IN THE SUPREME COURT OF THE STATE OF NEVADA

SHIRLEY M. WALKER,
ADMINISTRATRIX OF THE ESTATE
OF ROBERT D. WALKER,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
NANCY M. SAITTA, DISTRICT JUDGE,
Respondents,
And
LESLIE MARK STOVALL,
Real Party in Interest.

No. 37700

FILED

MAR 28 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This is an original petition seeking a writ of mandamus. The district court awarded petitioner attorney fees based on the principles of quantum meruit. Petitioner claims that the district court lacks jurisdiction to decide the dispute, and asks this court to vacate the district court's award. Alternatively, petitioner asks this court to reverse the district court's determination that the estate never perfected its attorney's lien, or to remand to the district court for specific findings of fact explaining the court's division of fees. After reviewing the petition and the answer thereto, we conclude that writ relief is not appropriate. Accordingly, we deny petitioner's request for a writ of mandamus.

Robert Walker, a California attorney, was diagnosed with cancer three months before he was to serve as counsel in a trial for a medical malpractice claim. Walker associated with Nevada attorney Leslie Mark Stovall, the real party in interest here, to try the case. Walker died two months before trial. At trial, Stovall obtained a jury

verdict in excess of $5 million. The case later settled for $1,617,201.30, from which Stovall received attorney fees of $646,880.52.

Walker's estate sought a division of the attorney fees, and filed an attorney's lien to protect its interest in the fees. However, due to procedural deficiencies, the lien was never perfected. Stovall subsequently moved to strike or adjudicate the attorney's lien. After a hearing, the district court found that although Walker's estate failed to properly protect its interest in the final settlement, an award based on the principles of quantum meruit was warranted. The court thereby awarded Walker's estate $100,000.00 in attorney fees and $37,235.39 in costs.

Writ relief is an extraordinary remedy that will only issue at the discretion of this court.[1] A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station.[2] "Mandamus will not lie to control discretionary action unless discretion is manifestly abused or is exercised arbitrarily or capriciously."[3] Moreover, a writ will only issue when there is no plain, speedy and adequate remedy in the ordinary course of law.[4]

As a preliminary matter, Stovall asserts that neither petitioner Shirley Walker (a California resident), as the administratrix of the estate of Robert Walker, nor her attorneys had obtained ancillary letters of administration in Nevada, and therefore, they lacked the

---

[1]Ashokan v. State, Dep't of Ins., 109 Nev. 662, 665, 856 P.2d 244, 246 (1993).

[2]NRS 34.160.

[3]Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (citation omitted).

[4]NRS 34.170.

authority and capacity to attempt to collect a debt on behalf of the estate in the State of Nevada.

NRCP 17(b) provides that "[t]he capacity of an individual, including one acting in a representative capacity, to sue or be sued shall be determined by the law of this State." Nevada limits the issuance of letters of administration to a resident of the State of Nevada.[5] This court has stated that "'it has become an established doctrine that an administrator, appointed in one state, cannot, in his official capacity, sue for any debts due to his intestate in the courts of another state.'"[6] Therefore, a foreign representative's failure to obtain authorization to act on behalf of an estate involves a defect of capacity.[7]

NRCP 9(a) requires that a party raising an issue as to the capacity of another party must do so by specific negative averment. If the opposing party does not raise the issue of capacity in the manner provided by NRCP 9(a), the objection is waived.[8] The record indicates that Stovall has raised this objection for the first time in his answer to the petition for writ of mandamus. Although Stovall claims that he raised this issue to the district court in his supplemental points and authorities to his motion to strike the attorney's lien, the supplement was not included in Stovall's

---

[5]NRS 139.010.

[6]Shaw v. Stutchman, 105 Nev. 128, 131, 771 P.2d 156, 158 (1989) (quoting Vaughan v. Northup, 40 U.S (15 Pet.) 1,6, (1841)); see also Matter of Estate of Widmeyer, 741 S.W.2d 758, 760 (Mo. Ct. App. 1987) (noting that an administrator, appointed in state A, cannot sue in his representative capacity in state B in the absence of a statute in state B authorizing him to do so).

[7]Shaw, 105 Nev. at 130, 771 P.2d at 158.

[8]Id. at 131, 771 P.2d at 159.

answer to the petition. Second, Stovall did not raise the issue of capacity in a timely manner, and therefore, the objection is now waived. The estate filed its first notice of attorney's lien on June 29, 1999. Stovall did not challenge Shirley Walker's capacity to act as executor for the estate in Nevada until June 12, 2000.[9]

Stovall also asserts that even if the estate has standing to petition for writ relief, the petition is barred by laches. Writ relief, as an extraordinary remedy, is subject to laches.[10] In determining whether or not laches should preclude consideration of a writ petition, this court must consider: "(1) whether there was an inexcusable delay in seeking the petition; (2) whether an implied waiver arose from the petitioner's knowing acquiescence in existing conditions; and (3) whether there were circumstances causing prejudice to the [real party in interest]."[11]

The estate originally filed an attorney's lien on June 29, 1999; however, the estate did not realize until March 2000 that its lien was not perfected. It then took immediate steps to perfect its lien on March 28, 2000. The court issued its decision in August 2000, and the writ petition was filed on April 13, 2001. Because the estate regularly took steps to assert its right to attorney fees, it did not cause inexcusable delay and did not impliedly waive its right to seek extraordinary relief. Additionally, although Stovall argues, without substantiation, that he has already

---

[9]See id. at 132, 771 P.2d at 159 (concluding that when respondent waited two years from the date of the filing of the complaint to raise the issue of appellant's standing, the objection was waived).

