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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

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| Estate of CATHERINE WILLARD, Deceased. | B282122 |
| GERALD WILLARD, as Administrator, etc.,<br><br>Petitioner, Objector and Appellant,<br><br>v.<br><br>LARRY D. LEWELLYN,<br><br>Respondent. | (Los Angeles County Super. Ct. No. BP135294) |

APPEAL from an order of the Superior Court of Los Angeles County, William P. Barry, Judge. Reversed and remanded with directions.

Gerald Willard, in pro per; Slovak Baron Empey Murphy & Pinkney and Wendy S. Dowse for Petitioner, Objector and Appellant. [*Retained*.]

Law Offices of Larry D. Lewellyn, Larry D. Lewellyn; Mazur & Mazur and Janice R. Mazur for Respondent.

## INTRODUCTION

Gerald Willard, administrator of his mother's estate, appeals from a probate court order granting attorney Larry D. Lewellyn statutory and extraordinary attorneys' fees. Because the probate court overruled Willard's objections without affording him an evidentiary hearing, we reverse the order and remand for a hearing.

## PROCEDURAL AND FACTUAL BACKGROUND

Willard's mother, Catherine Willard, died intestate in January 2007. Her sole asset was a parcel of real property in Los Angeles. For some reason not disclosed by the record, nothing happened with her estate for more than five years.

Willard hired Lewellyn to represent him as administrator of the estate, but the parties dispute when that occurred.[1] In June 2012 Lewellyn filed a petition for Willard's appointment as administrator of Catherine's estate, and in July 2012 the court appointed him administrator. In July 2013 Catherine's five other surviving heirs assigned their interests in the real property to Willard, waived their rights to further notice in the probate proceedings, and consented to approval of the final accounting.

Three and a half years later, in November 2016, Lewellyn filed a first and final report and account, which included a request for $11,200 in statutory attorneys' fees based on the

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[1] Willard said he retained Lewellyn in November 2010. Lewellyn informed the State Bar of California, in response to a complaint by Willard, "I did not get involved with representing Mr. Willard until 2013."

value of the estate. (See Prob. Code, § 10810;[2] *Estate of Wong* (2012) 207 Cal.App.4th 366, 375, 378.) Willard objected to Lewellyn's statutory fee request as excessive because, according to Willard's appraiser, the real property was worth $145,000, not, as the court-appointed appraiser found, $410,000. On appeal, however, Willard has not raised any issue regarding the appraisal.

Lewellyn also requested $24,130 in extraordinary attorneys' fees, which the probate court has discretion to award "in an amount the court determines is just and reasonable" (§ 10811, subd. (a)). Lewellyn sought extraordinary fees for services rendered in connection with three tasks: (1) negotiating with the five other heirs and obtaining from them the assignments to Willard of their interests in the real property; (2) persuading the California Department of Health Care Services to waive an $86,000 creditor's claim; and (3) resolving a property tax reassessment dispute.

Willard objected to Lewellyn's request for extraordinary attorneys' fees on several grounds. First, Willard claimed Lewellyn was seeking extraordinary compensation for services necessitated by Lewellyn's failure to respond to a notice regarding potential property tax reassessment from the Los Angeles County Tax Assessor. Second, Willard claimed Lewellyn unreasonably delayed in opening probate for 18 months. Third, Willard objected to specific requests as duplicative, unnecessary, or untrue, including a request for fees purportedly incurred for a telephone conversation with one of Willard's siblings who, at the time of the purported telephone

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[2] Undesignated statutory references are to the Probate Code.

call, had been dead for several months. Fourth, Willard claimed he had already paid Lewellyn $1,200 in 2010 and $4,500 in 2014.

Willard and Lewellyn each filed statements, declarations, and exhibits in support of their adverse positions. Following their initial submissions, and at the probate court's request, Willard filed further objections, and Lewellyn filed responses. The court, without an evidentiary hearing, granted Lewellyn's requests for fees in their entirety. Willard timely appealed.[3]

## DISCUSSION

### A. *The Trial Court Erred in Not Holding an Evidentiary Hearing*

Willard argues, among other things, he did not have an opportunity to present his case at a hearing on his objections to Lewellyn's request for fees. He asserts the trial court told him he would have 30 minutes "to argue [his] side of the case in court," but he "did not get the opportunity to present [his] side," and the court took the matter under submission after Lewellyn and Willard filed "additional paperwork." Willard argues the trial court erred in ruling on "Mr. Lewellyn's petition for extraordinary fees without giving Mr. Willard an opportunity to present his objections" at an evidentiary hearing, in violation of section 1022.

Under section 1022, "'[a]n affidavit or verified petition shall be received as evidence when offered in an uncontested proceeding under this code,'" but "[w]hen a [probate] petition is

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[3] An order "[f]ixing, authorizing, allowing, or directing payment of compensation or expenses of an attorney" is appealable. (§ 1300, subd. (e); see *Leader v. Cords* (2010) 182 Cal.App.4th 1588, 1594-1595.)

contested, . . . 'affidavits and verified petitions may not be considered as evidence at a contested probate hearing.' [Citation.] Rather, absent a stipulation among the parties to the contrary, . . . each fact set forth in a supporting affidavit must be established by competent evidence." (*Estate of Lensch* (2009) 177 Cal.App.4th 667, 676; see *Estate of Bennett* (2008) 163 Cal.App.4th 1303, 1308-1309 ["'when challenged in a lower court, affidavits and verified petitions may not be considered as evidence at a contested probate hearing,'" and "'the facts in the affidavit filed in support [must] be established by competent evidence'"]; *Estate of Wallace* (1977) 74 Cal.App.3d 196, 201 ["affidavits or declarations are permitted only in uncontested [probate] proceedings"].)

Willard raised many contested issues regarding Lewellyn's request for attorneys' fees that justified an evidentiary hearing. One of the primary contested issues was whether Lewellyn sought compensation for services necessitated by his mishandling of a notice from the Los Angeles County tax assessor regarding an exclusion from a property tax reassessment on the Los Angeles property. A transfer of real property to a child or children upon the death of a parent does not trigger a property tax reassessment if a transferee or the administrator of the estate files a timely claim for an exclusion. (Rev. & Tax. Code, § 63.1, subds. (a)(1)(A), (c)(1), (d)(1).) A claim for exclusion is timely if it is filed either within three years after the parent's death or six months after the mailing of a notice of reassessment based on the transfer. (Rev. & Tax. Code, § 63.1, subds. (e)(1)(B)

& (C).)[4] A timely exclusion claim was never filed in this case. Because Willard blamed Lewellyn, he objected to Lewellyn's request for time spent trying to rectify the consequences of the error.

Catherine Willard died in January 2007, and no one filed a claim by January 2010. Lewellyn denied responsibility for missing that three-year deadline because Willard did not retain him until, at the earliest, November 2010. However, on February 12, 2013—which was after Willard hired Lewellyn and before the tax assessor reassessed the property—the assessor sent Lewellyn a notice, titled "Re: Catherine E Willard," that directed Lewellyn to file a claim for a property tax reassessment exclusion for transfer between parent and child by March 4, 2013. The notice warned Lewellyn that "[f]ailure to return the requested information may result in a reassessment of your property for the change in ownership." Lewellyn never responded.

On June 6, 2013, having not received any response from Lewellyn, the assessor reassessed the property as of the date of Catherine's death, issued a $30,000 supplemental tax bill for the years 2006 and 2007, and sent notice of the assessed value change to the address on record, which was the address of Catherine's son Harold Willard. No one filed a claim within six months of that notice, which Lewellyn said he never knew about.[5]

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[4] A third potential deadline, not applicable here, is "within three years . . . prior to transfer of the real property to a third party . . . ." (Rev. & Tax. Code, § 63.1, subd. (e)(1)(B).)

[5] On December 27, 2013, after the six-month period expired, the assessor received an untimely claim for a reassessment exclusion. Although the record is unclear, it appears Willard, not Lewellyn, filed that claim.

Willard had to hire another attorney to resolve the property tax reassessment issues. In July 2016 the assessor ruled that, because no one had filed a timely claim, "the sole relief available" to the estate was "the prospective exclusion" under Revenue and Taxation Code, section 63.1, subdivision (e)(2), commencing in 2013, the assessment year in which the claim was filed. The assessor granted a prospective exclusion and cancelled the supplemental tax bills.

Willard asserted that Lewellyn's claim for extraordinary attorneys' fees included compensation for efforts by Lewellyn to resolve the property tax reassessment matter, even though Willard had hired another attorney to perform that work. Lewellyn's charges included attending a meeting at the assessor's office on October 5, 2015, conducting legal research on the tax issue on November 30, 2015, and preparing a letter to the assessor on March 22, 2016.[6] There is no evidence in the record establishing the content of, or the participants in, the negotiations that ultimately led to the assessor's rulings granting the prospective exclusion and cancelling the supplemental property tax bills. An evidentiary hearing would allow the parties to address whether Lewellyn's extraordinary fee request included services rendered to correct his error in failing to respond to the tax assessor's February 12, 2013 notice. (See *Estate of Bonaccorsi* (1999) 69 Cal.App.4th 462, 472 ["[c]ourts specifically may disallow compensation for services rendered

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[6] Willard did not object to Lewellyn's charge for a January 10, 2015 visit to the assessor's office. At a December 31, 2015 hearing, the probate court advised Lewellyn to go to the office with Willard.

negligently"]; Ross & Cohen, Cal. Practice Guide: Probate (The Rutter Group 2018) ¶ 16:333 ["in no event will extraordinary compensation be granted for services that were necessitated by the . . . attorney's *own mistake*"].)

