

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

IN THE MATTER OF	:	CASE NO 942428
THE TRUST OF	:	
LUDWIG BERTHOLD, deceased	:	
	:	<u>OPINION AND ENTRY</u>
	:	<u>GRANTING IN PART</u>
	:	<u>APPLICATION FOR ATTORNEY</u>
	:	<u>FEES</u>

STATEMENT OF THE CASE

This matter came before Judge Wayne F. Wilke on January 21, 1997, concerning various motions brought by the Trustee, Arthur T. Knabe, for authority to expend funds from the Trust U/W of Ludwig Berthold, deceased. The Court, by entry dated January 28, 1997, approved the payment of Trustee's fees in the amount of \$6,505.48; it approved the payment of attorney fees to McIntosh, McIntosh & Knabe in the amount of \$2,525.00; and it approved the payment of attorney fees to Lindhorst & Dreidame in the amount of \$1,169.50. The Court found that the expenditures described above were beneficial and necessary to the Estate. The Court withheld judgment with respect to the Trustee's application for authority to make additional expenditures, to wit: \$52,311.00 to Lindhorst & Dreidame for attorney fees related to the administration of the decedent's estate, Case No. 923974; \$53,215.68 for expenses incurred from August 1, 1994 through December 7, 1995 for the care, maintenance, support and recreation of Walter Berthold; fees of \$1,547.10 for court reporting expenses related to the administration of the Estate;

and \$3,273.12 for costs related to the administration of the Estate which were advanced by the Executor of the decedent's estate.

FINDINGS OF FACT

Walter A. Berthold was appointed Executor of the Estate of Ludwig Berthold on August 21, 1992. Attorney Thomas E. Martin has represented the Estate of Ludwig Berthold since the estate was opened. On June 14, 1994, this court authorized the payment of attorney fees to Thomas E. Martin, from the firm of Lindhorst & Dreidame, in the amount of \$6,750.00 for assisting in the administration of the estate. The final account, filed on August 4, 1994, indicated that the estate administration had been completed and that the \$6,750.00 would represent the full fee for attorney Martin's representation of the Estate of Ludwig Berthold.

After the Executor filed the final account but prior to this court approving and settling the account, five of the trust remaindermen filed exceptions to the account. The five remaindermen are as follows: Arlena Ruther, Christine Kemp, David Berthold, Robert Berthold and Amy Lightfield. They alleged, *inter alia*, that the major asset in the estate of Ludwig Berthold (which was to form the corpus of the trust under which they are to ultimately benefit), the real estate at 5491 Hanley Road, was substantially underappraised and that the Executor engaged in self-dealing by selling the property at less than fair market value to his future wife. The parties to this dispute then reached a settlement, which agreement was filed in this court on February 16, 1995 and which in part, provided that an independent appraiser would reappraise the property. A new appraisal was performed by a court-appointed appraiser which increased the property's

value from \$144,500 to \$250,000. The court-appointed appraiser then filed addendums, first increasing to \$300,000, then decreasing the appraisal back to \$250,000. Thereafter, the remaindermen moved to set the settlement agreement aside under Civ. R. 60(B).

The Court found sufficient grounds to set the settlement agreement aside and therefore on December 6, 1995, granted the remaindermen's motion. It was obvious to the Court that demonstrable defects in the second appraisal warranted yet a third appraisal. Consequently, on April 17, 1996, the Court ordered another appraisal of the property. Appraiser Thomas Willingham appraised the property at \$300,000. As that new appraisal was \$155,500.00 over the original appraised value, by terms of the parties' settlement agreement, obliged Walter A. Berthold to pay into this trust that amount.

CONCLUSIONS OF LAW

As the current beneficiary of this trust, Walter A. Berthold requested the Court allow the expenditure of \$53,215.68 for his benefit and he later verbally reduced that request to \$41,119.33. Under Item IV (A). of the testator's will, the trustee is authorized, "without any order of the Court [to] pay so much of the principal and income of the Trust property as in his sole discretion is advisable for the care, maintenance, support and recreation of the said Walter A. Berthold." The instrument further provides that the trustee is authorized, "in his sole discretion, to disburse from principal in a liberal manner consistent with preserving principal but keeping in mind the needs of the said Walter A. Berthold".

Despite the mutually exclusive goals of the two phrases quoted above, the decision whether to make the requested expenditures on the beneficiary's behalf rests

solely with the trustee. The current trustee is the named trustee under the decedent's will. It must be presumed that the settlor had full faith and confidence in his trustee to effectuate the terms of the trust. Despite the paradoxical terms of the trust, the plain reading of the instrument is such that the trustee is granted a great deal of latitude and discretion in providing for the care, maintenance, support and recreation of Walter A. Berthold. As such, the decision whether to make the requested expenditures lies with the trustee alone.

