

**COURT OF COMMON PLEAS  
PROBATE DIVISION  
HAMILTON COUNTY, OHIO**

ESTATE OF	:	CASE NO. 953985
JAMES LEROY ATCHISON	:	
	:	<u>OPINION AND ENTRY</u>
	:	<u>APPROVING SETTLEMENT</u>
	:	<u>AND SETTING CONTINGENT</u>
	:	<u>FEE</u>
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This matter came before Judge Wayne F. Wilke on April 10, 1997, concerning Administratrix Jacqueline Atchison’s application to approve the settlement of a wrongful death claim, the distribution of the proceeds of that settlement, and the payment of attorney fees from that settlement. Present were Robert B. Newman and Lisa Meeks, representing the Administratrix herein, Jacqueline Atchison, and George W. Bunyan, Jr., the guardian *ad litem* for Melissa Atchison. The report of the guardian *ad litem*, which the Court requires in all such cases as the one before it, was finally filed on May 5th, 1997.

FACTS

The decedent herein, James Leroy Atchison, died intestate on August 30, 1993. The decedent was incarcerated at the Lima Correctional Facility in Lima, Ohio at the time of his death and was survived by his spouse, Jacqueline Atchison, and an adult

daughter, Melissa Atchison. Jacqueline Atchison was appointed Administratrix of this estate on August 24, 1995.

The Administratrix instituted a wrongful death action alleging a Federal Civil Rights violation against, *inter alia*, the Ohio Department of Corrections. As a consequence of that claim, the Administratrix secured a proposed full and complete settlement in the amount of \$77,500.00. Of that total, the Administratrix asked the Court to allow her attorneys to receive fees of \$35,560.33 and to recover litigation costs in the amount of \$14,939.67. The Administratrix proposed that the remaining \$27,000.00 be distributed to her outright, since the decedent's daughter, Melissa Atchison, suffers from a mental illness a significant developmental disability. Melissa Atchison currently lives with and is cared for by the Administratrix.

In support of her application regarding the payment of attorney fees, the Administratrix submitted a "Civil Rights Contingent Fee Agreement" dated March 14, 1997. Clearly, this fee agreement was executed after the Plaintiffs and Defendants in the wrongful death action tentatively settled the claim. Paragraph 3 of that contract provides that "the minimum fee shall be 33 1/3% of the amount of any recovery or settlement." In the event of a settlement, the contract ostensibly requires plaintiff's attorneys to attempt to obtain a separate award of attorney fees to be paid by the defendant directly. Further, the fee agreement provided that any amount recovered directly from the defendant would be credited against the 33 1/3% "minimum fee".

One final provision of the fee agreement concerns the situation where the defendant offers to settle the claim without a separate award of attorney fees. Paragraph

8 of the fee agreement shifts responsibility to the plaintiff to pay the greater of the “either the minimum fee or the attorney’s fees which might have been awarded under 42 U.S.C.§1988, computed by multiplying the “reasonable amount of hours spent by each attorney, paralegal and law student... by the market rate for that person’s services”. The Court is asked to approve the wrongful death settlement of \$77,500.00, costs in the amount of \$14,939.67, and attorney fees in the amount of \$35,560.33.

#### CONCLUSIONS OF LAW

Revised Code §2117.05 allows a probate court to compromise and settle claims in favor of a decedent’s estate “on such terms as the court deems to be for the best interest of the estate”. Given the circumstances surrounding the decedent’s death, the Court finds that the proposed settlement of \$77,500.00 is in the best interest of the estate and hereby approves the amount of the proposed settlement. Furthermore, with respect to the case expenses which amount to \$14,939.67, the Court cannot state that those expenses are unreasonable and therefore, those costs are hereby approved. With respect to the proposed distribution, however, not all of the proposed terms of the settlement are in the best interest of the estate. Consequently, the proposed distribution shall not be approved.

As in this case, a party to a successful Civil Rights action brought under 42 U.S.C. §1983 has the potential to recover attorney fees against the defendant. Specifically, 42 U.S.C. §1988 provides that “[i]n any action or proceeding to enforce a provision of 42 U.S.C. §1983 et seq.... the court, in its discretion, may allow the prevailing party... a reasonable attorney’s fee as part of the costs.” Plaintiff in this case potentially may have recovered attorney fees from Defendants separate from any

settlement but according to the evidence, was unable to do so. As a result, the Administratrix' position is that she is bound by the fee agreement of March 14, 1997, which requires her to pay fees in accordance with Paragraph 8 of that agreement, i.e., the greater of the minimum (contingent) fee or the hourly-rate fee. The proposed fee is \$35,560.33. The Administratrix' proposal to use the hourly-rate fee, albeit at a discounted rate, cannot be approved. Instead, the Court shall order the payment of attorney fees in the amount of \$25,833.33.

