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Attorney and Client: Attorney's Charging Lien in the Probate Court

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CASE COMMENTS

ATTORNEY AND CLIENT: ATTORNEY'S CHARGING LIEN IN THE PROBATE COURT

In re *Warner's Estate, 35 So.2d 296 (Fla. 1948)*

In the administration of the estate of Ellsworth C. Warner, attorneys Earnest, Lewis and Smith represented, among others, one H. L. Warner, a non-resident legatee. Upon successful completion of the services for which they were employed the attorneys submitted a bill to Mr. Warner, and when it was not paid they filed a petition in the probate court alleging the performance and the non-payment. The petition also alleged that distribution of the estate was about to be made, that their client had assigned his legacy to a foreign corporation, and that the attorneys would be without remedy if settlement were made and the assets of the estate transferred to another jurisdiction. On this petition the probate court directed the executors to withhold $2,100 from the legacy payable to H. L. Warner and later, adjudicating a lien in favor of the attorneys, directed the executors to pay for the services from this fund. On appeal the circuit court decreed that the probate court was without jurisdiction to adjudicate such a lien but directed the executors to withhold immediately the sum of $2,500 to satisfy the attorneys' claim whenever a judgment for it should be secured in an appropriate action. On the attorneys' appeal to the Supreme Court, HELD, the probate court has jurisdiction, upon petition, to adjudicate the lien of an attorney against a distributee's interest. Decree reversed.

The court based its decision on the doctrine of implied powers as laid down in *McCulloch v. Maryland*[1] and upon the established recognition given in Florida to the existence of the attorney's charging lien.[2] As the sole basis of a court decision these principles are subject to the criticism that they are too general in nature, but their use finds some justification

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[1]4 Wheat. 316, 4 L. Ed. 579 (1819).

[2]Chancey v. Bauer, 97 F.2d 293 (C. C. A. 5th 1938); Forman v. Kennedy, 156 Fla. 219, 22 So.2d 890 (1945); Miller v. Scobie, 152 Fla. 328, 11 So.2d 892 (1943); Knabb v. Mabry, 137 Fla. 530, 188 So. 586 (1939); Scott v. Kirtley, 113 Fla. 637, 152 So. 721 (1933); Alyea v. Hampton, 112 Fla. 61, 150 So. 242 (1933); Carter v. Davis, 8 Fla. 183 (1858); Carter v. Bennett, 6 Fla. 214 (1855); Randall v. Archer, 5 Fla. 438 (1854).

in the fact that the case is one of first impression in Florida.

The opinion indicates that the court considered the question of jurisdiction to adjudicate the lien to be determined by whether the attorneys should have a lien and, if so, whether the remedy allowed by the probate court is an appropriate one.

It is well settled throughout the United States that the attorney is entitled to a lien,[3] but the conclusion that jurisdiction can be implied from the recognition accorded to attorneys' liens and from the propriety of the remedy finds little direct support in the decisions of other jurisdictions. English precedents are of little aid, except by way of analogy, because the allowance of attorneys' liens in England is based to a large extent on a different concept of the relationship between bench and bar.[4] A New York case in 1901,[5] in which the decision was reached without the aid of a statute, sustained the allowance of a charging lien by the surrogate's court against an attack on the jurisdiction of that court to adjudicate such a lien. The circumstances of the New York case differed from those of the principal case only in the manner in which the client attempted to defeat the attorney's lien. An analogy in support of jurisdiction is furnished by Section 734.01 of the Florida Probate Law which provides for the allowance by the probate court of attorneys' fees for the "care, management and settlement of the estate." The court's reference to this section of the probate law is somewhat unfortunately worded, however, in that the section is apparently cited in direct support of jurisdiction, whereas in fact it provides only for the fees of any attorney who has represented the *personal representative* or the estate. It is doubtful whether the language should be interpreted as including an attorney who has merely represented a *distributee.* The words of the Florida Constitution[6] and of Section 732.01 of the Florida Probate Law giving the county judge jurisdiction of the "settlement of estates of decedents" seem much more susceptible to such an interpretation. Distributee's arguments against the existence of jurisdiction are the absence of an express grant and the absence of any controlling precedent that would bring the power within the constitutional grant to "discharge the duties usually pertaining to the courts of probate."[7]

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[3]See Annotation, 51 Am. St. Rep. 251, 258 (1892).
[4]*Ibid.*
[5]*In re* Regan, 167 N. Y. 338, 60 N. E. 658 (1901).
[6]FLA CONST. Art. V, §17.
[7]*Ibid.*

Assuming, however, that jurisdiction exists, there remains to be considered the question of whether the remedy sanctioned is appropriate. It cannot be seriously contended that the result reached by the court in the principal case is unfair, for, as the court pointed out, the client should not be permitted to take the benefits of the attorney's efforts without paying for them. The remedy is also in accord with the growing tendency to abolish procedural niceties, and there is no controlling argument in favor of requiring a separate action or suit in those situations in which the subject-matter and the parties are already before the court. There is, moreover, substantial authority in support of proceeding by petition.[8] Two Florida cases involving suits in equity sanction the enforcement of an attorney's lien by simple petition to the court in the suit giving rise to the lien, although the question was not specifically raised on appeal.[9] On the other hand, attorneys' liens in Florida have usually been enforced by separate bill in equity, although here, again, the propriety of the procedure has never been directly adjudicated.[10] Indicative of the status of Florida law on the point is a 1943 case wherein the opinion of the court pointed out that the matter of enforcing attorneys' liens had never been adjudicated in this state.[11]

The jurisdictional and the procedural questions of the case are so interrelated that the court was justified in considering them in conjunction with one another and in treating the procedural question as the controlling one. In view of the absence of precedents compelling an opposite result as regards the jurisdictional problem, the Florida court has commendably sanctioned a procedure securing speedy and just relief to attorneys in the enforcement of their recognized rights.

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[8]See Annotation, 51 Am. St. Rep. 251, 271 (1892).

[9]Knabb v. Mabry, 137 Fla. 530, 188 So. 586 (1939); Randall v. Archer, 5 Fla. 438 (1854).

[10]Forman v. Kennedy, 156 Fla. 219, 22 So.2d 890 (1945); Scott v. Kirtley, 113 Fla. 637, 152 So. 721 (1933); Alyea v. Hampton, 112 Fla. 61, 150 So. 242 (1933); Carter v. Davis, 8 Fla. 183 (1858).

[11]Miller v. Scobie, 152 Fla. 328, 11 So.2d 892 (1943).