Another contested issue was whether Lewellyn was responsible for an 18-month delay in administering the estate. Under section 12205, subdivision (a), the probate court may reduce the compensation for the attorney for the administrator of an estate if the court finds "(1) [t]he time taken for administration of the estate exceeds the time required by this chapter [(either one year or 18 months after the date of issuance of letters)] or prescribed by the court," "(2) [t]he time taken was within the control of the . . . attorney whose compensation is being reduced," and "(3) [t]he delay was not in the best interest of the estate or interested persons." (See *Estate of Kerkorian* (2018) 19 Cal.App.5th 709, 722 ["a quicker resolution of the proceedings furthers important public policy goals in probate cases"]; *Estate of Heller* (1992) 7 Cal.App.4th 862, 867 [section 12205 reflects a "strong public policy in favor of the prompt closing and distribution of estates"].) According to Willard, "Lewellyn became our attorney [o]n November 19, 2010." Eighteen months later, on June 18, 2012, Willard faxed a letter to Lewellyn regarding probate of the estate and stating: "It has been at least a year plus since I have heard from you. We have called, and also had an attorney call on our behalf. If you remember you [were] to get back with us on cost, and our disposition of this matter." On June 20, 2012, two days after Willard's letter, Lewellyn finally took a first step toward probating the estate when he filed the petition for Willard's appointment as administrator. Four years later, the administration of the estate was still not complete.

Yet another contested issue was whether certain of Lewellyn's charges were duplicative, excessive, or inaccurate. For example, Willard objected to Lewellyn's charges for purported visits with Willard at his home that Willard said never happened; telephone calls that Willard denied occurred; meetings that Lewellyn cancelled; telephone conferences with Willard to obtain the addresses of other heirs that Llewellyn already had; and letters and telephone calls to the other heirs concerning settlement that occurred after the heirs had settled and assigned their rights in the real property to Willard, cashed their settlement checks, waived their rights to notice in the probate action, and consented to the final accounting. One of the charges Willard challenged was for a September 1, 2013 telephone call Lewellyn claimed he made to one of Willard's brothers who had died on June 11, 2013, three months earlier, and for which Lewellyn subsequently changed his billing entry from .9 hours to .1 hours. Willard also objected that, while the probate case was pending, Lewellyn increased his hourly rate from $350 to $400. And Willard argued Lewellyn's request for over $24,000 in extraordinary fees was excessive for an estate valued, according to Willard, at only $145,000.

Another contested issue was whether Lewellyn improperly demanded and received compensation from Willard personally. Compensation for services rendered by the attorney for an administrator are payable only out of the estate and may not be charged to the administrator. (*Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore* (2008) 162 Cal.App.4th 1331, 1339.) The attorney must petition the probate court, and the court, after a hearing, may make an order allowing compensation from the estate. (§§ 10830, 10831; see *Estate of*

*Wong*, *supra*, 207 Cal.App.4th at p. 375 ["'statutory provisions govern both the amount recoverable and the procedure for recovery'"].) An attorney representing an estate may not request or accept a retainer without court approval. (See Ross & Cohen, Cal. Practice Guide: Probate, *supra*, ¶ 1:32 [in probate cases, "compensation must be *approved by the court* before payment to counsel—i.e., *no retainers and no payment on account* without court approval!"].) There was evidence, however, Lewellyn did just that. Before the probate action commenced, and after complaining he had not heard from Lewellyn for more than a year, Willard asked Lewellyn to return "the retainer." In addition, the attorney Willard hired to resolve the property tax reassessment matter stated Willard paid Lewellyn $6,000 while probate was pending. For his part, Lewellyn described the payments as deposits toward costs, toward which he reported Willard paid $6,200, leaving, after a deduction for reimbursement, a $4,389.50 credit.

Willard also raised a contested issue regarding whether Lewellyn billed the right client for his legal services. The attorney for an administrator cannot charge the estate for expenses incurred for the administrator's benefit as a beneficiary. (See *Estate of Higgins* (1910) 158 Cal. 355, 358-359 [executor may not charge an estate for expenses incurred for the benefit of the executor as a beneficiary]; *Butler v. LeBouef* (2016) 248 Cal.App.4th 198, 213 [attorney can only recover fees from a trust where the services benefit the trust]; *Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore*, *supra*, 162 Cal.App.4th at p. 1343 ["[w]hen defense of a will contest would benefit only the executor, it is inequitable to charge the estate for legal services rendered in that defense"].) For example, it

appears that Lewellyn may have represented Willard personally, as a beneficiary and not as administrator of the estate, when Lewellyn negotiated with Catherine's five other heirs and persuaded them to assign their interests in the estate's property to Willard, making Willard the only heir to the estate's sole asset. It is hard to see how the assignments benefitted the estate. Lewellyn's request for extraordinary attorneys' fees included over $4,000 attributable to obtaining the assignments for Willard that do not appear to be properly chargeable to the estate.

