively to Set Aside Pursuant to Rule 60(b) and Order Denying Motion to Disqualify*. On December 29, 2016, the Court entered its *Order Denying Second Motion For Reconsideration and/or Set Aside*. Bailey submitted a proposed judgment to the Magistrate in late December, 2016 seeking entry of judgment against Appellant for the amount set forth in the Closing Order. An objection to entry of the proposed Judgment was filed. The Magistrate did not schedule a hearing on the objection but instead entered the Judgment as proposed. The following day Appellant appealed to the District Court from the Closing Order, from denial of his motions to reconsider and from the Judgment entered in January 2017.

On March 23, 2017, the Magistrate filed his *Supplemental Order Re: Attorney Fees* (Supplemental Order) in which on Page 1 he acknowledged that he did not have equitable authority to award attorney fees.

Oral arguments were heard before the District Court, before the Hon. Judge Bruce L. Pickett, on June 1, 2017. Appellant argued that the Magistrate's equitable assessment of fees was erroneous and that the inclusion in the Closing Order of those sums set forth in the Memorandum filed by the Estate was procedurally defective. Appellant also argued that the Judgment entered by the Magistrate against the Appellant was defective. Although the Magistrate had acknowledged that the Court did not have equitable authority to assess legal fees, the PR argued before Judge Pickett that the Magistrate did in fact have equitable authority to assess fees and cited *Needham, supra*, as authority. The PR argued that Appellant's failure to object to the

Memorandum was a total and complete waiver to any later objection to recovery of the fees and costs claimed therein. On July 5, 2017 an *Opinion and Order on Appeal* was issued in which Judge Pickett found that the Magistrate did not have equitable authority to assess legal fees against Appellant's interest in the Estate. Judge Pickett set aside the Judgment entered against Appellant. Judge Pickett did find, however, "Judge Riddoch's award of \$11,559.05 is affirmed." *Id.* at Page 6.

On August 14, 2017 Appellant filed this appeal.

IV. ISSUES PRESENTED ON APPEAL

- A. THE MAGISTRATE COURT DID NOT AWARD THE ESTATE ATTORNEY FEES OR COSTS.
- B. BECAUSE THE ESTATE HAD NO CONTRACTUAL OR STATUTORY BASIS FOR AN AWARD OF LEGAL FEES, LEGAL FEES COULD NOT BE AWARDED IN THIS CASE.
- C. FAILURE TO OBJECT TO THE MEMORANDUM OF FEES AND COSTS IS NOT A SUFFICIENT BASIS TO GRANT THE AWARDED OF ATTORNEY FEES.

V. STANDARD OF REVIEW

"The determination whether to award attorney fees under [a] statute is discretionary with the trial court and will not be overturned on appeal absent an abuse of discretion." Everett v. Trunnell, 105 Idaho 787, 791, 673 P.2d 387, 391 (1983); United States Nat'l Bank of Oregon v. Cox, 126 Idaho 733, 735, 889 P.2d 1123, 1125 (Ct.App. 1995).

" We consider: " (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 to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." Indian Springs LLC v. Indian Springs Land Inv., LLC, 147 Idaho 737, 215 P.3d 457 (2009); Lettunich v. Lettunich, 145 Idaho 746, 749, 185 P.3d 258, 261 (2008).

VI. ATTORNEY FEES ON APPEAL

Appellant is entitled to attorney's fees under Idaho Code § 12-121, in that Bailey has continually pursued and defended the Magistrate's Court erroneous assertion that it had equitable authority to assess attorney fees against the Respondent. And without the foundational requirement that such attorney fees be based on contract or statute, Bailey has frivolously perpetuated this case to the Respondent's detriment and cost.

VII. ARGUMENT

A. THE MAGISTRATE COURT DID NOT AWARD THE ESTATE ATTORNEY FEES OR COSTS

The Magistrate Court did not award attorney fees or costs to the Estate. The only order entered by the Magistrate following Respondent's filing of its Memorandum was the *Estate Closing Order and Order of Distribution* (Closing Order) signed and entered by the Magistrate, on October 20, 2016. In that Order the Court directed Personal Representative to make distributions of the estate assets. I.R.C.P. Rule 54(e)(6) reads in part, ". . . after the time for filing an objection has passed, ***the court must enter an order settling the dollar amount of attorney fees, if any, awarded to any party to the action.***" (Emphasis added) The Closing

Order reads in part:

NOW THEREFORE, IT IS HEREBY ORDERED AND DECREED
THAT:

1. The will of the decedent heretofore informally probated by the Court is hereby formally probated in accordance with the will, the Order Approving Compromise Agreement filed September 10, 2012, and subsequent proceedings and orders herein.
2. The final account of Petitioner has been approved.
3. Petitioner is hereby authorized and directed to deliver and distribute title and possession of the assets of the estate to the distributees in the amount and the manner set forth in the annexed Schedule of Distribution, and all prior distributions shown in the Amended Final Accounting are hereby approved

The Magistrate “authorized and directed” the Respondent to “deliver and distribute” the assets of the estate. This order did not “settle the dollar amount”, it did not award the Estate legal fees and costs, and it did not enter an award of fees and costs against the Appellant. As neither an order been entered settling the dollar amount of legal fees and costs, nor has an order been entered awarding fees and costs, the District Judge, acting in his appellate capacity, erred in affirming an award of fees that was never made.

