

Judgment rendered March 4, 2005.

No. 39,275-CA
ON REHEARING

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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SUCCESSION OF ROBERT SEWELL, JR.

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On Rehearing

On Appeal from the
Fourth Judicial District Court for the
Parish of Ouachita, Louisiana
Trial Court No. 03-0635

Honorable J. N. Dimos, Judge

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SIR CLYDE LAIN, II

Counsel for Appellants
Robert Dewayne Sewell
and Richard Tyrone Sewell

WRIGHT & UNDERWOOD, L.L.P.
By: Patrick H. Wright, Jr.

Counsel for Appellee
Mary Murth Sewell

DIANNE HILL

Counsel for Appellee
Robertine C. Gholston

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Before BROWN, WILLIAMS, PEATROSS, MOORE, and DREW, JJ.

DREW, J., dissents with written reasons.

BROWN, C.J., On Rehearing,

We granted appellants' request for a rehearing on the question of fees to be paid to the administrator and the attorney for the administrator. The facts of the case are essentially unchanged from the original opinion; however, for the following reasons, we now amend and as amended, affirm.

Discussion

On April 23, 2003, the trial court appointed Charles Traylor, III, as administrator and Patrick Wright as the attorney for the administrator. Prior to this appointment, the surviving spouse, Mary Sewell, who was represented by Patrick Wright, filed a request to be appointed administrator. Decedent's children objected to an administration and as the sole heirs agreed to accept the succession unconditionally. However, Lena Henderson Sewell intervened claiming that she was decedent's first wife and that they had never divorced, causing the court to order an administration. It was agreed that the parties would deposit with Traylor \$1,200, and that his fee would be \$100 per hour. Mary Sewell, Lena Henderson Sewell and appellants, Robert and Richard Sewell, were each to deposit \$400. Appellants were the only parties who did not deposit their portion of the fee.

Within one month of the appointment, on May 20, 2003, appellants advised all parties involved that they had found court records showing that Lena Henderson Sewell and decedent had, in fact, divorced. Accordingly, appellants requested that Wright end the administration, have the surviving spouse turn over the estate property and place the appropriate parties in possession of the estate. Wright declined to do so. On January 12, 2004, appellants filed a sworn detailed descriptive list and a rule to dismiss the

administration and place decedent's children in possession of the succession property. On January 28, 2004, Wright filed on behalf of the administrator a detailed descriptive list and tableau of distribution, each setting forth the administrator's \$1,200 fee and attorney fees of \$10,357.70. Appellants immediately filed an opposition to the tableau of distribution on February 6, 2004.

The next month, on March 15, 2004, a hearing was had and the fees of Traylor and Wright were discussed. The court minutes indicated that appellants stipulated to the fees. A transcript of that hearing was not in the appellate record, but a certified copy was provided on rehearing. A review of that transcript shows that, contrary to the minute entry, appellants disputed the fees. The transcript is controlling. We therefore granted a rehearing to determine whether the fees, as charged, were warranted.

Administrator's Fee

As noted, Traylor was appointed on April 23, 2003. Although appellants requested Traylor's dismissal on May 20, 2003, after it was discovered that Lena Henderson Sewell and decedent were in fact divorced, he was not released until after the March 15, 2004, hearing. At the April 23, 2003, hearing, the trial court, without objection, set Traylor's fee at \$100 per hour and ordered the parties to deposit with Traylor \$1,200. Appellants did object to the tableau of distribution which contained the administrator's fee on February 6, 2004. They also objected to his fee at the hearing on March 15, 2004, and in their motion for a new trial, filed on May 26, 2004.

There was nothing introduced into the record to show the time that Traylor spent on his duties as administrator. Further, there is nothing in the record to show that \$1,200 was an agreed to minimum fee as argued by Wright. The record simply shows that Traylor was to receive a fee of \$100 per hour with all parties sharing equally in an up front deposit of \$1,200. The trial court made no determination as to what work was done. However, the record does show that Traylor was appointed as administrator on April 23, 2003, and was not released until May 17, 2004. During that time, Traylor met with or had telephone conferences with Wright on several occasions. Additionally, he reviewed, verified and signed the tableau of distribution and petition for possession prepared by Wright. The parties, including appellants, did not dispute this appointment at the time it was made, and agreed to put up \$1,200. We find that appellants should pay their share of the fee in accordance with this agreement. An examination of the record allows us to conclude that \$1,200 was a reasonable administrator's fee. The judgment will be amended to reflect that the succession will be liable for a fee of \$400, to be paid out of appellants' share of the succession proceeds.

Attorney's Fee

During the March 15, 2004, hearing, Wright stated that his fee was \$9,000, after a reduction of \$1,357, but provided no detailed billing records. The reduction was a discount requested by the trial court. Additionally, Wright admitted in open court that "a lot of work was done by myself on behalf of Mary Sewell who was the administrator at that time..." Actually, Mary Sewell had only petitioned to be named as administrator, and was

never named or appointed. Wright did not provide a detailed bill or evidence of his work to the trial court. The trial court accepted Wright's naked statement and set attorney fees at \$9,000. A petition for possession was filed and a judgment of possession signed on May 17, 2004. Appellants filed a motion for a new trial and attached a copy of what purports to be Patrick Wright's time sheet for the work he did on the succession. No objection was made to this attachment and the new trial motion was denied.

Wright's time sheet starts with his initial interview with Mary Sewell on February 4, 2003, and clocks more than 23 hours before his appointment as attorney for the administrator. During the period after the appointment, the time sheet demonstrates that Wright spent a great amount of time talking with Mary Sewell.

The transcript of the March 15, 2004 hearing is interesting:

By Mr. Lain: Right. One thing we forgot to mention is that the bonds were cashed in pursuant to an order signed by Judge Clark alleging that Mrs. Mary Sewell was the administrator. Not Charles Traylor. So I think.

By the court: But I made the appointment of Mr. Traylor.

By Mr. Lain: Right. But what I'm saying. Mrs. Mary Sewell was the one who signed the order saying that she was the administrator for cashing in those bonds and not Mr. Traylor. Just want the record to reflect that.

By Mr. Wright: Judge, we talked about that. At the time that a lot of work was done on behalf of Mary Sewell who was the administrator at that time such as gathering all this information up and getting everything lined up and almost ready to be closed out. . . .

(Note: The bonds were not listed in Wright's detailed descriptive list or inheritance tax form, but a number of bonds were noted in appellants' detailed descriptive list).

One month after Wright's appointment, the divorce judgment was found. Identification of the property, recognition of the surviving spouse's interest in the community property and identity of the legal heirs was thereafter without contest. However, Wright spurned appellants' request for Wright's client, the surviving spouse, to turn over possession of the separate property, place the appropriate parties into possession and close the succession, despite his later declaration that the work he did for Ms. Sewell was "getting everything lined up and ready to be closed out. . . ."

According to the detailed descriptive list filed by Wright, decedent's net estate was \$16,708.12 (this was after deducting Wright's fee of \$10,357.70); however, the inheritance and estate transfer tax return shows a net estate of \$7,161.53. The record lends support to the argument that Wright represented Mary Sewell at all times and was protecting her community property interest.

The small size of the estate and the fact that within one month of Wright's appointment the claim of Lena Henderson Sewell was shown to be false indicates that there was no need to prolong the administration. Further, we find that the trial court had no basis for setting Wright's fee. The court simply took Wright's assertion as to what his fee was and applied a small discount. Accordingly, we find that the attorney fee as set was unreasonable. Although Wright protected the interest of Mary Sewell, he

was appointed as the attorney for the administrator. He did eventually file a detailed descriptive list, tableau of distribution and judgment of possession. This work justifies a reasonable fee of \$1,500.

Conclusion

For the reasons set forth above, we amend the trial court's judgment in the following respects: Appellants, Robert D. Sewell and Richard T. Sewell, are ordered to pay \$400 of their proceeds of the Succession of Robert Sewell, Jr., to the administrator, Charles Traylor, III, and the fee awarded to Patrick Wright, attorney for the administrator, is reduced to \$1,500 to be paid by the Succession of Robert Sewell, Jr.

Amended and as amended, affirmed.

AMENDED AND AS AMENDED, AFFIRMED.

DREW, J., Dissenting,

I respectfully dissent for the reasons expressed in the original opinion.

The minutes state that the parties stipulated to the fees about which the appellants now complain. We should not substitute our judgment for the considered stipulation of the parties absent a showing of fraud, duress, menace, or mistake.