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Deanna M Ogo

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IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN THE MATTER OF THE ESTATE OF ANGEL MALITE,
Deceased.

Supreme Court No. 2012-SCC-0019-CIV

Superior Court No. 09-0369

SLIP OPINION

Cite as: 2016 MP 20

Decided December 29, 2016

Antonio M. Atalig, Saipan, MP, Appellant, Pro Se.
Reynaldo O. Yana, Saipan, MP, Appellant, Pro Se.

Stephen J. Nutting, Saipan, MP, for Appellees.

BEFORE: JOHN A. MANGLONA, Associate Justice; ROBERT J. TORRES, Justice Pro Tem; TIMOTHY H. BELLAS, Justice Pro Tem.

PER CURIAM:

¶ 1 Appellants Antonio M. Atalig and Reynaldo O. Yana (“Atalig” or “Yana” or, collectively, “Appellants”) appeal the trial court orders invalidating their contingent fee agreements and awarding them \$75,525.00 in attorney’s fees received for work performed in connection with four heirs (“the Heirs”) of the Estate of Angel Malite (“Estate”).¹ Appellants ask that this Court find that the trial court erred in invalidating the contingent fee agreement, or in the alternative that the trial court erred in the extent to which it reduced the attorney’s fee award. Appellants present two issues on appeal: (1) whether the trial court had substantial evidence to invalidate the contingent fee agreement; and (2) whether the trial court’s award of attorney’s fees was unreasonable. For the following reasons, we AFFIRM the judgments and award of the trial court.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 This matter is now before us for a third time, with facts that have not changed since we last heard arguments on this matter in 2010 and issued the opinion *In re Malite*, 2010 MP 20. There, we affirmed a trial court’s disgorgement order regarding attorney’s fees that had been awarded to Appellants, but vacated an order denying all attorney’s fees. *In re Malite*, 2010 MP 20. We remanded the question of attorney’s fees to the trial court with the instruction to conduct a hearing on the validity of the contingent fee agreements. We instructed the court that if it found those arrangements to be invalid, it should then consider the reasonableness of the attorney’s fees proposed by Appellants pursuant to Rule 1.5 of the ABA Model Rules of Professional Conduct, and either grant that proposal or determine what the reasonable fees should be.

¶ 3 On remand, the trial court invalidated the contingent fee agreements because the Heirs were not properly advised of their rights, Appellants bore no risk in prosecuting the case, Appellants purposefully withheld information from the Heirs, and Appellants breached their fiduciary duty to the Heirs. The court then considered the reasonableness of the attorney’s fees proposed by Appellants,² and found they were excessive and unreliable, and reduced the award of attorney’s fees to \$75,525.00 for Atalig and \$24,175.00 for Yana, to be paid from Atalig’s share.

¹ Atalig entered in contingent fee agreements with four of the Estate’s eighteen alleged heirs.

² Atalig claimed to have spent over 6,000 hours on this case and argued that at his hourly billing rate of \$250 his reasonable fee would exceed \$1,500,000. *In re: The Estate of Angel Malite*, No. 97-0369 (NMI Sup. Ct. June 19, 2012) (Findings of Fact & Conclusions of Law at 13).

¶ 4 Appellants now appeal the trial court’s invalidation of the contingent fee and subsequent fee award determinations.

II. JURISDICTION

¶ 5 We have jurisdiction over Superior Court final judgments and orders. NMI CONST. art. IV, § 3.

III. STANDARDS OF REVIEW

¶ 6 Appellants present two issues on appeal: (1) whether the trial court had substantial evidence to invalidate the contingent fee agreement; and (2) whether the trial court’s award of attorney’s fees was unreasonable.

¶ 7 Whether the trial court had substantial evidence on which to base its decision, is a question regarding findings of fact. We review a trial court’s finding of fact under the clearly erroneous standard. *Commonwealth v. Guerrero*, 2014 MP 2 ¶ 10. “The clearly erroneous standard accords high deference to the lower court.” *Xiao Ru Liu v. Commonwealth*, 2006 MP 5 ¶ 17. A finding of fact is clearly erroneous only if after “reviewing all the evidence . . . [we are] left with a definite and firm conviction that a mistake was made.” *Guerrero*, 2014 MP 2 ¶ 10 (quoting *Pangelinan v. Itaman*, 4 NMI 114, 120 n.33 (1994)). This deference extends to credibility judgments made by the trial court regarding the credibility of witnesses. *Id.* “The test is whether the trial court could rationally have found as it did, rather than whether the reviewing court would have ruled differently.” *Markoff v. Lizama*, 2016 MP 7 ¶ 8 (Slip. Op., June 16, 2016).