With respect to the application to make payment of \$52,311.00 out of the trust corpus for attorney fees related to the administration of the Estate of Ludwig Berthold, some well settled rules may be stated.¹ R.C. 2113.36 provides for the payment of reasonable attorney fees out of the estate as a part of the expense of administration. The determination of the amount of attorney fees to be paid from the estate is to be based upon the actual services performed by the attorney and upon the reasonable value of those services. *In re Estate of Verbeck* (1962), 173 Ohio St. 557. Furthermore, the Supreme Court has determined that the burden is upon an attorney to introduce into the record sufficient evidence of the services in order to justify a reasonable attorney fee. *Id.* at 558. When determining the reasonable value of an attorney's services, a probate court must look at all of the evidence. *Imler v. Cowan* (1989), 65 Ohio App.3d 359, 362.

The timesheets filed in Case No. 923974 on November 20, 1996 were the only evidence to support Lindhorst & Dreidame's application for extraordinary fees. Evidence supplied in the form of timesheets submitted by an applicant are but one factor

¹ Normally, attorney fees would be applied for and paid out of the estate, but the administration of this estate was effectively completed and all assets transferred to this trust when the litigation which generated the disputed legal fees ensued. The Court recently authorized the expenditure of estate taxes out of the trust assets for this very same reason.

a court must consider and those timesheets must be given a proper amount of emphasis. As the Eighth District Court of Appeals has stated, in determining an award of attorney fees, the time and labor involved is only one of the many factors to be given consideration. *In re Estate of Ziechmann* (1987), 41 Ohio App.3d 214, 218. That court further stated that with respect to many probate cases, counsel “must generally realize that he cannot always expect full compensation for the time so consumed.” *Id.* at 218 citing *Swanson v. Swanson* (1976), 48 Ohio App.2d 85, 92.

The trust remaindermen do not object to the requested fee. That fact alone, however, does not guide this court. The facts surrounding the production of the majority of those fees, on the other hand, indicate that the services benefitted Walter A. Berthold individually and as the Executor of the Estate of Ludwig Berthold. At a minimum, the legal services rendered by Lindhorst & Dreidame helped to protect Walter A. Berthold from potential liability resulting from the remaindermen’s claims that Walter A. Berthold breached his fiduciary duty by selling the real estate to his future wife. The Court’s decision herein should not be construed as reflecting on the merits of that allegation. However, suffice it to say that both Walter A. Berthold and the firm of Lindhorst & Dreidame took affirmative steps to constructively increase the sale price of the real estate and thus, the amount of this trust’s corpus.

To the extent they directly resulted in the addition of over \$155,000 being paid into the trust to offset the low purchase price paid by the Executor’s fiancée, legal services for the remaindermen were clearly beneficial. Under the facts of this case, however, the same cannot be said for the services rendered on behalf of the Executor.

Consequently, the \$52,311.00 requested by Lindhorst & Dreidame, as well as the expenses of \$3,273.12 and court reporting costs of \$1,547.00 should be borne by Walter A. Berthold himself, with one qualification. The Court acknowledges that part of the litigation in this matter resulted as a consequence from errors in the second appraisal performed by the court-appointed appraiser, Howard G. Thiemann. The Court hereby approves that portion of services rendered by Lindhorst & Dreidame on behalf of the Estate which directly relate to the consequences caused by the mistake-laden second appraisal and subsequent addendums. The second appraisal was filed on March 23, 1995, and a third appraisal was ordered on April 17, 1996. An examination of Lindhorst & Dreidame's timesheets from that period indicate that at least 192.60 hours were spent by Lindhorst & Dreidame on matters related to the mistakes on the second appraisal, the defense of the remaindermen's Civ. R. 60(B) motion, the subsequent appeal of this court's order granting the Civ. R. 60(B) motion, and the efforts expended to obtain a third appraisal of the property. A reasonable fee for those services is \$23,112.00. Therefore, the Trustee is authorized to pay from the Ludwig Berthold Trust the amount of \$23,112.00 to Lindhorst & Dreidame for services rendered to the Estate of Ludwig Berthold.

The evidence submitted in support of Lindhorst & Dreidame's application for costs, on the other hand, fails to indicate when and under what circumstances specific costs were incurred. The evidence shows only that certain costs were incurred. Without evidence as to when those costs were incurred, the Court cannot determine that they were beneficial to the estate given the circumstances surrounding the administration of Ludwig

Berthold's estate. Consequently, those costs may only be borne by Walter A. Berthold individually.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: Thomas E. Martin
Peter C. Newberry
Arthur T. Knabe
Daniel J. Hoffheimer