Respondent may attempt to argue that the copy of the Schedule of Distribution annexed to the Closing Order qualifies as an “order” of the Magistrate. Such is not the case. The very language of the document demonstrates that it is not.

“** This amount requires a payment from Bruce Birch instead of a distribution from Bruce Birch to cover the \$10,521.00 in attorney fees and \$144.85 in costs . . . to which there was no timely objection and motion to disallow filed, together with the \$10,314.50 of Estate attorney fees *assessed* against Bruce Birch *in the court’s Order* filed August 18, 2016. . .” (Emphasis Added.) *Estate Closing Order and Order of Distribution*, annexed Schedule of Distribution. Footnote.

A simple and plain reading of the footnote shows the difference between the two amounts

of attorney fees cited. The language pertaining to the first figure, \$10,521.00 simply mentions that no objection had been made by the Appellant. This language does not constitute an award of attorney fees or costs in the amount cited. This language does not comply with the provisions of I.R.C.P. Rule 54, specifically the requirements of I.R.C.P 54(e)(6). The Estate was not awarded \$10,521.00. Appellant's decision not to object the Memorandum cannot be construed as an entitlement to an assessment of legal fees.

The second sum mentioned, \$10,314.50, were not awarded to the Estate. In his *Order Granting in Substantial Part the Personal Representative's Petition For Orders Filed* filed August 18, 2016, the Magistrate wrongfully concluded that he had equitable authority to assess these sums against Appellant's interest in the Estate assets. As the closing order states, these sums were "assessed" against Appellant's estate interest. On appeal, Judge Pickett correctly overturned that assessment.

The language of the Closing Order clearly indicates that the Magistrate assessed not only \$10,314.50 the Magistrate initially assessed against Appellant's interest in the Estate but the \$10,521.00 set forth in the PR's Memorandum as well. As there was no award of attorney fees, the Magistrate's inclusion of this sum in the Closing Order can only be construed as the Magistrate's ongoing and wrongful exercise of equitable authority to assess legal fees against the Appellant's interests in the assets of the Estate.

The Closing Order authorized the PR to distribute certain sums of money to heirs of the Estate only after wrongfully assessing more than \$20,000.00 against Appellant's interest in the Estate.

B. BECAUSE THE ESTATE HAD NO CONTRACTUAL OR STATUTORY BASIS FOR AN AWARD OF LEGAL FEES, LEGAL FEES COULD NOT BE AWARDED IN THIS CASE.

There exists no contractual or statutory basis for an award of attorney fees to the Estate. “Idaho adheres to the “American Rule,” which requires each party to pay its own attorney fees unless otherwise provided by statute or contract.” *Mortenson v. Stewart Title Guar. Co.*, 235 P.3d 387,398, 149Idaho 437, 448 (2010). I.R.C.P. 54(e)(1) reads: “In any civil action the court may award reasonable attorney fees, including paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when ***provided for by any statute or contract.***” (Emphasis Added) Additionally, I.R.C.P. 54(e)(4) states: “[a]ttorney fees, ***when allowable by statute or contract,*** are costs in an action and processed in the same manner as other costs and included in the memorandum of costs.”(Emphasis Added).

These provisions of I.R.C.P. 54, as supported by case law, require that an award of attorney fees must be statutorily or contractually based. “It is a general rule that attorney’s fees cannot be recovered in an action ***unless authorized by statute or by express agreement of the parties.***” (Emphasis added) *Barnes v. Hinton*, 651 P.2d 553, 554, 103 Idaho 619, 620 (1982).

1. There does not exist a contractual basis for an awarding of attorney fees.

Simply stated, the issue of a contractual basis for an award of attorney fees is not present, neither has a contractual basis been addressed or argued by either party as a basis for the awarding of attorney fees. Additionally the District Court made the following finding.

In this case, the compromise agreement signed by the heirs to the estate was silent concerning attorney fees; therefore, ***no contractual basis existed for the assessment. Therefore the remaining basis for the assessment was statutory, and not equitable.*** (Emphasis added) *Opinion and Order on Appeal* filed July 5, 2017, Page 4 Section A.