As the Sixth Circuit Court of Appeals has stated, the purpose of §1988 is to encourage lawyers to accept civil rights cases in which damages may be small, nominal or nonexistent. *Kinney v. Rothchild*, 678 F.2d 658, 660 (6th Cir. 1982). The court then stated that greatly reducing fees will discourage lawyers from accepting civil rights cases and from "vindicating the rights Congress had in mind". *Id.* While this court agrees fully with the propositions stated above, those tenets do not necessarily apply to the case *sub judice* because there was no separate award of attorney fees under §1988. This court has no jurisdiction to adjust attorney fees awarded under §1988. However, as the requested fees in this case are to be drawn from the proceeds of the settlement itself, this court has jurisdiction over any attorney fees awarded.

Ohio Common Pleas Superintendence Rules 38 through 40 concern the settlement of claims for wrongful death; counsel fees in connection with the settlement of those claims; and counsel fees in general. Specifically, C.P. Sup. R. 38(C) provides that an application for approval of a settlement of a claim for wrongful death shall state what arrangements have been made with respect to counsel fees. That rule further provides

that those fees shall be subject to review by the Court. Next, C.P. Sup. R. 39 specifically allows representation on a contingent fee basis, but the contingent fee is subject to the court's approval. Consequently, this court has jurisdiction to approve and review such contingent fee contracts as the one *sub judice*.

Two additional rules concern actions a fiduciary must take with regard to contingent fee agreements in probate court cases. First, C.P. Sup. R. 40(H) requires that a fiduciary apply for authority to enter into an agreement with an attorney for services prior to executing a contingent fee contract. Second, Hamilton County Probate Court Local Rule 39.1 provides that a contingent fee arrangement which exceeds 33 1/3% of the recovery must be approved by the Court prior to the fiduciary entering into such contract. Local Rule 39.1 also provides that a contingent fee agreement which does not exceed 33 1/3% of the recovery may be approved by the Court at the time of settlement. By executing the contingent fee agreement on March 14, 1997, Jacquoline Atchison and her attorneys violated Local Rule 39.1.

An examination of the "Civil Rights Contingent Fee Agreement" executed by Jacquoline Atchison and attorney Lisa Meeks shows that under the facts of this case, Paragraph 8 of that agreement would apply. The provisions of that section require the Administratrix to pay the greater of either the minimum fee (33 1/3% of recovery) or the "lodestar" fee, calculated by multiplying the hours spent times the hourly rate. Because of the large amount of time spent on this case by the Administratrix' attorneys, the fee agreement requires the Administratrix to pay fees based upon the time expended. Attorney Robert B. Newman's affidavit indicates that the firm expended over \$65,000.00

of legal services based upon the time spent on the case. The Administratrix' attorneys have agreed to lower their fee to \$35,560.33, which represents 46% of the settlement.

Not only did the Administratrix violate Local Rule 39.1 by failing to obtain court approval before entering this agreement, it appears that her attorneys represented her since at least August of 1995 without a written fee agreement. Revised Code §4705.15(B) provides that “[i]f an attorney and a client contract for the provision of legal services in connection with a claim that is... the basis of a tort action and if the contract includes a contingent fee agreement, that agreement shall be reduced to writing and signed by the attorney and the client.” The fact that the Administratrix and her attorneys executed their fee agreement well after settlement negotiations had concluded defeats the intent and purpose of R.C. §4705.15(B).

For all of the following reasons, the Court finds that a fee of 33 1/3% of the recovery in this case would be justified. Accordingly, the Court orders an attorney fee of \$25,833.33 be paid from the total settlement of \$77,500.00. The Administratrix proposes that costs in the amount of \$14,939.67 be paid and the Court has already approved their payment. However, those costs do not include the fee for the guardian *ad litem*. The Court set the fee for the guardian *ad litem* in the amount of \$564.00 by entry dated May 5, 1997 and that amount shall be paid from the settlement proceeds. Therefore, the remainder available for distribution to the next of kin shall amount to \$36,163.00. Of that amount, Jacquoline Atchison shall receive \$27,000.00 and Melissa Atchison shall receive \$9,163.00. The amount distributed to Melissa Atchison shall be paid into a court-approved custodial account, which will obviate the need to establish a guardianship.

Counsel for the Estate shall prepare an Entry Approving Settlement and Distribution of Wrongful Death and Survival Claims consistent with the Court's rulings herein.

SO ORDERED.

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WAYNE F. WILKE, JUDGE

cc: Lisa Meeks  
Robert B. Newman  
George W. Bunyan