[10]Building & Const. Trades v. Public Works, 108 Nev. 605, 611, 836 P.2d 633, 637 (1992).

[11]Id.

"utilized" the attorney fees he was awarded by the district court, we conclude that the estate's delay did not cause Stovall substantial prejudice.

The estate argues that the district court's decision should be vacated for lack of jurisdiction because NRS 18.015, which provides for a lien for attorney fees, is inapplicable to purely inter-attorney disputes. In Harvey L. Lerer, Inc. v. District Court, we held that "NRS 18.015 is inapplicable to purely inter-attorney disputes, such as this one, which are not predicated on an attorney/client fee agreement."[12] However, the underlying dispute here arises entirely from an attorney/client fee agreement. Both Walker and Stovall had an attorney/client fee agreement with the plaintiffs, and both had substantial relationships with the plaintiffs. Both attorneys were associated together in this action; neither was merely acting as local counsel or as an agent for the other. Accordingly, NRS 18.015 is applicable to this controversy.

"[T]he court in the action in which the attorney's services were rendered has incidental jurisdiction to resolve disputes between a litigant and his attorney relative to the establishment of an attorney's lien."[13] The district court correctly asserted incidental jurisdiction over the dispute for attorney fees because the underlying claim was heard in the district court.

Petitioner further asks this court to reverse the district court's determination that the estate never perfected its attorney's lien. Although the estate filed its notice of attorney's lien on June 29, 1999, the notice was sent by regular mail. NRS 18.015(2) requires that notice be sent by

---

[12]111 Nev. 1165, 1168, 901 P.2d 643, 645 (1995).

[13]Gordon v. Stewart, 74 Nev. 115, 118, 324 P.2d 234, 236 (1958).

certified mail for perfection of the lien; therefore, the lien was not perfected. The plaintiff's settlement with the doctor's insurance company was approved by the district court on February 28, 2000, and the court awarded Stovall the disputed attorney fees at that time. It was not until March 28, 2000, after Stovall filed a motion to strike the attorney's lien, that the estate re-filed and perfected its attorney's lien in conformity with NRS 18.015. In Schlang v. Key Airlines, Inc.,[14] a federal district court's interpretation of NRS 18.015 provided that when a lien for attorney fees becomes perfected after an underlying settlement has been finalized, then the lien is unenforceable because there are no longer any proceeds to which the lien could attach. We agree. The district court approved the underlying settlement and awarded attorney fees one month before Walker's estate perfected its attorney's lien. Since Walker did not perfect the lien until after settlement of the underlying claim, the district court correctly found that the estate failed to properly protect its interest in the settlement.

Finally, we conclude that the district court's division of fees cannot be declared arbitrary or capricious. Although the district court found procedural deficiencies in the manner in which the estate attempted to preserve its lien, it still granted Walker's estate a quantum meruit award of $100,000.00 in attorney fees and $37,235.39 in costs. In determining that Walker was entitled to an award of fees based on principles of quantum meruit, the district court considered: (1) the initial contingent contract; (2) the length of time spent on the case relative to the total amount of time expended from initiation to conclusion; (3) the quality of the representation; (4) the result of each firm's efforts; (5) the reasons

---

[14]158 F.R.D. 666, 670 (D. Nev. 1994).

for the change in counsel; and (6) whether the merits of the case itself had changed as a result of the change in counsel.

Walker personally performed only 156 hours of work. His firm billed a total of 882 hours at an average rate of $188.00 per hour. Assuming the district court based its award on 882 hours of work performed, the award amounted to an average of $113.00 per hour. While that amount is lower than the estate would like, it cannot be declared unreasonable. Moreover, Stovall was the attorney that tried the case and obtained the verdict as a result of his efforts. Additionally, Stovall negotiated the final settlement with the insurance carrier. Accordingly, the district court's decision to award Stovall the majority of the fee is consistent with factors three and four, whereby the quality of the representation and the results obtained should be considered by the district court in its fee award. The district court's consideration of the other factors in favor of Walker is consistent with its quantum meruit award. Thus, the district court's division of fees cannot be declared arbitrary or capricious.

Accordingly, we ORDER the petition DENIED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Nancy M. Saitta, District Judge
Vannah Costello Canepa Riedy Rubino & Lattie
Leslie Mark Stovall
Clark County Clerk