¶ 8 We review an award of attorney’s fees for an abuse of discretion. *In re Malite*, 2010 MP 20 ¶ 38 (citation omitted). Factual determinations underlying an award of attorney’s fees are reviewed for clear error. *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1147–48 (9th Cir. 2001) (citation omitted); *see also* NMI. R. CIV. P. 52(a) (“Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”).

IV. DISCUSSION

A. The Reasonableness of the Contingency Fee Agreements

¶ 9 The trial court found “the contingent fee agreements in this case are invalid and unenforceable.” *In re: The Estate of Angel Malite*, No. 97-0369 (NMI Sup. Ct. Sept. 16, 2011) (Findings of Fact & Conclusions of Law at 9) [hereinafter Contingent Fee Findings]. The trial court gave four reasons for its determination: (1) under the standard put forth by the Restatement (Third) of the Law Governing Lawyers § 35, Appellants bore little risk of nonpayment and the fee was otherwise unreasonable when measured on a non-contingent fee basis, *id.* at 10–11; (2) Atalig failed to offer his clients alternative fee bases and the contingent fee agreements were not in the best interest of his clients as required by ABA Model Rule of Professional Conduct 1.5, *id.* at 11–12; (3) Atalig took the contingent fee before he was actually entitled to be paid, *id.* at 12–13; and (4) Appellants breached their fiduciary duty to the Heirs by

prioritizing their own interests over those of their clients, *id.* at 13.³

¶ 10 A contingent fee can be found unreasonable and invalidated if either (1) the lawyer bears little risk of nonpayment; or (2) the lawyer’s fee would clearly exceed the sum appropriate to pay for the services performed and risks assumed. Comment C to Section 35 of the Restatement (Third) of Law Governing Lawyers makes clear:

A tribunal will find a contingent fee unreasonable due to a defect in the calculation of risk in two kinds of cases in particular: those in which there was a high likelihood of substantial recovery by trial or settlement, so that the lawyer bore little risk of nonpayment; and those in which the client's recovery was likely to be so large that the lawyer’s fee would clearly exceed the sum appropriate to pay for services performed and risks assumed.

Restatement (Third) of the Law Governing Lawyers, § 35 (3rd 2000).

¶ 11 If either condition is met, a contingent fee may be found unreasonable and invalidated. Here, both conditions were met. The trial court found at the time the Heirs signed the contingency fee agreement, Atalig was aware of the bond and who the recipients of the bond would be. Contingent Fee Findings at 9. The trial court found the timing of the events, the publication of the bond in the community, and Atalig’s brother sitting on the Board at Marianas Public Land Authority (MPLA) combined to show that Atalig was aware of the bond and knew the Estate would be a beneficiary of the bond. *Id.* The trial court found that this resulted in there being “no risk involved in obtaining land compensation for the MHS property at the time of the execution of the contingency fee agreements.” *Id.* The trial court further found that the application to MPLA was prepared four days before the execution of the fee agreement, and that it was done in ten hours on a single day. *Id.* at 10–11. The court determined that these two factors rendered the fee unreasonable relative to the amount of work done. *Id.* at 13.

³ We note that Atalig was already representing the Administrator of the Estate at the time he entered into the contingent fee agreement with the Administrator and some, but not all, of the heirs of the Estate in the land compensation civil matter. Since the Administrator occupies a position of a fiduciary in relation to the Estate, it was incumbent upon the attorney to protect the interests of the existing client by obtaining the approval of the probate court, after notice to all the heirs of the Estate, both in order to pursue the separate civil action and for the Administrator to enter into the contingent fee agreement on behalf of the Estate. *See Potter v. Moran*, 49 Cal. Rptr. 229, 232 (Cal. Ct. App. 1966) (“That [the attorneys] had a duty to inform the court that the attorneys were representing the guardian as well as the trustee is not open to doubt.”). Atalig also should have considered the potential conflicts of interest involved in representing both the existing client and heirs of the Estate as clients. At a minimum, he was required to obtain the written consent of all clients involved. *See Model Rules of Professional Conduct* r. 1.7 (1983).

¶ 12 We defer to the trial court’s determination on the reasonableness of a contingent fee agreement unless there is sufficient evidence to show that the trial court finding was clearly erroneous. *Islam v. Islam*, 2009 MP 17 ¶ 20. Under this standard, appellants are responsible for showing that the trial court’s finding was clearly erroneous—that is, that there is not “relevant evidence a reasonable mind might accept as adequate to support a conclusion.” *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Here, Appellants have failed to do so. As discussed above, the trial court cited to multiple points of evidence, both from Atalig’s own testimony and in the form of reasonable inferences from circumstantial evidence, to conclude that the attorneys were aware there was a high likelihood of substantial recovery so they bore minimal risk of non-payment. The Appellants failed to offer evidence, other than their own testimony and time logs prepared after the fact, to refute this finding. As such, we find that the trial court could properly invalidate the contingent fee agreement on the grounds of little risk of non-payment.

