IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

ELVIE SMITH, ANNIE MAE BENNETT, Individually and as Executrix of the Estate of Pearlie Mae Porter, Deceased; WANNA MAY REDMON and PAUL E. WEAVER,

Plaintiffs-Appellees,

Vs.

LURENE FAULKNER, BETTY JEAN WEAVER, AND JAMES ARLIN PORTER,

Defendants-Appellants,

Vs.

WALTER BENNETT,

Third Party Defendant.

FROM THE CHESTER COUNTY CHANCERY COURT, No. P-300

THE HONORABLE JOE C. MORRIS, Chancellor

AFFIRMED

C.A. No. 02A01-9504-CH-00088

F. Lloyd Tatum, Tatum & Tatum of Henderson, For Appellees

Luther Wayne Robertson of Collierville, For Appellants,

FILED

July 11, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

MEMORANDUM OPINION[1]

CRAWFORD, J.

Defendants-Appellants, Lurene Faulkner, Betty Jean Weaver, and James Arlin Porter (Appellants), appeal from the judgment of the trial court denying their claim for attorney's fees to be paid by the estate of Pearlie Mae Porter.

This is the second time this case has been before this Court. The parties in both suits are the six children of Ardie and Pearlie Mae Porter. On August 1, 1990, the appellees; Elvie Smith, Annie Mae Bennett, and Wanna Mae Redmon, filed a complaint seeking to sell a house and 1.15 acres of real property contained in the estate. Ms. Smith and Ms. Bennett are the executrices of Mrs. Porter's estate. On October 9, 1990, appellants filed an answer and counter-complaint for rescission of a warranty deed executed by Ardie and Pearlie Mae Porter conveying other real

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[1]Rule 10 (Court of Appeals). Memorandum Opinion. -- (b) The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

property to the appellees. Also on October 9, 1990, appellants filed a petition to contest the last will and testament of Pearlie Mae Porter, alleging that the will was invalid because Mrs. Porter lacked testamentary capacity at the time the will was executed and that she was unduly influenced by the appellees. The cases were tried together, and on September 29, 1992, the trial court entered judgment on a jury verdict which found that the purported last will and testament of Pearlie Mae Porter was Mrs. Porter's true will, but that the deed from the Porters transferring the bulk of their real property to appellees was invalid. On appeal to this Court, the trial court's decree was affirmed in all respects.

After remand, appellants now seek an award of attorney's fees against the estate in the amount of $18,330.00. This figure is based on one-third of $55,000.00, the amount by which appellants allege Mrs. Porter's estate increased as a result of the appellants' successful efforts to set aside the aforementioned deed. Appellants first filed a motion on March 11, 1992, seeking attorney fees from the estate in the amount of $14,380.00 for time appellants' attorney spent between August 3, 1990, and February 15, 1992. The motion was not heard prior to the appeal and after remand appellants sought attorney fees for 303.6 hours of work, at the rate of $100.00 per hour. On December 21, 1994, after an evidentiary hearing, the trial court entered an order denying allowance of fees out of the estate to either party. The present appeal followed.

Appellants present a single issue on appeal which, as stated in appellants' brief, is:

> Whether the trial court erred in not allowing the Appellants any attorney fees in this cause when the services of their attorney were of value to the estate in this cause in that the deed which was set aside, the property represented by such deed was almost three-fourths of the value of the estate of Perlie Mae Porter, deceased, and to not allow the Appellants their reasonable attorney's fees amounts to unjust enrichment of the Appellees in this cause.

Since this case was tried by the court sitting without a jury, we review the case ***de novo*** with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d).

Generally, "[i]n the absence of a statute or contractual provisions for indemnification or some recognized ground of equity, there is no right to have attorneys fees paid by an opposing

party in civil litigation." ***Kimbrough v. Union Planters National Bank***, 764 S.W.2d 203, 205 (Tenn. 1989).

Counsel for an unsuccessful contestant of a will cannot be paid out of the assets bequeathed by the will. ***Bridgeford v. Williams,*** 58 Tenn. App. 693, 697, 436 S.W.2d 453, 455 (1967). In ***Merchants & Planters Bank v. Myers***, 644 S.W.2d 683 (Tenn. App. 1982), this Court said:

> As a general rule, for attorneys' fees to be allowed out of an estate, the attorney must have been employed by the personal representative of the estate; however, there is an exception where an attorney's services have inured to the benefit of the estate and, in those cases, the court has discretion to allow fees. (Citations omitted.)

Id. at 688.

Even where fees may be properly charged against the estate, they must be reasonable, necessary and proper. ***In re Estate of Wallace***, 829 S.W.2d 696, 701 (Tenn. App. 1992). The ***Wallace*** court stated: "Trial courts have the discretion, in the first instance, to determine whether the requested fees and expenses are reasonable. . . . We will not alter the trial court's decision unless we find that the award exceeds reasonable limits." ***Id***. (Citations omitted.); ***see also Merchants & Planters Bank***, 644 S.W.2d at 688.

In the instant case, it is clear that appellants' suit to set aside the deed inured to the benefit of the estate by increasing the value of the estate by approximately $55,000.00. However, it is also uncontroverted that appellants' unsuccessful suit to contest the will did not inure to the benefit of the estate and thus, attorney's fees should not be allowed for that portion of the suit. ***Bridgeford,*** 58 Tenn. App. at 697, 436 S.W.2d at 455 (1967).

With regard to the suit to set aside the deed, appellants did not present the court with separate calculations of attorney's fees for the will contest and the suit to set aside the deed and, by the admission of appellants' attorney, "it was impossible to divide one issue from the other." The court cannot arbitrarily award attorneys fees without a basis for their calculation, nor can a court randomly impose, as appellants' counsel suggests, what is effectively a unilateral contingency fee agreement on the estate. Apparently appellants' attorney could not conceive of a means by which to separate the fees for the will contest and for the suit regarding the deed.

Under these circumstances, we hold that it was well within the discretion of the trial court not to allow an award of fees. ***Wallace***, 829 S.W.2d at 701; ***Merchants & Planters Bank v. Myers***, 644 S.W.2d at 688.

Accordingly, we affirm the judgment of the trial court. Costs of appeal are taxed to the appellants. In view of our decision, appellee's issues are pretermitted.

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE