

IN THE COURT OF APPEALS

7/15/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01289 COA

IN THE MATTER OF THE ESTATE OF BESSIE L.

LUSK, DECEASED: ILANETTE BYRD, EXECUTRIX APPELLANTS

v.

ROBERT L. EILAND, NANCY UTZ, JUAWEICE DEVINE,

YVONNE WOODRUFF, GARY GIBSON, STEVE LAMASTUS

AND ED LAMASTUS APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HARVEY T. ROSS

COURT FROM WHICH APPEALED: BOLIVAR COUNTY CHANCERY COURT

SECOND JUDICIAL DISTRICT

ATTORNEY FOR APPELLANTS: CHARLES E. WEBSTER

ATTORNEY FOR APPELLEE: P. J. TOWNSEND, JR.

NATURE OF THE CASE: WILLS & ESTATES - COMPENSATION OF EXECUTRIX

TRIAL COURT DISPOSITION: CHANCELLOR AWARDED AN EXECUTRIX FEE OF .4 OF 1 % OF THE VALUE OF THE ESTATE.

MANDATE ISSUED: 8/5/97

BEFORE McMILLIN, P.J., HERRING, HINKEBEIN, AND KING, JJ.

HINKEBEIN, J., FOR THE COURT:

This is an appeal from a decision of the Bolivar County Chancery Court awarding Byrd an executrix fee of \$3,500 which is approximately four tenths of one percent of the value of the estate. Byrd was also allowed compensation for her expenses associated with administering the estate. Being aggrieved by the chancellor's award, Byrd presents but one issue to the court for consideration in this case:

Did the court abuse its discretion by awarding Byrd an executrix fee which was less than one percent of the total value of the estate?

Proceedings Below

Bessie Lusk died September 7, 1992 and her will was admitted to probate on September 24, 1992. The estate consisted of the following assets:

Farmland: \$199,333.33

Stocks: \$ 32,028.39

Certificates of Deposit: \$555,478.14

Miscellaneous: \$ 2,636.00

Total: \$789,475.86

On September 21, 1995, Byrd filed a petition requesting that the court award her an executrix fee. The petition was heard on September 25, 1995 and the chancellor made his ruling awarding Byrd a fee in the amount of \$3,500. A notice of appeal was filed on November 3, 1995.

FACTS

It is uncontested that Byrd administered her duties to the estate responsibly. In addition to the usual obligations of an executrix, Byrd sought and received two partial distributions of the estate for the benefit of the heirs. Byrd was also required to work with an attorney for the estate regarding a suit which had been filed against the estate. As noted above, the estate mostly consisted of liquid assets and Lusk left very few debts at the time of her death.

Byrd conducted most of the estate business by telephone; however, she did travel occasionally. All of Byrd's expenses incident to the administration of the estate were paid in addition to her fee. Attorneys performed all of the legal work for the estate and a CPA firm did all of the accounting and tax work for the estate. Furthermore, an appraiser did all of the appraisal work for the estate. There was no business in operation at the time of Lusk's death, and the real property was rented out. There was no work necessary in winding up a business of any sort.

Byrd kept a journal of her hours worked and expenses incurred in dealing with the estate. Her total time amounted to 168.75 hours. This amounts to a fee payment of roughly \$20.74 per hour. Byrd requested that the court grant her a commission of approximately 4% of the estate which is about \$28,000. Byrd testified that her yearly income as a jewelry salesperson was based on a commission and was about \$24,000 per year. Byrd stated that she could not determine what her time was worth on an hourly basis and said that she would leave that to the determination of the chancellor.

The court found that Byrd had spent approximately 165 hours in her work as executrix and that all of the professional work for the estate had been performed by attorneys and accountants. The court found that the work performed by Byrd was not professional in nature and that it would be arbitrary to say that 4% of the estate is fair compensation. The chancellor held that the litigation was not really a substantial factor in the complexity of administering the estate and awarded Byrd \$3,500 which was \$1,000 more than the estimate of her fees listed on the estate's tax return.

ANALYSIS

Section 91-7-299 of the Mississippi Code controls this issue. The relevant provision of the Code effective as of July 1989 reads as follows:

Allowance to an executor or administrator.

The court shall allow to an executor or administrator, as compensation for his trouble, either in partial or final settlements, such sum as the court deems proper considering the value and worth of the estate and considering the extent or degree of difficulty of the duties discharged by the executor or administrator; in addition to which the court may allow him his necessary expenses, including reasonable attorney's fee, to be assessed out of the estate, in an amount to be determined by the court.

Miss. Code Ann. § 91-7-299 (Supp. 1989).

Prior to the 1989 revision of the code, a statutory guideline existed which directed that a fee of between 1% and 7% should be awarded absent some maladministration. A case decided by the Mississippi Supreme Court in 1986 held that absent some maladministration, compensation for an executor of an estate with a gross value in excess of \$229,000 should be awarded with the statutory guidelines, rather than at \$1,500 or .6% of the value of the estate. *Scott v. Hollingsworth*, 487 So. 2d 811 (Miss. 1986). Since the court's decision in *Scott*, there has been no meaningful interpretation by case law of the amended version of the code.

The Mississippi Supreme Court has consistently held that allowance of compensation to an administrator is a matter left to the sound discretion of the chancery court and a reviewing court will not interfere with the exercise of that discretion unless there is a manifest and flagrant abuse thereof. *Schwander v. Rubel*, 75 So. 2d 45, 54 (Miss. 1954). Further, the judgment of the lower court concerning the amount of fees to be allowed to an executor and as to which the court has discretion is entitled to great respect. *Scott*, 487 So. 2d at 814.

There is little doubt that the Mississippi Legislature intended to amend Section 91-7-299 for the purpose of removing the arbitrary statutory guideline of awarding between 1% to 7% of the estate for executor's fees.

Byrd urges this Court to adopt "judicial guidelines" setting executor's fees between 1% and 7% of the estate. By doing so, we would in effect be circumventing the obvious intent of the Mississippi Legislature. This we cannot do.

Additionally, Byrd charges that the amended statute "provides no actual guidance as to the amount to be awarded . . . [and] leaves that decision to the unbridled discretion of the chancellor." As it is currently written, Section 91-7-299 of the Mississippi Code requires the chancellor to set such sum as it deems proper considering the value and worth of the estate and the extent or degree of difficulty of the duties discharged by the executor or administrator. The court, therefore, is instructed upon what factors to consider in determining an appropriate fee.

The chancellor found that the assets owned by the deceased were easily managed and there was no business to wind up or sell. Moreover, the more difficult aspects of settling the estate were accomplished by professionals who were paid substantial fees from the estate. Although there was litigation involving the estate, the litigation involved complex issues of future interests. Consequently, the chancellor found that Byrd could have no viable input into the work necessary to defend against that claim.

The chancellor in this case heard the proof, reviewed the documents, and awarded Byrd a fee of \$3,500, plus all of her expenses. While the award is admittedly low, this ruling was in accordance with the law and the statute in effect at the time. Thus, the chancellor's decision is entitled to great deference on appeal. Based on the record before us and the controlling statute, we cannot find that the chancellor abused his discretion in awarding Byrd an executor's fee of .4% of the total value of the estate.

THE DECISION OF THE BOLIVAR COUNTY CHANCERY COURT, SECOND JUDICIAL DISTRICT, AWARDING EXECUTRIX' FEES IN THE AMOUNT OF \$3,500, PLUS

EXPENSES, IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING,
PAYNE, AND SOUTHWICK, JJ., CONCUR.**