

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
October 15, 2003 Session

IN RE: ESTATE OF LURLINE HESS

PAULA JEAN HESS, ET AL.

v.

ROBERT RAY HESS.

**Appeal from the Probate Court for Shelby County
No. B-33062 Donn Southern, Judge**

No. W2002-02166-COA-R3-CV - Filed February 27, 2004

This case involves a claim for attorney's fees in connection with an intestate estate. The attorneys entered into a fee agreement with the decedent's daughters. The attorneys petitioned on behalf of the daughters to require the administrator of the estate to return assets to the estate for proper distribution. The petition also asserted a claim against the administrator in favor of the minor son of one of the daughters. The minor was not mentioned in the attorneys' fee agreement. The ensuing litigation resulted in a favorable settlement for the decedent's daughters, as well as for the minor. The attorneys collected fees from the daughters, pursuant to the fee agreement. The attorneys then petitioned the probate court to assess fees against the minor's proceeds from the settlement agreement. The probate court denied this petition, finding that the attorneys had been adequately compensated for their efforts by the fees collected from the decedent's daughters. The attorneys waited until the estate was closed and then filed a motion to alter or amend the order denying their request for attorney's fees from the minor. This was found untimely and denied. The attorneys appeal. We affirm, finding no abuse of discretion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Probate Court Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

Thomas D. Yeaglin, Memphis, Tennessee, Petitioner/Appellant pro se, and for the Petitioner/Appellant, Wayne Vaiden, attorneys, representing Paula Jean Hess and Maria Hess-Florow.

Kathleen N. Gomes, Memphis, Tennessee, Guardian Ad Litem, for the Respondent/Appellee Christopher L. Hess.

OPINION

The appellant attorneys in this case seek attorney's fees out of a minor child's proceeds from a settlement in probate court. The facts underlying this appeal arose during the administration of the estate of Lurline M. Hess ("Lurline Hess"), who died without a will. The heirs at law to the decedent's estate were her three children: her daughters, Paula Jean Hess ("Paula Hess") and Maria Hess-Florow ("Hess-Florow"), and her son Robert Ray Hess ("Robert Hess"). Hess-Florow has a minor son, Christopher Hess, who was thirteen years old at the time of this appeal. Hess-Florow suffers from a mental illness and did not have legal custody of Christopher Hess. She had supervised visitation with him. During her lifetime, decedent Lurline Hess was Christopher's legal guardian. After the death of Lurline Hess, Robert Hess was appointed Christopher's legal guardian. Robert Hess was also appointed administrator of the Estate of Lurline Hess.

A dispute arose between Robert Hess and his sisters, Hess-Florow and Paula Hess. Hess-Florow and Paula Hess hired Petitioner/Appellant attorneys Thomas Yeaglin ("Yeaglin") and Wayne Vaiden ("Vaiden") to represent them in the probate proceedings. Paula Hess and Hess-Florow entered into a fee agreement with Yeaglin and Vaiden, under which the sisters agreed to pay the attorneys fifteen percent of monies collected "from [the] Estate of Lurline M. Hess and/or [a] cause of action against Robert Ray Hess regarding assets of Lurline M. Hess." The fee agreement with Yeaglin and Vaiden does not mention the minor, Christopher Hess.

On behalf of the sisters, Yeaglin and Vaiden filed a petition against Robert Hess, challenging his use of a power of attorney from decedent Lurline Hess prior to her death. The petition sought the return of estate assets allegedly diverted by Robert Hess, so that the assets could be properly distributed as part of the estate. The petition also asserted a claim on behalf of Christopher Hess by Hess-Florow, as his parent and "next friend," seeking Christopher's share of the proceeds from an annuity owned by decedent Lurline Hess.

Discovery ensued. During the course of discovery, Robert Hess admitted to using the decedent's power of attorney to execute change of beneficiary forms on two annuities held by the decedent. On one of the annuities, the decedent Lurline Hess had named Robert Hess and Christopher Hess as co-primary beneficiaries. Using the power of attorney, Robert Hess changed the original beneficiaries on this annuity from Robert Hess and Christopher Hess as co-primary beneficiaries to Robert Hess as the primary beneficiary and Christopher Hess as a contingent beneficiary.