Judge Pickett did not find any statutory basis for an award of fees.

2. There is no statutory basis for an awarding of attorney fees.

No order, entered by the Magistrate in this case, has cited any statute as authority for either an award or an assessment of legal fees. The Magistrate's assertion that he had equitable authority to assess legal fees lacked any legal basis and contradicted existing case law in this State. The Magistrate routinely denied each motion for reconsideration filed by the Appellant, citing equitable authority as a basis for the assessment. Judge Pickett's appellate order stated: "As Judge Riddoch correctly acknowledged in his Supplemental Order, he did not have equitable authority to assess \$10,314.50 against Appellant's interest in the estate. See *Golder v. Golder*, 110 Idaho 57,61, 714 P.2d 26,30 (1986)." *Opinion and Order on Appeal*, Page 4, Section A. Accordingly, the assessment of attorney fees in the amount of \$10,314.50 against the Appellant interest in the Estate was reversed by the District Court. Additionally, the Judgment issued against Appellant in favor of Linda Bailey on January 20, 2017 was vacated. The addition sums assessed against Appellant's Estate interests in the Closing Order should be vacated for the same reasons.

Idaho Code § 15-3-720

The Magistrate Court improperly interpreted Idaho Code § 15-3-720 as allowing for the assessment of attorney fees against the Appellant. On appeal the District Court found that the "Supplemental Order [Regarding Attorney Fees] [which] attempted to cure the errors made in the Order Granting In Substantial Part The Personal Representative's Petition For Orders Filed 5/17/2016 by attempting to assess the attorney fees pursuant to

Idaho Code § 15-3-720.” *Opinion and Order on Appeal*. Page 4, Last Paragraph.

“If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorney's fees incurred.” Idaho Code § 15-3-720

The District Court correctly interpreted Idaho Code § 15-3-720 as, “. . .allow[ing] the Personal Representative to be reimbursed for attorney fees incurred while representing the estate,” *Opinion and Order on Appeal*, Page 5, Paragraph 1, and not as statutory grounds for assessing attorney fees against Appellant. The District Court then reversed this second incorrect statutory basis, Idaho Code § 15-3-720, put forward by the Magistrate Court. The District Court found that, “it was an abuse of discretion for Judge Riddoch to assess [attorney] fees against Appellant’s interest in the estate under equity and/or Idaho Code § 15-3-720.” *Opinion and Order on Appeal*, Page 5, Paragraph 2. Therefore, the Magistrate Court improperly interpreted Idaho Code § 15-3-720 as allowing for the assessment of attorney fees against the Appellant.

The PR may argue that she is entitled to attorney fees under other statutes or rules, however, the time for asserting grounds in support of the Magistrates erroneous orders has passed. The Court of Appeals of Idaho concluded;

As a reviewing court, however, our task is not to search out statutory support for the award of fees below. Such support must be garnered by court and counsel at the time the award is requested and made. Therefore, the award of attorney fees must be vacated.” *Fournier v. Fournier*, 125 Idaho 789, 847 P.2d 600 (Idaho App.

1994)

The record before this Court reflects that neither the Magistrate or District Court found or concluded that the fees and costs set forth in PR's Memorandum were contractually or statutorily based, that the Magistrate had set the sums due and owing or than an order awarding fees was entered.

C. FAILURE TO OBJECT TO THE MEMORANDUM OF FEES AND COSTS IS NOT A SUFFICIENT BASIS TO GRANT THE AWARDING OF ATTORNEY FEES.

As the Magistrate did not award legal fees, the District Court mischaracterized the Magistrate's assessment of those sums set forth in the PR's memorandum of fees and costs and thus erred in affirming the Magistrate's "award" assessment of legal fees in the sum of \$10,521.00. "When reviewing an exercise of discretion, an appellate court must determine whether the lower court properly applied the legal standard." *Estate of Kunzler*, 109 Idaho 350 at 354, 707 P.2d 461 at 465 (App. 1985).

I.R.C.P. Rule 54(e)(7) states: "Any claim for attorney fees, including claims pursuant to Idaho Code section 12-121, *must* be made pursuant to Rule 54(e) unless an applicable statute or contract provides otherwise." (Emphasis added.) The District Court found error in the Magistrate Court's decision to assess attorney fees to the Respondent. The District Judge wrongfully relied upon the fact that the, "Appellant did not timely object to the memorandum of costs by filing a motion to disallow all or part of the fees and has thus waived his objection to those costs," See *Opinion and Order on Appeal*, Page 6, Second Paragraph, as grounds for affirming the assessment of \$10,521.00 against the Appellant.

