

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs September 16, 2015

**IN RE ESTATE OF NATHLEENE C. SKINNER**

**Appeal from the Probate Court for Davidson County  
No. 13P1829 David Randall Kennedy, Judge**

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**No. M2015-00206-COA-R3-CV – Filed January 11, 2015**

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At issue in this appeal is whether the attorney-in-fact for Nathleene Skinner, the decedent, had the authority to incur post-mortem legal fees to defend an action by the decedent's step-children to recover the cremated remains of their father, Roy Skinner. After Mr. Skinner died, his body was cremated, and Mrs. Skinner retained possession of his remains until her death. When Mrs. Skinner died, her body was also cremated, and her attorney-in-fact took possession of both her remains and her husband's remains. While Mrs. Skinner's estate was being administered in the probate court, the stepchildren of the decedent, the children of Roy Skinner, commenced a separate civil action to recover their father's remains from the decedent's attorney-in-fact. The estate of Mrs. Skinner was not brought into the action. The attorney-in-fact hired the plaintiff to represent him in the action to recover Mr. Skinner's remains. After the action to recover the remains of Mr. Skinner was dismissed, the plaintiff filed a motion in the probate court to require Mrs. Skinner's estate to pay his attorney's fees. The executor of Mrs. Skinner's estate opposed the motion. Following a hearing, the trial court denied the motion because there was "an insufficient showing that such fees were reasonable, necessary or for the benefit of this Estate." The plaintiff appealed. We affirm the probate court's determination that the services rendered by the plaintiff did not inure to the benefit of the estate of Mrs. Skinner. We have also determined that Mrs. Skinner did not grant her attorney-in-fact any post-mortem authority pertaining to her husband's remains; therefore, her attorney-in-fact did not have the legal right to incur legal fees on her behalf to defend a civil action regarding Mr. Skinner's remains. Accordingly, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Probate Court Affirmed**

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Karl David Bradley, Jr., Salt Lick, Kentucky, Pro se.

Kenneth L. Campbell, Nashville, Tennessee, for the appellee, the Estate of Nathleene C. Skinner.

## OPINION

The decedent, Nathleene C. Skinner, was married to Roy G. Skinner until his death on October 25, 2010. Each of them were previously married and had children from their previous marriages.

On March 26, 2004, Mr. and Mrs. Skinner each executed similar documents titled “Durable Power of Attorney for Health Care.” Each power of attorney authorized the attorney-in-fact to, *inter alia*, “direct the disposition of [the grantor’s] remains pursuant to Tennessee Code Annotated, Title 68, Chapter 4.”

Mr. Skinner designated Mrs. Skinner as his attorney-in-fact.<sup>1</sup> Mr. Skinner died in October 2010, and Mrs. Skinner survived him. After Mr. Skinner’s body was cremated, Mrs. Skinner retained possession of his remains, and no one challenged this decision.

In her power of attorney, Mrs. Skinner named her husband as her attorney-in-fact and Harold D. Witt, Jr., her stepson from a previous marriage, as the alternate attorney-in-fact. Following the death of Mrs. Skinner in November 2013, Mr. Witt took possession of the remains of Mrs. Skinner and Mr. Skinner.

In December 2013, Mrs. Skinner’s will was admitted to probate in the Probate Court for Davidson County, Tennessee, and Kenneth L. Campbell was appointed executor of her estate.

Over the next few months, two of Mr. Skinner’s children, Dea Johnson and Chris Skinner Fox, contacted Mr. Witt requesting that he release their father’s remains to them. After Mr. Witt refused to do so, they filed a “Petition for Disposition of Remains” in May 2014 against Mr. Witt to compel him to return Mr. Skinner’s remains to them. The only defendant in that action was Mr. Witt; the executor of Mrs. Skinner’s estate was never a party to that action.<sup>2</sup>

Mr. Witt retained attorney Karl David Bradley, Jr. (“Plaintiff”) to represent him in the litigation concerning Mr. Skinner’s remains. After filing an Answer and

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<sup>1</sup> Mr. Skinner also named an alternate attorney-in-fact should Mrs. Skinner predecease him. Because she survived him, the alternate never took office.