¶ 13 Appellants argue that there was no certainty as to the size of the contingency fee, and therefore they did not know that the fee would clearly exceed the sum appropriate to pay for the services performed. Again, however, Appellants offer no evidence beyond their own assertions that the trial court erred in making its findings regarding the amount of work Appellants did in order to successfully resolve the claim. Rather than citing to other admitted evidence, Appellants simply claim that the trial court erred, in some cases misstating the trial court’s findings or contradicting their prior testimony. For example, Appellants claim the trial court conceded that Appellants spent 500 hours on the case, when in fact the trial court noted that it did not agree with that assertion and that the amount of time to complete the actual work at issue was only ten hours. Contingent Fee Findings at 10.

¶ 14 Furthermore, Appellants’ arguments regarding whether the fee was disproportionate to the work performed are internally inconsistent. At one point in their brief the Appellants seem to concede the point, stating, “Only the second element [disproportionate contingency fee] could be argued as present, even though we believe that such an argument will fail,” while at others arguing the opposite, “It cannot be said that Atalig’s billing was any less than what he had ultimately gotten in contingent fee.” Again, Appellants have failed to meet their burden, and we have no definite or firm conviction that the trial court erred in invalidating the contingency fee based on its determination that the contingency fee was unreasonable.

¶ 15 On review, we are left with no definite or firm conviction that the trial court reached the wrong conclusion. As such, we find the trial court’s invalidation of the contingent fee agreement based on a high likelihood of substantial recovery, so that the Appellants bore little risk of non-payment and that the fees would clearly exceed the sum appropriate to pay for services

performed was not clearly erroneous.⁴ We now turn to the discussion of whether the fees the trial court awarded were reasonable.

B. Award of Reasonable Fees

¶ 16 An award of attorney’s fees is reviewed for an abuse of discretion. *In re Malite*, 2010 MP 20 ¶ 38 (citing *Century Ins. Co. v. Guerrero Bros.*, 2010 MP 13 ¶ 17). A trial court abuses its discretion in awarding attorney’s fees if it does not “articulate . . . the reasons for its findings regarding the propriety of the hours claimed or for any adjustments it makes either to the prevailing party’s claimed hours or to the loadstars.” *Gates v. Deukmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). Because attorney fee awards are reviewed for an abuse of discretion, trial courts have a “wide latitude” in awarding fees. *In re Malite*, 2010 MP 20 ¶ 44. We give deference to the trial court’s judgment of fee awards because the appellate court is not well situated to assess the course of litigation and the quality of counsel. *Copeland v. Marshall*, 641 F.2d 880, 901 (D.C. Cir. 1980). It is better to have the trial court exercise discretion in awarding fees because it is “most intimately connected with the case.” *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977).

¶ 17 Determining an attorney’s fees award is a two-step process. *In re Malite*, 2010 MP 20 ¶ 45. First, the court must determine whether the requested fees are reasonable by considering similar fee agreements in the local legal community and relevant Model Rule of Professional Conduct (“MRPC”) 1.5 factors. *Id.* Second, the court must determine the appropriate fee award. *Id.* If the requested fees are deemed reasonable, they may be awarded. *Id.* If the requested fees are deemed unreasonable, the court must determine the appropriate remedy. *Id.* ¶ 45. The MRPC factors for determining the reasonableness of fees include:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;

⁴ We need not examine the alternative grounds provided by the trial court for invalidating contingent fee agreements, as either of the two findings already discussed provides adequate grounds for invalidating the agreements.

- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

Model Rules of Professional Conduct r. 1.5(a). Depending on the circumstances in a given case, some factors may be weighed more heavily than others. *In re Malite*, 2010 MP 20 ¶ 44.

¶ 18 We vacated the trial court’s order denying all attorney’s fees in *In re Malite* “because the court failed to consider all relevant MRPC Rule 1.5 factors, and thus, did not conduct a proper reasonableness hearing.” 2010 MP 20 ¶ 45 However, we found “what is crucial for purposes of our ruling is not how the MRPC Rule 1.5 factors are balanced, but that the lower court must consider more than only time billings.” *Id.* ¶ 44. In most cases, a court should consider other factors including “the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the requested legal services.” *Id.*

¶ 19 Here, the trial court divided the Appellants’ billings into three time periods.⁵ In its discussion on Period I, the court detailed each of the eight MRPC 1.5(a) factors. It determined that Factors 2⁶, 5⁷, 6⁸, 7⁹, and 8¹⁰ did not vary by period, were not applicable, or had already been determined. *In re: The Estate of Angel Malite*, No. 97-0369 (NMI Sup. Ct. June 19, 2012) (Findings of Fact & Conclusions of Law at 9–11) [hereinafter Fee Award Findings]. The court then proceeded to expressly apply the remaining relevant factors to each period. In each period, the trial court articulated its reasoning for its finding on

⁵ The three time periods were (1) before Atalig filed the MPLA application for land compensation on January 9, 2004 (“Period I”); (2) between the filing of the MPLA application on January 9, 2004, and the filing of the Attorney General’s civil action on December 3, 2004 (“Period II”); and (3) between the filing of the civil action on December 3, 2004, and the removal of Appellants as attorneys of the Estate on December 24, 2007 (“Period III”).