“It is the general rule that attorney's fees cannot be recovered in an action unless authorized by statute or by express agreement of the parties. There are, however, exceptions to this general rule, in the case of fraud, wilful wrong or gross negligence.” Barnes v. Hinton, 103 Idaho 619, 621 (1982). These exceptions are not applicable to this case. There exists no exception in statute or case law for an award of attorney fees based solely upon the failure of a party to object to a memorandum of fees and costs. The Idaho Court of Appeals determined that the failure to object to a memorandum of fees and costs does not, in and of itself, result in an award of fees.

[T]he *waiver of objections does not detract from the trial court's responsibility to exercise sound discretion in ruling upon requests for attorney fees under I.C. § 12-121 and for discretionary costs under Rule 54(d)(1)(D)*. Accordingly, although the unions waived their right to take exception to the memorandum of costs, it does not follow that the memorandum of costs was deemed approved in its entirety and that a writ of execution could be issued thereon

In the less typical case, where the losing party does not object to the cost bill, the court can, on its own initiative review the memorandum, as provided in Rule 54(d)(1)(D), n. 2. *supra*, and make the same determinations. If the court neglects to review the memorandum and fix the amount of costs, as in this case the prevailing party can simply submit a proposed order fixing costs (and attorney fees, where applicable) and request the court to enter the order. This request can be made without notice to the losing party because objections are deemed waived under 54(d)(6). *However, in all events, the order entered by the Court must reflect the judge's exercise of discretion as to those items which relate to attorney fees under I.C. §12-121 and to discretionary costs under Rule 54(d)(1)(D). Such awards do not become automatic simply because they were claimed and the opposing party fails to object* (Emphasis added) Operating Engineers Local Union 370 v. Goodwin Const. Co. Of Blackfoot, 104 Idaho 83, 656 P.2d 144 (Idaho App. 1982)

As stated above, the Magistrate had the responsibility and the *duty to review the*

Memorandum and make findings as to their validity and allowance under Idaho

Statute. Such responsibility is addressed in Allison v. John Biggs, 121 Idaho 567, 826

P.2d 916 (1992), wherein the Court stated:

Properly understood, "[a]ll costs and attorney fees approved by the court," I.R.C.P. 54(d)(1)(F), refers to those costs and fees requested within the fourteen-day time limit of I.R.C.P. 54(d)(5) **and which are approved by the court as reasonable and as having a statutory or contractual basis.**" (Emphasis Added) *Id.* at 570, Section II.

The Court also addressed how the Court is to fulfill this responsibility of approving attorney fees:

The court must then follow the procedure outlined in Rule 54(d)(6), determine which of the items claimed will be allowed, and decide the amount of the award. After making this decision, the court can enter a supplemental order stating the precise amount awarded. See e.g., *St. John v. O'Reilly*, 80 Idaho 429, 333 P.2d 467 (1958).” *Operating Engineers, supra.*

The Magistrate did not review and determine the validity of the assessed attorney fees in the amount of \$10,521.00. The PR could have submitted a proposed order awarding fees and costs to the Estate. No such order was submitted. The proposed Closing Order submitted to the Court could have contained language fixing costs and awarding fees but it did not. The District Court erroneously concluded that Appellant’s failure to object to the Memorandum entitled the Estate to recover of fees and costs. The Magistrate had the duty to review PR’s Memorandum. He did not. The PR could have submitted a proposed order awarding fees and costs to the Estate. No such order was submitted. The proposed Closing Order submitted to the Court could have contained language fixing costs and awarding fees but it did not.

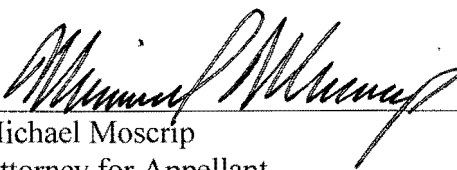
VIII. CONCLUSION

The Magistrate Court did not award attorney fees or costs to the Estate, the Magistrate Court erroneously assessed legal fees against Appellant's interest in the Estate and merely instructed the Personal Representative to make distributions of the estate assets based on those assessments. Even if there had been such an award, it would be without contractual or statutory basis.

The District Court erred in characterizing concluding that Appellant's failure to object to PR's Memorandum entitled the Estate to recover from Appellant's estate interest those fees and costs identified therein. The District Court erred in affirming as an "award" of fees which was nothing more than an erroneous equitable assessment of fees against Appellant's interest in the Estate.

The PR's defense against this appeal lacks any legal basis. Appellant is entitled to an award of attorney fees and costs herein.

Respectfully submitted this 14th day of May, 2018.


Michael Moscrip
Attorney for Appellant