<sup>2</sup> Although the Petition for Disposition of Remains was filed in the Probate Court for Davidson County where Mrs. Skinner’s estate was being administered, it was filed as a separate civil action independent of the administration of Mrs. Skinner’s probate estate.

Counterclaim, Mr. Witt informed Mr. Skinner's children that he had commingled the remains of Mr. Skinner with those of Mrs. Skinner and scattered them at a location pursuant to Mrs. Skinner's oral instructions. Subsequently, Mr. Skinner's children filed a "Notice and Order of Nonsuit."

After the litigation concerning Mr. Skinner's remains concluded, Plaintiff filed a "Motion for Attorney's Fees" in the probate proceedings to compel Mrs. Skinner's estate to pay his fees for representing Mr. Witt in the litigation regarding Mr. Skinner's remains. Following a hearing, the trial court denied Plaintiff's motion because he was not retained by the executor of her estate and "there has been an insufficient showing that such fees were reasonable, necessary or for the benefit of [Mrs. Skinner's] Estate." Plaintiff appealed.

### ANALYSIS

Plaintiff contends the trial court applied the wrong legal standard in denying his claim for legal fees. He further insists the estate of Mrs. Skinner is obligated to pay his attorney's fees based on two contracts: (1) his contract for legal services with Mr. Witt; and (2) Mrs. Skinner's power of attorney, which states that "the actions taken by the Attorney-In-Fact that are properly authorized [under the power of attorney], shall be binding upon . . . my estate . . ." <sup>3</sup> We will discuss each issue in turn.

#### I. WHETHER PLAINTIFF'S SERVICES BENEFITTED THE ESTATE

As a general rule, "for attorneys' fees to be allowed out of an estate, the attorney must have been employed by the personal representative of the estate . . ." *Merchants & Planters Bank v. Myers*, 644 S.W.2d 683, 688 (Tenn. Ct. App. 1982). However, when an attorney was not employed by a representative of the estate, "there is an exception where an attorney's services have inured to the benefit of the estate and, in those cases, the court has discretion to allow fees." *Id.*; *Pierce v. Tharp*, 455 S.W.2d 145, 149 (Tenn. 1970); *Davis v. Mitchell*, 178 S.W.2d 889, 915 (Tenn. Ct. App. 1943) (The services of an attorney not employed by the personal representative of a decedent's estate "are sometimes allowed out of the assets [of the estate] but only where the services have inured to the benefit of the estate."). When a court determines whether the fees of an attorney who was not retained by the estate should be awarded against an estate, the court must decide "whether the services rendered by the attorneys . . . inured to the benefit of the entire estate as distinguished from services rendered to individuals claiming an

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<sup>3</sup> Mrs. Skinner's power of attorney states in pertinent part: "the actions taken by the Attorney-In-Fact that are properly authorized [under the power of attorney], shall be binding upon me, my estate, the personal representatives of my estate, and my heirs, successors, and assigns."

interest in the estate.” *Leaver v. McBride*, 506 S.W.2d 141, 145 (Tenn. 1974) (quoting *Pierce*, 455 S.W.2d at 149) (alteration in original).

It is undisputed that Plaintiff was not retained by the executor of Mrs. Skinner’s estate, and it is additionally undisputed that none of the services rendered by Plaintiff benefitted the estate of Mrs. Skinner. Therefore, we affirm the trial court’s finding that there was “an insufficient showing that such fees were reasonable, necessary or for the benefit of [Mrs. Skinner’s] Estate.”

