

In the
Supreme Court of Florida

FILED

89-733

APR 7 1997

CLERK, SUPREME COURT
By _____
Clerk Deputy Clerk

SALLY SMEDLEY TEAGUE,

Petitioner,

vs.

ESTATE OF HERBERT D.
HOSKINS, DECEASED,

Respondent.

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Case No. 89,733

District Court of Appeal,
5th District - No. 96-727

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Petitioner's Reply Brief on the Merits

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ARGUMENT IN REPLY

Petitioner, Sally Smedley Teague (“TEAGUE”), argues the following in reply to the Answer Brief of Respondent, Estate of Herbert D. Hoskins, deceased (the Respondent is hereinafter generally referred to as the “Personal Representative).

I. THE CERTIFIED QUESTION SHOULD BE REPHRASED

TEAGUE submits that the Fifth District might more precisely have phrased the certified question as:

ARE ATTORNEY’S FEES ASSESSED AGAINST THE PERSONAL REPRESENTATIVE OF AN ESTATE *PURSUANT TO AN OFFER OF JUDGMENT* AN EXPENSE OF ADMINISTRATION AND THUS CLASS 1 PRIORITY OR ARE THEY “OTHER CLAIMS,” GRANTING THEM CLASS 8 STATUS?

(Emphasis added.) TEAGUE’s argument is limited in scope to attorneys fees and costs awarded under Section 768.79, *Florida Statutes*. TEAGUE suggests that the above language more accurately reflects the issue recognized by the Fifth District.

II. THE ANALYSIS USED BY COURTS EXAMINING NON-CLAIM STATUTE ISSUES SUPPORTS TEAGUE’S INTERPRETATION OF THE PROBATE CODE’S PRIORITY SCHEME

In her Answer Brief, the Personal Representative appears to take the position that two cases relied upon by TEAGUE instead support the Personal Representative’s position that the attorneys’ fees in question here should be treated as Class 8 claims

under Section 733.707(1). TEAGUE is compelled to respond to this inaccurate assertion by the Personal Representative.

First, the Personal Representative seems to state that a right to reimbursement of post-death mortgage payments in the possession of a personal representative are “all other claims” under Section 733.707(1), under *Swenzkowski v. Compton*, 662 So. 2d 722 (Fla. 1st DCA 1995). (Answer Brief, Page 4) This is not at all what *Swenzkowski* holds. In fact, *Swenzkowski* holds that such a right is not a “claim” subject to the Probate Code’s statutes of nonclaim; there is no statement that Mr. Swenzkowski’s right is an “other claim” under Section 733.707(1). TEAGUE asserts that this case supports the logic of her position, because the First District’s rationale relied on the fact that “Swenzkowski is not making a claim or demand against the decedent’s estate that arose before [the decedent’s] death, and because the action cannot be deemed a liability of the decedent, as it arose well after her death.” *Swenzkowski*, 662 So. 2d at 723. Similarly, TEAGUE’s right to payment of her attorneys fees did not arise before the decedent’s death, and in fact arose well after his death.

The Personal Representative’s citation of *In re Estate of Kulow*, 439 So. 2d 280 (Fla. 2d DCA 1983), apparently for the proposition that rights to a refund erroneously paid to a personal representative are classified under Section 737.707(1)(h) as Class

8 claims, is also incorrect. In *Kulow*, State Farm overpaid hospital bills incurred by the decedent, with payment occurring after his death. When the hospital mistakenly refunded the overpayment to the personal representative, State Farm unsuccessfully attempted to convince the personal representative to turn over the funds. Ultimately, State Farm decided to file a proof of claim in the estate, but missed the deadline for doing so and had its claim stricken as untimely. State Farm appealed the order.

