

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

DOROTHY BANKER	:	CASE NO. C94322
	:	
Plaintiff	:	
	:	
-vs-	:	<u>OPINION AND ENTRY</u>
	:	<u>GRANTING AND DENYING</u>
	:	<u>PAYMENT OF</u>
NORTH SIDE BANK & TRUST	:	<u>ATTORNEY FEES</u>
COMPANY	:	
	:	
and	:	
	:	
NANCY R. HALL,	:	
	:	
Co-defendants	:	
	:	
	:	

This matter came before Judge Wayne F. Wilke on August 7, 1996, concerning the motions of North Side Bank & Trust Company and Nancy R. Hall for attorney fees. Present were Carter A. Beck, representing Co-defendant North Side Bank & Trust Company; Timothy A. Garry, Jr., who represents Co-defendant Nancy R. Hall; and Gordon H. Hood, representing Plaintiff Dorothy Banker.

FINDINGS OF FACT

Howard H. Banker (the decedent) died testate on June 5, 1991. At the time of his death, substantially all of the decedent's assets were held by Star Bank, N.A., Trustee, pursuant to a revocable inter-vivos trust agreement (the Trust), dated June 10, 1983, as amended on March 10, 1988. Upon his death, the terms of the decedent's Trust directed the trustee to split the principal and to fund two other trusts. One of those trusts is for the

benefit of the plaintiff, Dorothy B. Banker (hereafter the “Marital Trust”) and the other is for the benefit of Co-defendant Nancy R. Hall (hereafter the “Daughter’s Trust”).

Howard H. Banker’s estate was relieved from administration in this court, and pursuant to Item VI of the Howard H. Banker Trust, Star Bank, N.A., as Trustee, prepared Federal and Ohio estate tax returns. As a result of its calculations, Star Bank, N.A. paid \$133,107.22 in Federal tax and \$55,004.48 in Ohio estate tax. Star Bank, N.A. believed the Ohio Tax Apportionment Statute, R.C. §2113.86 applied, and therefore it charged all taxes to the Daughter’s Trust. In accordance with Item VII(A) of the trust, Star Bank, N.A. satisfied the estate tax obligations then divided the balance of the trust equally between the Marital Trust and the Daughter’s Trust.

After Star Bank, N.A. filed the federal estate return on March 5, 1992, the Internal Revenue Service audited the return and on March 1, 1993, determined that the estate tax should be paid from the gross estate after deductions and credits, with the balance after taxes to be split equally between the Marital Trust and the Daughter’s Trust. The I.R.S.’s position was that the Tax Apportionment Statute did not apply. Consequently, the I.R.S. decreased the marital deduction which increased the gross estate tax due, so that the net tax due after appropriate credits was increased by \$5,372.00. It is uncontroverted that the changes proposed by the I.R.S. were not disputed by either Star Bank, N.A or by the successor trustee, Co-defendant North Side Bank & Trust Company

After the payment of the additional taxes, the Trustee divided the Trust assets by charging one-half of the estate taxes against both the Marital Trust and the Daughter’s Trust so that each trust was equally funded. Beginning in October of 1991, Star Bank,

N.A. had been methodically transferring assets from the decedent's trust into the Marital Trust and into the Daughter's Trust. These transfers occurred through March of 1993. The Marital Trust and the Daughter's Trust had different trustees. In late 1991, the Trustee of Dorothy B. Banker's Marital Trust was Star Bank of Northern Kentucky, and the Trustee of the Daughter's Trust was North Side Bank & Trust Company.

Item XII of the decedent's revocable trust granted to Nancy R. Hall the power to remove the trustee. Pursuant to that power, Co-defendant Nancy R. Hall removed Star Bank, N.A. as Trustee of the decedent's trust and designated Co-defendant North Side Bank & Trust Company as Successor Trustee in February of 1992. Co-defendant North Side Bank & Trust Company succeeded Star Bank, N.A. as trustee, but as stated above, Star Bank, N.A. continued in many respects to function as the *de facto* Trustee. For example, Star Bank, N.A. still held various trust assets and was wholly responsible for the tax return around which this dispute revolves.

To further complicate the events surrounding this dispute, while Dorothy B. Banker kept Star Bank, N.A. of Northern Kentucky as Trustee of the Marital Trust, Nancy R. Hall replaced North Side Bank & Trust with yet another entity as the trustee of her trust.

On June 10, 1994, Plaintiff Dorothy B. Banker instituted an action for declaratory judgment in this court in an effort to construe the decedent's will with respect to whether the Tax Apportionment Statute applied. The litigation in this court and in the First District Court of Appeals is a matter of record so that only a passing reference need be made. Plaintiff Banker was unsuccessful at both the trial and appellate levels.

On June 11, 1996, North Side Bank & Trust Company filed an application for attorney fees in the amount of \$10,811.93 for its services in defending the declaratory judgment action and the appeal. North Side Bank & Trust Company wants those fees to be charged against Plaintiff Dorothy B. Banker or in the alternative, against Dorothy B. Banker and Co-defendant Nancy R. Hall jointly.

Additionally, Co-defendant Nancy R. Hall filed a motion for Dorothy B. Banker to pay the costs of Nancy R. Hall's attorney fees in the amount \$10,366.00 incurred in the defense of the declaratory judgment action at both the trial and appellate levels.