## II. MRS. SKINNER’S POWER OF ATTORNEY

The foregoing notwithstanding, Plaintiff contends that Mrs. Skinner’s estate is obligated to pay his attorney’s fees because Mrs. Skinner’s power of attorney states that “the actions taken by the Attorney-In-Fact that are properly authorized [under the power of attorney], shall be binding upon me, my estate, the personal representatives of my estate, and my heirs, successors, and assigns.” It is undisputed that Mr. Witt retained the services of Plaintiff to defend the action to recover the remains of Mr. Skinner. What is disputed is whether Mr. Witt was “properly authorized” under Mrs. Skinner’s power of attorney to retain Plaintiff’s services to defend that action.

The three provisions in Mrs. Skinner’s power of attorney that relate to the disposition of her remains are in section 2.2(i)-(k) and they read as follows:

- (i) **Power To Make Anatomical Gifts.** To donate my body or parts thereof for transplant, therapeutic, educational or scientific purposes pursuant to the “Uniform Anatomical Gift Act,” Tennessee Code Annotated, Title 68, Chapter 30;
- (j) **Power To Authorize Autopsy.** To authorize an autopsy of my remains pursuant to the “Post-Mortem Examination Act,” Tennessee Code Annotated, Title 38, Chapter 7; and
- (k) **Power To Dispose Of Remains.** To direct the disposition of my remains pursuant to Tennessee Code Annotated, Title 68, Chapter 4.

The legal effect of a written instrument is a question of law. *Tenn. Farmers Life Reassurance Co. v. Rose*, 239 S.W.3d 743, 750 (Tenn. 2007). “[P]owers of attorney are to be construed in accordance with the rules for the interpretation of written instruments generally; in accordance with the principles governing the law of agency, and, in the absence of proof to the contrary, in accordance with the prevailing laws relating to the act authorized.” *Owens v. Nat’l Health Corp.*, 263 S.W.3d 876, 884 (Tenn. 2007) (quoting 3 Am. Jur. 2d *Agency* § 27 (2007)) (emphasis omitted).

The agency relationship between a principal and an attorney-in-fact usually terminates when the attorney-in-fact has actual knowledge of the principal’s death. *See*

Tenn. Code Ann. § 34-6-105(a). However, in the context of a durable power of attorney for health care, an attorney-in-fact may have authority that survives the principal's death for a limited purpose and period of time. Specifically, Tenn. Code Ann. § 34-6-204(b) provides that, subject to the limitations contained in the power of attorney itself, an attorney-in-fact designated in a durable power of attorney for health care may make "health care decisions for the principal, before or after the death of the principal, to the same extent as the principal could . . . if the principal had the capacity to do so . . . ." Such decisions include "[d]irecting the disposition of remains pursuant to [Tennessee Code] title 68, chapter 4." Tenn. Code Ann. § 34-6-204(b)(3).

When interpreting powers of attorney, we are mindful that formal written instruments that have been carefully drafted can be assumed to "spell out the intent of the author with a high degree of particularity." *Rose*, 239 S.W.3d at 750. Accordingly, powers of attorney must be subjected to careful scrutiny in order to carry out the intent of the author and no more. *Id.* As this court has previously stated:

It is the general rule that a power of attorney must be strictly construed and strictly pursued. Under this rule, the instrument will be held to grant only those powers which are specified, and the agent may neither go beyond nor deviate from the power of attorney – in other words, the act done must be legally identical with that authorized to be done. For example, an attorney in fact has no power to make a gift of his principal's property unless that power is expressly conferred on him by the instrument or unless such power arises as a necessary implication from the powers which are expressly conferred. . . . Where power is conferred on an agent by a power of attorney, the meaning of general words in the instrument is restricted by the context and construed accordingly and the authority given is construed strictly, so as to exclude the exercise of any power that is not warranted either by the terms actually used or as a necessary means of executing with effect the authority given.

*Jones v. Kindred Healthcare Operating, Inc.*, No. W2007-02568-COA-R3-CV, 2008 WL 3861980, at \*5 (Tenn. Ct. App. Aug. 20, 2008) (quoting *In re Estate of Coggins*, No. 03A01-9604-PB-00131, 1996 WL 571510, at \*4-5 (Tenn. Ct. App. Oct. 3, 1996)); see 3 Am. Jur. 2d *Agency* § 27.