⁶ The court found that Appellants’ hourly claims would appear to preclude taking other work, but took judicial notice that Atalig continued to handle other matters before the CNMI Superior Court even as the case was still pending. Fee Award Findings at 9.

⁷ The court found no evidence that there were any time constraints imposed on Atalig, and noted the lengthy nature of the case indicated few, if any, time constraints. Fee Award Findings at 10.

⁸ The court found that the nature of Atalig’s representation with the Estate did not provide grounds for a higher fee. Fee Award Findings at 10.

⁹ The court found that Atalig offered no evidence demonstrating a higher degree of experience or reputation that would influence the consideration of fees. Fee Award Findings at 11.

¹⁰ The court noted that the contingent fee agreements had been invalidated. Fee Award Findings at 12.

Appellants' claimed hours of work and the subsequent adjustments.

¶ 20 In Period I, the court focused particularly on Factor 1, noting that Atalig's research had only produced two documents; that there were not novel nor difficult issues addressed during that time; and that there was little to do and no risk involved, reducing Atalig's claimed hours from 500 to 20. Fee Award Findings at 8–9. Turning to Factor 3, the court found that the reasonable rate was \$150.00 an hour, and awarded Atalig \$3,000.00 for his work done during Period I. *Id.* at 11. In Period II, again under Factor 1, the court noted the inevitability of obtaining land compensation, the lack of any timekeeping records, and Atalig's lack of any special skill, and reduced Atalig's claimed hours from 440 to 83. Turning to Factor 3, the court determined that the reasonable rate was \$175.00 an hour, entitling Appellants to \$14,525.00 for Period II. The court then awarded Appellants an additional \$58,000.00 "for having the audacity to ask for and receive the sum of \$3,450,000" under Factor 4, finding that the attorneys deserved more than the hourly amount calculated by the court. *Id.* at 14. In Period III the court declined to award any hours under Factor 1, noting that several of the Heirs took matters into their own hands, meeting with the Governor and Attorney General to discuss settlement opportunities, and that there was a pervasive lack of trust in Appellants' representation. *Id.* at 15. The court found "it [was] clear that neither Atalig nor Yana did anything to advance the Estate's position." *Id.* The court further determined that under Factor 3 and this court's ruling in *Ferreira v. Borja*, 1999 MP 23 ¶ 18, attorney's fees for Period III should be denied because Atalig's submitted billings were excessive and unsupported by the evidence. *Id.* at 15–16.

¶ 21 We do not find it necessary to delve deeply into how each factor was considered. "There is no formula [to applying the relevant attorney fee factors], and a trial court must exercise its discretion and wisdom to tailor the balancing of factors to the particular circumstances in a given case." *In re Malite*, 2010 MP 20 ¶ 44.

¶ 22 Because the trial court applied the MRPC 1.5(a) factors, and articulated the reasons for its findings, we cannot say that the court abused its discretion. We affirm the trial court's reduction of Appellants' claimed hours and subsequent award of \$75,525.00.

V. CONCLUSION

¶ 23 In conclusion, we find that the trial court did not clearly err when it found the contingent fee agreements unreasonable and invalid. We further find that the trial court did not abuse its discretion when it reduced the hours Appellants' claimed and instead awarded attorney's fees in the amount of \$75,525.00. The judgments of the trial court are AFFIRMED.

SO ORDERED this 29th day of December, 2016.

/s/
JOHN A. MANGLONA
Associate Justice

/s/
ROBERT J. TORRES
Justice Pro Tem

/s/
TIMOTHY H. BELLAS
Justice Pro Tem



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JUDGMENT

Appellants Antonio M. Atalig and Reynaldo O. Yana appeal the trial court decisions invalidating their contingent fee agreements and awarding them \$75,525.00 in attorney's fees received for work performed in connection with the Estate of Angel Malite. For the reasons stated in the accompanying opinion, we **AFFIRM** the trial court's judgments.

ENTERED this 29th day of December, 2016.

/s/ _____
DEANNA M. OGO
Clerk of the Supreme Court