Finally, there were contested issues regarding whether Lewellyn failed to communicate with his client(s). (See Bus. & Prof. Code, § 6068, subd. (m) [an attorney has a duty "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services"]; *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1534 ["'[t]he attorney-client relationship is a fiduciary relation of the very highest character imposing on the attorney a duty to communicate to the client whatever information the attorney has or may acquire in relation to the subject matter of the transaction'"]; former Rules Prof. Conduct, rule 3-500 ["[a] member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information"]; see also Rules Prof. Conduct, rule 1.4(a)(3).) The record includes numerous communications from Willard to Lewellyn expressing frustration and concern about Lewellyn's apparent unavailability and inability to keep Willard informed of the status of the probate proceedings. These communications include emails on June 18, 2012 ("We are still in the dark. At

this time we would like to go with another attorney so that we can get this matter finalized."), December 16, 2013 ("Larry you will remember that you were going to get back to me several times, yet you haven't. [W]ill you let me [know] what's going on."), January 9, 2014 ("I'm sure you will remember my name Gerald Willard in your file and the many times I have ask[ed] for some kind [of update]. You will also remember the many times you were going to get back to me. I was under the impression that we were completing the probate on our last visit to you. CAN I [HEAR] FROM YOU?"), April 2, 2014 ("This is a second notice on this matter. We have called and spoken to secretary Krystal and left messages and have not received a response to this matter."), April 18, 2014 ("I know that you know that I have been trying to get to you for the third time regarding my taxes. I need to know what it takes for you to respond to this matter."), April 23, 2014 ("I am sure you have gotten all of my messages to you regarding my taxes[.] I consider my messages to you to be very important and I need to [hear] from you because time is to be considered."), May 1, 2014 ("I have been trying to get to you to resolve this matter. At this point [there] will be penalties. Let me know where we stand on this matter."), and June 22, 2014 ("[S]urely you have received all my messages, and surely you have a good reason for not responding back to me. If you have not given up on my case then I need to know what to do because I am [having] problems.").

### B. *Willard Did Not Forfeit His Right to an Evidentiary Hearing*

A party may forfeit the right to an evidentiary hearing by failing to object or request a hearing in the probate court. (See

*Estate of Bennett*, *supra*, 163 Cal.App.4th at p. 1309 ["the restriction on the use of declarations in contested probate hearings is inapplicable when 'the parties d[o] not object to the use of affidavits in evidence and both parties adopt[ ] that means of supporting their positions'"]; *Estate of Nicholas* (1986) 177 Cal.App.3d 1071, 1088 ["where the parties do not object to the use of affidavits in evidence, and where both parties adopt that means of supporting their positions, the parties cannot question the propriety of the procedure on appeal"].)

Under the circumstances of this case, however, Willard's failure to request a hearing or object to how the trial court proceeded did not forfeit his right to a hearing. The contested proceeding here was between the administrator of an estate and the attorney representing the administrator regarding the attorney's right to statutory and extraordinary fees. Lewellyn had no incentive to request an evidentiary hearing on Willard's behalf, nor to advise Willard he had a statutory right to an evidentiary hearing. Lewellyn wanted the court to approve his request for extraordinary fees, not to question it. In all likelihood, Willard did not even know he could request an evidentiary hearing (Lewellyn had not requested one), and Willard did not have independent legal advice telling him he could do so. The probate court, on the other hand, could have protected Willard's rights as a person interested in the estate by giving him an opportunity to have an evidentiary hearing, or at least asking whether he wanted one. (See *Estate of Lundell* (1949) 95 Cal.App.2d 352, 356 [probate courts "in administering the valuable estates of decedents, are charged with the duty of protecting the rights of persons interested in those estates by preventing the improper dissipation of assets"]; see also *A.G. v.*

*C.S.* (2016) 246 Cal.App.4th 1269, 1288 ["'[t]rial judges must acknowledge that in propria persona litigants often do not have an attorney's level of knowledge about the legal system and are more prone to misunderstanding the court's requirements,'" and "'[w]hen one party is represented and the other is not,'" the "'judge should monitor to ensure the in propria persona litigant is not inadvertently misled, either by the represented party or by the court'"].) And whenever possible we will not strictly apply technical rules of procedure in a manner that deprives a self-represented litigant of a hearing.

## DISPOSITION

The order approving Lewellyn's statutory and extraordinary attorney's fees is reversed. The matter is remanded with directions for the probate court to hold an evidentiary hearing on Willard's objections to Lewellyn's request for an award of extraordinary attorneys' fees. Willard is to recover his costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.