To resolve the issues raised, the Second District first noted that State Farm's rights arose after the death of the decedent. Then, in its examination of the personal representative's defense that State Farm's cause of action was a "claim for personal property in the possession of the personal representative," the Second District turned to Section 73 1.201(4) of the Florida Probate Code -- the **selfsame** definition of "claims" upon which TEAGUE relies in this appeal. The Second District concluded that State Farm's rights were *not* a "claim" under the Probate Code, stating that:

State Farm's cause of action cannot be deemed a liability of the decedent. Within the scope of the foregoing definition [§ 73 1.20 1(4)], it can be more nearly equated with an expense of administration since it did not exist even in contingent form until after Mr. Kulow's death.

Kulow, 439 So. 2d at 282. The Second District finally concluded, after a review of authority from other jurisdictions which was not directly on point but which dealt with various rights against personal representatives, that State Farm was "not required to

file a claim.” *Kulow*, 439 So. 2d at 283.

The Fifth District should have applied the approach taken in *Kulow* to the case at bar. TEAGUE’s right to attorney fees cannot be a Class 8 expense because the pertinent provision of Section 733.707(1) applies only to “claims.” “Claims” are defined, for Florida Probate Code purposes, at Section 73 1.20 1(4), *Florida Statutes*. Because TEAGUE’s right to attorney fees arose after the death of the decedent, it cannot be deemed a liability of the decedent, and can “be more nearly equated with an expense of administration since it did not exist even in contingent form” until after Mr. Hoskins’ death. See *Kulow*, 439 So. 2d at 282.

III. THERE IS NO SIGNIFICANT OR MEANINGFUL DISTINCTION BETWEEN “COSTS” AND “ATTORNEYS FEES” UNDER THE PERTINENT STATUTORY SECTIONS FOR PURPOSES OF THE PROBATE CODE’S PRIORITY SCHEME

The Personal Representative also continues to take the position (not expressly adopted by the Fifth District) that because Section 733.707(1) provides that “costs” are Class 1 claims, and because Section 768.79 does not equate “costs” and “attorneys fees,” that the costs portion of an award under Section 768.79 is a Class 1 claim, but the attorneys fee portion is a Class 8 claim. There is no authority for this argument, and it is not logical.

Under the Florida Probate Code's definition of "claims," there is no reason to distinguish between costs and attorneys fees awarded pursuant to the offer of judgment statute. There is no qualitative difference between a cost award against a personal representative at the conclusion of unsuccessful litigation, and an attorneys' fee award under the same circumstance. Those cases which have treated costs awarded against personal representatives as Class 1 expenses have not in so doing relied on the presence of the word "costs" in the definition of Class 1; what those courts have done is undertaken a realistic examination of the nature of the debt owed by the personal representative, together with an examination of how the personal representative came to incur the debt, in concluding that the personal representative's own action in pursuing litigation made the debt a cost or expense of administration.

This Court should require probate courts to engage in the same simple analysis in cases in which personal representatives pursue litigation, unreasonably refuse offers of judgment, and end up owing costs and attorney fees to those whom they have sued. Under those circumstances, the personal representative's obligation to pay costs and attorney fees arises from the personal representative's efforts to collect assets for the estate, and because of this should be treated under Class 1 of the Probate Code's priority scheme.

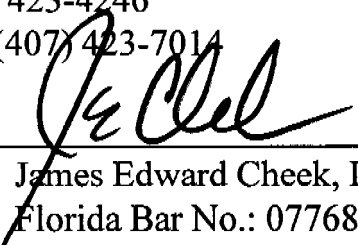
CONCLUSION

The probate court and the Fifth District erred in determining that the attorney's fee portion of the trial court's award to TEAGUE was a Class 8 claim, because the award is not a "claim" at all, having arisen after the decedent's death, and because the award is an obligation of the Estate created by the legal act of the personal representative in her effort to increase the assets of the Estate. The opinion appealed from should be reversed, and the circuit court and Fifth District, as applicable, directed to enter an order finding the entire award to TEAGUE to be entitled to Class 1 priority as a cost or expense of administration, to be paid without delay by the personal representative.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided by United States mail on this the 28th day of March, 1997, to Robert R. Foster, Attorney for the Estate, P.O. Box 4 1, DeLand, Florida, 3272 1-004 1.

By: 
_____ James Edward Cheek, III