

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF THE)
ESTATE OF RUSSELL E. JONES,) No. 257, 2000
)
JOHN H. BENGE, JR.,) Court Below: Court of Chancery
) of the State of Delaware
Respondent Below-) in and for New Castle County
Appellant,)
) RW No. 113625
v.)
)
MYRON C. JONES,)
)
Petitioner Below-)
Appellee.)

Submitted: December 12, 2000

Decided: February 2, 2001

Before **VEASEY**, Chief Justice, **HOLLAND** and **STEELE**, Justices.

ORDER

This 2nd day of February, 2001, it appears to the Court that:

1. John H. Benge appeals the Court of Chancery's entry of two default judgments against him in his capacity as the appointed executor of the Estate of Russell Jones. Those orders resulted in judgments against him in an amount of \$15,500 representing the sum he paid himself as an executor's commission and for \$497 representing additional sums improperly paid from the Estate plus costs and attorney's fees of \$2,625 with interest. Benge argues that the Court of Chancery abused its discretion when it entered the default judgments against him in the

absence of any actions warning him of potential sanctions or judicial orders requiring responses on his part. In addition, Benge argues that the Court of Chancery had no inherent power to assess attorney's fees in the absence of a statutory or contractual basis for an award of fees as costs.

2. Russell Jones died testate on December 30, 1996. The Will named Benge executor of the estate. The Will named Myron Jones the sole beneficiary of Russell Jones' estate. The estate consisted of a house valued at \$150,000, a bank account of approximately \$4,000, a life insurance policy of approximately \$23,000 and miscellaneous items valued at \$9,000. Russell Jones had minimal debt.

3. The house was sold on March 28, 1998. From that time until approximately March 15, 2000, the facts show that Benge failed to respond to Jones' lawyer's requests to distribute the proceeds from the sales, yet he did pay himself \$15,500 from the estate account for his fees as an executor.

4. On October 22, 1999, Appellee Jones filed a petition in the Court of Chancery for presentation on a regular Friday morning hearing on petitions.

5. The petition alleged that the estate had been liquidated as of May 28, 1998, seventeen months before Jones filed his petition and as of the date of filing, no distributions had been made to the sole beneficiary.

6. Jones' petition sought orders revoking Benge's letters testamentary, removing Benge as executor, appointing himself as successor administrator and for

delivery of all assets to Jones' counsel. The Court of Chancery considered the petition on November 5, 1999. Despite notice, Bengé did not appear.

7. A Vice Chancellor granted the requested order on November 5, 1999 and the Court provided a copy to Bengé. Bengé did not respond.

8. On November 19, 1999, with notice to Bengé, Jones filed a petition to enforce the November 5, 1999 Order and requested the issuance of a Rule to Show Cause why Bengé should not be held in contempt for refusing to comply with the Court's Order of November 5, 1999. The Court scheduled a hearing for December 17, 1999.

9. Bengé delivered the estate file to Jones' counsel on December 16, 1999, one day before the hearing on the Rule.

10. At the December 17, 1999 hearing, Jones' counsel withdrew the request for a contempt order but renewed his objection to the executor's commission and requested an award of attorney's fees. Jones requested that the Court schedule an evidentiary hearing on the reasonableness of the executor's fees. Bengé appeared at this hearing and represented to the Court that he would be filing an application for a commission which would substantiate the basis for his earlier payment to himself. The Court granted an award of attorney's fees subject to the filing of an affidavit in support.

11. On February 15, 2000, Jones alleged in a filing with the Court that: (a) Bengé had told Jones' counsel that he would pay attorney's fees and provide time records supporting his executor's commission (in hope of avoiding the need for an evidentiary hearing); and, (b) that on December 23, 1999 Jones' counsel wrote to Bengé requesting the attorney's fees and time records and that Bengé had not replied. Bengé did not respond to the February 15, 2000 filing.

12. The Vice Chancellor held an office conference on the February 15, 2000 petition on March 15, 2000. Both Bengé and Jones' counsel attended. At that conference, the Vice Chancellor entered an Order awarding attorney's fees incurred in connection with the petitions of October 22, 1999 and February 15, 2000 and scheduled an evidentiary hearing for May 4, 2000 on issues involving executor's commissions and improper payments of sums from the estate. At the conference, Bengé told the Vice Chancellor that he would file an application for his commission by March 23, 2000.

13. On March 17, 2000, Jones' counsel wrote Bengé reminding him of his representation to the Court that he would file a factually supported application for a commission by March 23, 2000, that Jones would seek discovery after receiving the application and that no hearing would be viable without Bengé's application in hand and responses to discovery available before a hearing date. Jones' counsel further made it clear to Bengé that if Bengé did not comply, that Jones intended to

seek an order denying Benge any commission. Benge neither replied to the letter nor filed a timely application.

14. Because Benge filed no application, Jones' counsel complained to the Court, by letter of March 27, 2000, that neither appropriate discovery could be filed nor adequate preparation be made for a hearing. Jones requested the entry of a default judgment against Benge for \$15,500 which represented the executor's commission which he had paid himself from the estate account. Jones further indicated that he would present evidence of the uncontested fact that Benge had paid himself \$15,500 in commission if required at the May 4 evidentiary hearing.

15. On March 28, 2000, the Court of Chancery entered a default judgment against Benge for \$15,500, five days after the date by which Benge stated he would file an application for a commission.

16. On April 14, 2000, Jones' counsel wrote Benge and then on May 1, 2000, the Court, in an attempt to avoid any further hearing. Benge did not respond.

17. On the May 4, 2000 hearing date, Benge did appear and admitted that he had not communicated with Jones' counsel, had produced no time records in support of his \$15,500 commission and did not object to the default judgment. He did not object to the entry of an additional award of attorney's fees for the February 15, 2000 petition. On May 4, 2000, the Court of Chancery awarded attorney's fees in the amount of \$2,625.

18. A trial court may enter the remedy of a default judgment within its sound discretion. We review the issue for abuse of discretion.

19. A trial court does not abuse its discretion when it enters default judgments on a record which reflects an exercise of judgment directed by conscience and reason.

20. Bengé's actions, outlined in detail above, caused delay in the distribution of the proceeds of the estate to Jones, the sole beneficiary, the loss of earnings on the proceeds and resulted in attorney's fees and costs that could have been avoided. He paid himself a commission of \$15,500 on an estate with a gross value of \$185,000 and, despite an opportunity to do so, never justified the commission by documented evidence of time spent on the estate's behalf.

21. Bengé's failure to communicate with other counsel and to follow his own representations to the Court inexplicably cost Jones and the Court time and expense.

22. We conclude that the Vice Chancellor conscientiously and reasonably exercised his discretion in granting default judgments for both the executor's commission paid and for other improper payments.

23. Further, the Vice Chancellor appropriately exercised his discretion to award attorney's fees and costs here, where the record shows that Bengé's actions unjustifiably caused attorney's fees to be incurred by Jones. The fees were

necessarily but totally unjustifiably incurred in order to force Bengé to exercise his fiduciary duty as an executor in good faith.

24. Bengé's argument that the Court of Chancery abused its discretion by entering default judgments where there had been no judicial action ordering discovery or pretrial procedure is without merit. The Court of Chancery appropriately found that Bengé had engaged in a two-year process of delay, failed to follow up on his own representations to the Court and ignored requests from Jones' attorney for information regarding the estate.

NOW, THEREFORE, IT IS ORDERED, that the judgment of the Court of Chancery in all respects be AFFIRMED.

BY THE COURT:

Myron T. Steele
Justice