During the course of the proceedings, it became clear that Hess-Florow had a conflict of interest with her son Christopher. Consequently, Robert Hess filed a motion requesting that

Christopher be appointed a guardian ad litem. On June 11, 2001, the probate court granted Robert Hess's motion, appointing Kathleen N. Gomes ("Guardian") as Christopher's guardian ad litem.¹

Further discovery resulted in the disclosure of a third annuity. Robert Hess admitted that he had used the decedent's power of attorney to remove Christopher as co-primary beneficiary from this additional annuity, leaving himself as the primary beneficiary.

Ultimately, the parties to the petition reached a settlement. As a result of the agreement, Christopher received \$268,829.09 of the assets, and Hess-Florow and Paula Hess each received \$135,000 of the assets. Under the settlement agreement, the checks issued to Hess-Florow and Paula Hess were also made payable to Yeaglin and Vaiden. Pursuant to the fee agreement, the attorneys would receive fifteen percent of the \$270,000 total award to the sisters. Since Christopher was not mentioned in the fee agreement with Paula Hess and Hess-Florow, the attorneys did not receive a portion of Christopher's award. Yeaglin and Vaiden then filed a motion in probate court to assess fees against Christopher's award.

In their motion, the attorneys argued that their employment contract with Hess-Florow "applied not only to the adult cause of action of Maria Hess-Florow but also to the cause of action to be asserted by Maria Hess-Florow as the natural parent and next friend of her minor child being Christopher Lynn Hess." They argued that they spent more than 220 hours pursuing the claims of all of the petitioners, including Christopher. Because Christopher's recovery was due to their efforts, the attorneys maintained that they were entitled to the assessment of a fee. Christopher's Guardian argued that the substantial fee the attorneys had received from Paula Hess was sufficient, and no fees should be assessed against Christopher.

The probate court denied the attorneys' motion to assess fees against Christopher's share of the settlement proceeds. The court held that the fee contract between Hess-Florow and the attorneys did not apply to Christopher, as it "does not purport to be entered into on behalf of [Christopher] nor could [Christopher]'s natural parent, Maria Hess-Florow, bind [Christopher] to such a contract." The probate court held further:

[T]here are conflicts and overlapping considerations in representation of Maria Hess-Florow and [Christopher] but the compensation for representing the two adult daughters is good and valuable and adequate compensation for the services rendered in this cause. To grant another 15% for representation of the minor is not required, as the attorneys for Paula Jean Hess and Maria Hess-Florow are being adequately compensated under the Contract of Employment and Security Agreement.

¹ The Guardian investigated and issued a report. She reported that Paula Hess and Maria Hess-Florow were apparently estranged from the decedent Lurline Hess. At the decedent's request, Robert Hess moved to Memphis to help care for Christopher, and they had developed a close bond. The decedent told numerous persons that she did not want Paula Hess or Hess-Florow to receive anything from her estate, but she wanted Robert Hess and Christopher Hess to share it. Robert Hess was given legal custody of Christopher after the decedent's death, and Christopher lived with him. Robert Hess indicated that he intended for any monies he had to go to the benefit of Christopher.

Thus, the probate court denied the motion because Christopher was not covered by the fee agreement and because the attorneys' compensation from Hess-Florow and Paula Hess was adequate compensation for the work performed. This order was signed on October 17, 2001. On April 23, 2002, over six months after the denial of the attorneys' motion, and after all of the estate's assets had been disbursed, the probate judge signed an order closing the estate. Shortly thereafter, on May 7, 2002, Yeaglin and Vaiden filed a motion under Rules 59.01 and 59.04 of the Tennessee Rules of Civil Procedure, requesting the probate court to alter or amend its order denying their request for an assessment of attorney's fees against Christopher's settlement proceeds. The attorneys relied on the common fund doctrine, which permits an attorney to assess a fee against a beneficiary's share of a fund of money, such as settlement proceeds, even if the beneficiary is not a client of the attorney. *Kline v. Eyrich*, 69 S.W.3d 197, 204 (Tenn. 2002).

In a carefully reasoned memorandum opinion, the probate court denied the motion to alter or amend. The probate court found that Yeaglin and Vaiden had failed to timely file their motion to alter or amend within thirty days of the original order denying their request for fees. It stated:

To grant attorney fees at this late date would impose a considerable hardship on a probate court and on the parties to the original lawsuit. . . . To hold as Petitioners contend would allow a will contestant to appeal a ruling made by a court long after the ruling is made, the estate administered, and the assets distributed. Judicial efficiency and logic require that judgments and orders have a degree of finality when entered.

