Third District Court of Appeal

State of Florida

Opinion filed June 10, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-2068
Lower Tribunal No. 10-2358

Marshal Glenn Spear,
Appellant,

vs.

Lawrence J. Denmark, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Celeste Hardee Muir, Judge.

Jonathan H. Green & Associates, P.A., and William Jay Palmer, for appellant.

Douglas H. Stein, P.A., and Douglas H. Stein, for appellees.

Before SCALES, HENDON and LOBREE, JJ.

PER CURIAM.

Marshal Glenn Spear (the "trustee") appeals the trial court's award of trustee's fees and costs of $8,419.31, where she originally sought $82,887.73 for work

performed on behalf of the Irving J. Denmark Trust (the "trust") and Lawrence J. Denmark (the "beneficiary"), mainly upon a determination that much of the alleged work performed by the trustee was neither necessary nor authorized. We reverse in part, holding that the trial court erred in calculating the hourly rate for the trustee's expert witness. However, because the trial court did not otherwise abuse its discretion or err as a matter of law in its award of the trustee's fees and other costs, we affirm the balance of the award.[1]

Factual Background

The dispute between the parties spans almost a decade and four appeals, including the present case. In 1988, Irving Denmark (the "settlor"), created the trust for the beneficiary, his brother, and their spouses. It required that, upon the death of both the settlor and his wife, Evelyn Denmark, the property be split in two, creating two separate trusts. In 2007, the prior trustee resigned, and the settlor's wife arranged for the trustee to take over. The settlor's wife died that same year, while the settlor died in 2009.

Between January and June 2010, seeking the termination of the trust pursuant to its terms, the beneficiary asked the trustee to make a distribution, resign, and forgo a full, final accounting, insisting that the beneficiary's counsel would instead review

[1] We decline to address the trustee's remaining arguments.

all the raw data. The trustee made three partial accountings of the trust in January, March, and June 2010. However, he refused to resign unless the beneficiary released him from all liability. The beneficiary refused and brought suit. Since the last appeal, the trustee moved for fees and costs that pertained to the three accountings performed, a number of hours spent by the trustee's counsel in defending against the suit brought by the beneficiary below, as well as on appeal, and the number of hours spent by the trustee's expert witness in preparation for the evidentiary hearing on the award.

Standard of Review

We review the award of trustee's fees and costs for an abuse of discretion. See West Coast Hosp. Ass'n v. Fla. Nat'l Bank of Jacksonville, 100 So. 2d 807, 811 (Fla. 1958) ("If the compensation of the trustee has not been fixed by statute or direction of the settlor, the amount of the award rests in the discretion of the court having jurisdiction, which is ordinarily the court receiving the account of the trustee."). While the lower court's legal conclusions are reviewed de novo, its factual findings are assessed for competent, substantial evidence. See Musi v. Credo, LLC, 273 So. 3d 93, 95-96 (Fla. 3d DCA 2019); Ashear v. Sklarey, 247 So. 3d 574, 577 (Fla. 3d DCA 2018).

Analysis

Calculation of the Trustee's Expert Witness Fee

The trustee argues that the trial court erred both in finding that fewer hours than spent by her expert in preparation for the evidentiary hearing were compensable and necessary and in calculating those hours deemed compensable, relying on an hourly rate different from that testified to by the expert. The record does not lack competent, substantial evidence for the lower court's reduction of the number of hours to be compensated, given both the legal nature and sometimes irrelevance of the expert's testimony. Moreover, the trial court did not abuse its discretion in making such finding.

Here, the trial court found—and the record supports—that the expert's fee was for reviewing legal documents and testifying, the expert gave his opinion as to the law governing the calculation of trustee fees, and most of the expert's time spent on the review of documents or testimony did not relate to the trustee's preparation of the first two accountings, the only compensable services. The court determined that only ten of the sixty hours claimed pertained to work necessary to assist the court and to the benefit of the trust. Because it cannot be said that no reasonable judge would agree with this allocation based on this record, the trial court did not abuse its discretion. See Canakaris v. Canakaris, 382 So. 2d 1197, 1204 (Fla. 1980) ("We acknowledge that reasonable persons might differ as to what is an appropriate sum for permanent periodic alimony in this cause, but we find it is within the parameters of reasonableness; therefore, there can be no finding of an abuse of discretion.");

Craig v. Chung, 751 So. 2d 192, 193 (Fla. 4th DCA 2000) (reversing award of fees for abuse of discretion in reduction but observing that, "[i]f the trial court had, as a result of concluding that some of the work of the CPA was unnecessary, made a reasonable reduction, we would have affirmed").

The trustee is correct, however, that the only evidence in the record was that the expert's hourly rate was $450, not the $400 used to calculate the award. Because the $400 rate is both unsupported and contradicted by the record, we reverse this portion of the award and remand for entry of an order reflecting a correct calculation based on the $450 hourly rate. See Smith v. Sch. Bd. of Palm Beach Cty., 981 So. 2d 6, 10 (Fla. 4th DCA 2007) ("We find the trial court erred in awarding Smith's attorney $200.00 an hour as opposed to $300.00 an hour, as this award is not supported by competent and substantial evidence and reverse for entry of a new order awarding the appropriate hourly rate.").

Application of the West Coast Test

The trustee argues that the lower court either failed to apply or actually misapplied the governing West Coast factors test in making the award, since it relied on the number and value of hours spent by the trustee in performing services, two factors characteristic of the lodestar method for calculating attorney's fees and inapplicable to trustees. See West Coast, 100 So. 2d at 812; Robert Rauschenberg Found. v. Grutman, 198 So. 3d 685, 688 (Fla. 2d DCA 2016) (concluding trial court

correctly refused to calculate trustees' fees using lodestar method set forth in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), which does not apply to trustee's fees).

The record, however, does not indicate that the trial court applied the lodestar method, or failed to apply (or misapplied) the West Coast factors. Based partly on testimony from the trustee's own expert, the trial judge considered and inevitably made findings as to the amount of time spent and value of services provided by the trustee, two of several factors that the Florida Supreme Court has found to control such an award. West Coast, 100 So. 2d at 812 (describing as factors amount of capital and income received, customary wages and salary, success or failure of trustee's administration, unusual skill or experience possessed by trustee, trustee's loyalty or disloyalty, amount of responsibility assumed by trustee, time consumed by trustee in serving trust, and customary charges by trust companies for similar work).

The record before the trial court presented it with evidence almost exclusively of these two factors, not others. West Coast does not, and cannot, require evidence of all factors. See West Coast 100 So. 2d at 812 (observing that trial court "may" consider any combination of factors). The mere fact that the only two factors for which there was either sufficient or credible evidence in this case are the two that coincidentally happen to be used in the lodestar method, and that the trial court did

not expressly assert its application of the West Coast test does not mean that it failed to apply it as far as the evidence allowed it. See, e.g., Elliot v. Elliot, 648 So. 2d 137, 138-39 (Fla. 4th DCA 1994) (reminding practitioners that absence of written opinion or statement by court specifically addressing argument or principle of law does not imply that court failed to consider arguments presented and rely on governing law).

Conclusion

Because the trial court purported, but failed, to calculate the trustee's expert witness' hourly rate based on the only hourly rate testified to at the evidentiary hearing, that component of the award lacks competent, substantial evidence. We reverse for entry of a new award reflecting the correct calculation. However, because the balance of the award rests on competent, substantial evidence and the trial court did not abuse its discretion in awarding substantially less than the trustee sought, we affirm the trial court's award as to the trustee's fees and other costs.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.