At the first hearing on these two motions on July 22, 1996, the Court continued the hearing in progress until August 7, 1996, in order for the parties to provide supplemental information to the Court. The occurrence of particular events in the trust administration needed to be clarified. The parties were given until August 28, 1996, in which to file their final memoranda of supplemental information.

CONCLUSIONS OF LAW

Ohio has adopted the "American Rule" with regard to the imposition of attorney fees in connection with litigation. The American Rule prohibits the prevailing party's recovery of attorney fees as part of the costs of civil litigation except where there is statutory authorization, the unsuccessful party acts "in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons," or the parties agree by contract to a fee-shifting scheme. *See, e.g. Sorin v. Bd. of Edn. of Warrensville Hts. School Dist.* (1976), 46 Ohio St. 2d 177; *Nottingdale Homeowners' Assn. v. Darby* (1987), 33 Ohio St. 3d 32; *Worth v. Aetna Cas. & Sur. Company* (1987), 32 Ohio St. 3d 238. Contrary to Plaintiff's belief,

there is such statutory authority for an award of attorney fees against an unsuccessful party in the case *sub judice*.

Revised Code §2721.03 provides that through an action for declaratory judgment, an individual may seek a judicial determination of the construction of a will, deed, written contract. Plaintiff Dorothy B. Banker initiated an action for declaratory judgment to construe Howard H. Banker's will. Revised Code §2721.09 states that "[w]henver necessary or proper, further relief based on a declaratory judgment or decree previously granted may be given." The "further relief" contemplated by R.C. §2721.09 may include an award of attorney fees against an unsuccessful litigant. For example, in *Motorists Mutual Insurance Company v. Brandenburg* (1995) 72 Ohio St. 3d 157, the Supreme Court of Ohio held that a trial court has the authority under R.C. §2721.09 to assess attorney fees based on a declaratory judgment issued by the court. The Court stated that the power of a trial court to grant fees is not absolute, however, but that an award of attorney fees should be granted only when "necessary or proper". *Id* at 160.

The Court finds that equitable considerations make it proper for Nancy R. Hall and Dorothy B. Banker to each be charged one-half, or \$5,405.97, of Co-defendant North Side Bank & Trust Company's attorney fees in the amount of \$10,811.93. The circumstances surrounding this litigation demand this result. North Side Bank & Trust Company was not responsible for preparing the initial estate tax return. The facts indicate that North Side Bank & Trust Company essentially served as a clearing house for the decedent's assets while those assets were ultimately distributed to the Marital and Daughter's Trusts. North Side Bank & Trust Company was given the unenviable task of defending a trust of which it held little or no assets.

Despite its limited role in the administration of the decedent's trust, however, North Side Bank & Trust Company had a fiduciary obligation to defend the suit brought against it. The lack of assets held by the bank now requires it to seek remuneration from either the Plaintiff, the Co-defendant, or both. North Side Bank & Trust Company was brought into this situation by Co-defendant Nancy R. Hall when she removed Star Bank, N.A. and appointed North Side Bank & Trust Company as successor trustee. The First District Court of Appeals has recognized the trial court's authority to award compensation out of the trust estate for services rendered by counsel for co-defendants in an action to construe a will. *Fifth -Third Union Trust v. Davis* (1936), 55 Ohio App. 377, 387. As Plaintiff mentions in her brief filed August 27, 1996:

“had North Side Bank and Trust Company, as successor trustee of the Howard Banker Intervivos Trust, retained sufficient assets to pay its legal fees and had the Court approved same, then there would have been an equal reduction in said Trustee's distributions to Plaintiff, Dorothy B. Banker, and Co-defendant, Nancy R. Hall, so that in effect each of them would have borne one-half (1/2) of such expenses.”

Constructively, the scenario described by Plaintiff is precisely how North Side Bank & Trust Company shall be paid its attorney fees. Both Dorothy B. Banker and Nancy R. Hall shall pay to North Side Bank & Trust \$5,405.97 in full consideration for their respective portion of that institution's attorney fees. This would have been the result had North Side Bank & Trust not prematurely transferred the assets under its control to the Marital Trust and the Daughter's Trust.

With respect to Nancy R. Hall, however, a different result should ensue. Instead of defending the suit because of a legally-imposed fiduciary duty, her primary motivation in defending this action was pecuniary in nature. It was a great benefit to Nancy R. Hall

personally to uphold the I.R.S.'s contention that the Tax Apportionment Statute did not apply. Otherwise, as Star Bank, N.A. erroneously calculated, Nancy R. Hall would be obligated to pay over \$188,000.00 in taxes out of her trust while Dorothy B. Banker would pay none.

In contrast to the North Side Bank & Trust Company, Nancy R. Hall stood to gain a great deal if she were successful in this suit for declaratory judgment. Consequently, her situation is easily distinguishable from that of North Side Bank & Trust Company. Motivated to defend this suit primarily because of her own interests, Nancy R. Hall should bear her own litigation expenses. Consequently, her application to charge Plaintiff Dorothy B. Banker attorney fees in the amount of \$10,366.00 is hereby denied.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: Carter A. Beck
Timothy A. Garry, Jr.
Gordon H. Hood