Clerks of Superior Court Conference
March 1, 2016

A Basic Guide to Approving Attorney Fees under G.S. 28A-23-2(d)(1) after *In re Taylor*

When a personal representative petitions for payment from the estate for fees paid to an attorney to assist in estate administration, can the clerk review the fees for reasonableness? Yes. In the recent case *In re Taylor*, 774 S.E.2d 863, 870 (2015), the North Carolina Court of Appeals said:

> [C]lerks do possess the authority to review attorney fees' petitions for reasonableness pursuant to their power to allow reasonable sums for necessary charges and disbursements incurred in the management of an estate.

So a PR cannot expect the clerk simply to sign off on the fee request without further examination. The clerk instead examines whether the fees were "necessary" to the estate management and, if so, whether the fees charged for necessary work were "reasonable" in amount. The court's order determining what amount of fees to allow must include written findings of fact as to these issues. *Taylor* does not address the specific procedure a clerk must follow when reviewing fees for reasonableness, so this short paper sets out a basic set of suggestions for formulating and structuring a fee order.

The clerk's order:

After the clerk considers a petition, the clerk must make a written order allowing (or disallowing, or allowing in part) the requested payment. Pursuant to G.S. 1-301.3 and *Taylor*, the order must include written findings of fact and conclusions of law. The findings of fact must be based on competent evidence.

The order should include findings of fact as to:

1. **Whether the attorney fees are for work that was reasonably "necessary [for the] management of the estate" pursuant to G.S. 28A-23-3(d)(1).**

    - To allow the clerk to do this, the PR should provide the attorney's itemized timesheets (or other itemized listings of the work for which reimbursement is sought, such as detailed invoices).

    - The Clerk should examine the entries to determine whether the time spent was reasonably related to and necessary for the estate administration. The statute does not define "necessary." Obviously the clerk's knowledge of estate administration will serve as a guide. *See Taylor* at 870 ("[A]s a judge of probate, the clerk has supervised the administration of the estate from the beginning and presumably will have some idea of the value of the

service which the executor and his attorney have rendered the estate."). But the clerk should remember that every estate is different and some are more complicated than others. Some factors to consider are the nature of the assets; the number, ages, and locations of beneficiaries; the condition of the decedent's affairs; and the number and types of disputes the estate generated. It is appropriate to consider the estate's size or complexity—even small estates can be complex—when considering whether certain work was "necessary." *See*, for example, *Matthews v. Watkins*, 91 N.C. App. 640 (1988) ("the size of the estate provides a useful guideline and may be considered as a factor in determining whether legal services were necessary and the time expended justified").[1]

- If the clerk identifies work that does *not* qualify as "necessary" under the statute, the clerk's findings of fact should specify why the clerk finds it to have been unnecessary to the estate management/administration.

2. The reasonableness of the fees (the fee amount).

- Once the clerk has found facts as to what work was necessary to the management of the estate, the clerk must determine a "reasonable" fee amount to be allowed for that work.

- In general, our courts require that the following factors be addressed when a judicial officer makes findings of fact as to reasonable fee amounts:
    - The time and labor the attorney expended
    - The skill required for the work
    - A customary fee for like work
      (customary in the geographic area, particularly in the relevant field of law)
    - Experience and ability of the attorney

  The first of these factors (actual time and labor expended) will likely already have been addressed in the clerk's findings regarding "necessary" work. As to "skill required" and "customary fee for like work" a clerk's own knowledge and experience is helpful, but it is unclear whether the findings of fact can be supported on that basis alone. The clerk is advised to require an affidavit from the attorney addressing these factors.[2] It is also

[1] The court in *Taylor* also stated, in a footnote, that the clerk should consider the effect of G.S. 28A-23-3(a). That statute allows a clerk to reduce a PR's commission after taking into account the amount of fees "paid by the estate for professional services performed in the ordinary course of administering the estate, including services performed by attorneys and accountants."

[2] It appears that, since October 2011, fee petitions should be considered "estate proceedings" under 28A-2-6. The statutes governing *contested* estate proceedings contemplate that that the clerk will conduct an evidentiary hearing. In such a hearing, it is unclear whether the clerk must require live testimony rather than accept affidavits. The Court of Appeals has not yet had an opportunity to address the level of formality required for the evidence supporting a fee petition under Chapter 28A.

customary for attorneys to support fee requests by providing affidavits of one or more fellow practitioners testifying to what constitutes a customary hourly rate for like work. As to "experience and ability," the clerk's observations of the attorney's work are useful, particularly if the clerk is already familiar with the attorney's practice in general. But affidavits by the attorney and one or more fellow practitioners is likely to be necessary. If the fee petition is contested, the clerk must, of course, consider any competing evidence offered by the respondents. As finder of fact, the clerk is not required to accept every statement as fact; the clerk is free to weigh the credibility of any of the petitioner's or respondents' evidence and accept or reject it. The clerk's findings of fact must be upheld on appeal as long as they are supported by competent evidence. G.S. 1-301.3.

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