Mrs. Skinner's power of attorney does not contain any express authority related to Mr. Skinner's remains. Instead, it authorizes the attorney-in-fact to "direct the disposition of *my* [that is, Mrs. Skinner's] remains pursuant to Tennessee Code Annotated, Title 68, Chapter 4." (emphasis added). The authority to direct the disposition of remains is expressly limited to Mrs. Skinner's remains, and the power of attorney makes no

reference to Mr. Skinner's remains or to the commingling of remains in general.<sup>4</sup> Consequently, it limits the attorney-in-fact's authority to the disposition of Mrs. Skinner's remains. *See* Tenn. Code Ann. § 34-6-204(b); *Owens*, 263 S.W.3d at 884. Therefore, Mr. Witt's decision to direct the disposition of Mr. Skinner's remains was not "warranted . . . by the terms actually used" in Mrs. Skinner's power of attorney. *See Jones*, 2008 WL 3861980, at \*5.

Despite the lack of express authority in the power of attorney, Plaintiff contends that Mrs. Skinner directed Mr. Witt to commingle her remains with Mr. Skinner's and that the civil action commenced by Mr. Skinner's children would have frustrated Mrs. Skinner's directive and wishes. Therefore, Plaintiff insists, Mr. Witt was required to defend himself in the litigation concerning Mr. Skinner's remains in order to execute the authority the power of attorney gave him to dispose of Mrs. Skinner's remains. *See Jones*, 2008 WL 3861980, at \*5.

We have determined that this argument is without merit because there is no evidence in the record that Mrs. Skinner made this request of Mr. Witt. The only references to Mrs. Skinner's desire to commingle her remains are contained in Plaintiff's pleadings in the trial court and his briefs to this court. Pleadings and briefs are not evidence and therefore do not provide adequate support for Plaintiff's contentions. *See Greer v. City of Memphis*, 356 S.W.3d 917, 923 (Tenn. Ct. App. 2010) ("[T]he arguments of counsel and the recitation of facts contained in a brief, or a similar pleading, are not evidence.").

The power of attorney states that "the actions taken by the Attorney-In-Fact *that are properly authorized* [under the power of attorney], shall be binding upon me, my estate, the personal representatives of my estate, and my heirs, successors, and assigns." (Emphasis added). Because the action taken by Mr. Witt, his disposition of Mr. Skinner's remains, was not properly authorized under Mrs. Skinner's power of attorney, the litigation that resulted was similarly unauthorized. As a consequence, neither the litigation that arose from his unauthorized action nor the attendant legal expenses that Mr. Witt incurred are the liability of Mrs. Skinner's estate.

For the foregoing reasons, we conclude that the action taken by Mr. Witt in disposing of the remains of Mr. Skinner were not authorized either expressly or implicitly under the power of attorney. Because Mr. Witt's disposition of Mr. Skinner's remains

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<sup>4</sup> Although Chapter 4 of Title 68 in the Tennessee Code discusses the cremation of unclaimed bodies, it does not mention the commingling of remains. Instead, the statutory section regarding that practice is Tenn. Code Ann. § 62-5-508. The relevant portions of Tenn. Code Ann. § 62-5-508 have been in place since 2000. *See* 2000 Tenn. Pub. Acts Ch. 779, §§ 16-18. It is undisputed that Mrs. Skinner executed the power of attorney in question in 2004 and that her power of attorney does not contain any reference to Tenn. Code Ann. § 62-5-508.

was not “properly authorized” under the power of attorney, the estate of Mrs. Skinner is not bound by Mr. Witt’s contracts for legal services with Plaintiff in defense of the action brought by the children of Mr. Skinner.

**IN CONCLUSION**

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Plaintiff, Karl David Bradley, Jr.

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FRANK G. CLEMENT, JR., JUDGE