Nevertheless, the probate court addressed the applicability of the common fund doctrine. It held that, although the common fund doctrine may be applicable to beneficiaries of a decedent's estate, in the case at bar there were equitable reasons to decline to apply the doctrine. The probate court found that the settlement negotiations on behalf of Christopher were not difficult or burdensome because Robert Hess was cooperative in correcting his actions. The probate court noted that the attorneys had already received "substantial" fees from Hess-Florow and Paula Hess for the negotiations, and concluded that "the fees received from the Petitioners' funds adequately compensated the attorneys for negotiating the additional settlement provisions that benefited Christopher." From that order, Yeaglin and Vaiden now appeal.

On appeal, Yeaglin and Vaiden argue that the trial court erred in concluding that their Rule 59.04 motion to alter or amend was not timely filed. They argue as well that the trial court abused its discretion in declining to alter or amend its order to permit the assessment of attorney's fees against Christopher's settlement proceeds, under the common fund doctrine. The Guardian argues that neither the motion to alter or amend nor this appeal were timely filed. Even assuming that the motion and this appeal were timely filed, the Guardian contends, the attorneys were sufficiently compensated by Paula Hess and Hess-Florow, and the trial court did not err in denying their request for additional fees from Christopher.

Rules 59.01 and 59.04 of the Tennessee Rules of Civil Procedure permit a party to file a motion to alter or amend a trial court's judgment within thirty days of entry of the judgment. Tenn. R. Civ. P. 59.01, 59.04. If the motion is timely filed, appellate review of the denial of the motion to alter or amend is for abuse of discretion. *Ruff v. Raleigh Assembly of God Church, Inc.*, 2003 WL 21729442, at *8 (Tenn. Ct. App. July 14, 2003).

If the motion to alter or amend was timely filed, we would then consider the attorneys' argument that their request for fees from Christopher should have been permitted under the common fund doctrine. Analysis on the applicability of the common fund doctrine requires a two-step process. First, as a matter of law, the court must determine whether the common fund doctrine is applicable to the general factual situation. *Kline v. Eyrich*, 69 S.W.3d 197, 203 (Tenn. 2002) (citing *Kindred v. City of Omaha Employees' Ret. Sys.*, 564 N.W.2d 592, 595 (1997)). Second, if the doctrine applies, the appellate court considers whether the trial court abused its discretion in determining whether an award of attorney's fees under the doctrine is appropriate for the specific case before it. *Id.* (quoting *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995)). Therefore, on appeal, the applicability of the common fund doctrine is reviewed *de novo* with no presumption of correctness, and the denial of an award of attorney's fees is reviewed under an abuse of discretion standard. *Id.*

A trial court has abused its discretion when it reaches an illogical decision which causes harm to a party, or when it applies an incorrect legal standard. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)). When reviewed under an abuse of discretion standard, the trial court's decision must be " 'upheld so long as reasonable minds can disagree as to [the] propriety of the decision [of the trial court].' " *Id.* (quoting *State v. Scott*, 33 S.W.3d 746, 751 (Tenn. 2000)). The appellate court may not substitute its own judgment for the trial court's. *Id.* (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998)).

On appeal, Yeaglin and Vaiden assert that their motion to alter or amend the judgment was timely, claiming that because of the numerous issues concerning the disbursement of the estate's monies, the probate court could have reconsidered its decision on their request for attorney's fees at any time. They contend that the probate court's order did not state expressly that it was final, nor could it be considered final under Rule 54.02 of the Tennessee Rules of Civil Procedure because there were multiple parties in the overall probate proceedings who still had pending claims. They maintain that the order on their motion for fees was not final until the probate proceedings were brought to a close, and that their motion to alter or amend was timely because it was filed within thirty days of the closing of the estate.

The Guardian argues that Yeaglin and Vaiden were required to file the motion to alter or amend within thirty days after the order they seek to appeal, that is, the order denying their request for attorney's fees from Christopher. As found by the trial judge, "Judicial efficiency and logic require that judgments and orders have a degree of finality when entered." Instead, the attorneys waited seven months, after the estate was closed and all of the monies in the estate had been disbursed. Noting that estates can sometimes be pending for many years before they are finally

closed, the Guardian maintains that the argument put forth by Yeaglin and Vaiden, that they could not file their appeal until after the estate was closed, makes no sense. Consequently, she argues, the trial court correctly concluded that the motion to alter or amend was not timely filed, and as a result, this appeal was not timely filed.

It is likely that the Rule 59.04 motion filed by Yeaglin and Vaiden was not timely. As noted by the trial court, holding as Yeaglin and Vaiden contend “would allow a will contestant to appeal a ruling made by a court long after the ruling is made, the estate administered, and the assets distributed.” *See* Tenn. Code Ann. §§ 30-2-315(b), 30-2-317 (2001). However, assuming *arguendo* that the motion was timely, we will consider the probate court’s refusal to assess a fee against Christopher’s settlement proceeds.

In arguing that the trial court erred in refusing to award them a fee from Christopher’s settlement proceeds, the attorneys rely primarily on the common fund doctrine. In Tennessee, in the absence of a statute or an agreement, an attorney generally must look only to his own client for payment of his fees, even if his work benefits persons other than his client. *Kline v. Eyrick*, 69 S.W.3d 197, 204 (Tenn. 2002). Under the common fund doctrine, however, when an attorney secures or preserves a fund of money in which persons other than his client share, the attorney may oblige beneficiaries of the fund who are not his client to contribute to the attorney’s fees by assessing the fee directly against the fund. *Id.* Citing *Kline*, Yeaglin and Vaiden argue at length that the common fund doctrine is applicable, and that the trial court erred in declining to apply it in this case and award them a portion of Christopher’s settlement proceeds.

Although *Kline* discusses the common fund doctrine at length, it is not applicable in this case. Among other things, the primary issue in *Kline* was whether the common fund doctrine was inapplicable to a wrongful death case. The Tennessee Supreme Court determined that it was. In addition, in *Kline*, the trial court had determined, in its discretion, that the application of the common fund doctrine was appropriate, and had assessed attorney’s fees against the settlement of a wrongful death claim, thereby assessing fees against beneficiaries who were not the attorney’s client. *Id.* at 202. In contrast, in this case, the trial court determined that, assuming that the common fund doctrine was generally applicable to this type of case, it should not be applied against Christopher because Yeaglin and Vaiden had received adequate compensation from Paula Hess and Hess-Florow. Thus, this case presents the converse of the situation in *Kline*; here we examine whether the trial court abused its discretion in *declining* to apply the common fund doctrine.

The probate court judge in this case oversaw the proceedings and was familiar with the reasonable efforts required in order to secure the settlement proceeds for all of the beneficiaries. Although the probate court held that the attorneys’ Rule 59 motion was untimely, it nevertheless carefully considered, again, the attorneys’ request for fees from Christopher. After considering all of the relevant factors, the probate court judge concluded that the compensation Yeaglin and Vaiden had requested was “good and valuable and adequate compensation for the services rendered in this cause.” The probate court found that granting another fifteen percent from Christopher was not warranted. Yeaglin and Vaiden argue that this decision results in unjust enrichment to Christopher.

As noted above, however, the probate court apparently concluded that granting the attorneys' request for fees from Christopher would result in "unjust enrichment," so to speak, to Yeaglin and Vaiden, since the fees they had already received were adequate compensation for the services rendered. We find no error in this.

In the alternative, Yeaglin and Vaiden argue that the fee agreement with Paula Hess and Hess-Florow binds Christopher Hess as well. The probate court considered this argument and concluded that the agreement "does not purport to be entered into on behalf of the minor nor could the minor's natural parent, Maria Hess-Florow, bind the minor to such a contract." We agree, and find the attorneys' argument in this respect to be without merit.

Overall, we find no abuse of discretion in the trial court's denial of the Rule 59.04 motion filed by Yeaglin and Vaiden. Thus, the denial of their request for fees from Christopher Hess is affirmed.

The decision of the trial court is affirmed. Costs are taxed against Petitioners/Appellants Thomas Yeaglin and Wayne Vaiden, and their surety, for which execution may issue if necessary.

HOLLY M. KIRBY, JUDGE