

PROBATE COURT OF HAMILTON COUNTY, OHIO

ESTATE OF BLANCHE DANIELS , DECEASED

CASE NO. 964568

OPINION AND ENTRY SETTING ATTORNEY FEE

This matter came before Judge Wayne F. Wilke on February 14, March 15, April 25 and May 22, 2000 concerning an application for extraordinary attorney fees. Present were Lee Bortz, on behalf of the Estate, and several of the next of kin who appeared pro se and who opposed the fee.

FINDINGS OF FACT

The decedent, Blanche Daniels, died testate on September 28, 1996. Under the terms of her will, which was admitted to probate on October 15, 1996, the decedent's six children are to receive the estate residue. Daughter Deborah White, also pursuant to the terms of the will, was appointed Executor on October 15, 1996.

According to the inventory, the Estate assets amounted to \$104,869.00, including an undivided 2/3 interest in real estate known as 5344 Weltner Street. Revised Code §2109.30 requires a fiduciary to file an account within nine months of appointment. In this case, Deborah White was required to file an account by July 15 of 1997. By November of 1997, Ms. White had still not filed an account so the Court sent her and her attorney an overdue notice. When she still had not filed an account by December of

1997, the Court issued her and her attorney a citation to appear if the account was not filed by January 14, 1998. At the citation hearing of January 14, 1998, the Court granted the fiduciary an extension to file the account until February 25, 1998 and that deadline was met.

After almost two years of administration, in October of 1998, five of the beneficiaries began encouraging the Executor and her attorney to settle the Estate. Because it appeared the estate administration was languishing, the Court ordered the fiduciary and her attorney to appear for a status conference. Attorney Lee Bortz indicated a plan for Lonnie Daniels to purchase the Weltner property from his siblings since attempts for the rental tenants to purchase the property had been frustrated. By May of 1999, the Executor still had not transferred or sold the real estate almost three years after the decedent's death. The five heirs reiterated their concerns in May of 1999 and the Court set another status conference. At that status conference, the Court was assured that the real estate was in the process of being sold although no land sales case had been filed. The Court granted the Executor until December 30, 1999 to complete the Estate's administration and ordered the real estate sold at public auction when the contract with the broker expired. At the status conference on December 30, 1999, the Court granted a continuance to complete the administration until May 4, 2000.

Revised Code §2109.30 requires annual accountings so that when Ms. White had not filed an account within a year of the first account, the Court sent her an overdue notice on March 1, 1999. Before a citation to appear was sent in April, Ms. White applied for an extension for filing the account. On the application, which was approved by attorney Lee Bortz, Ms. White indicated her reason for seeking an extension was that "rental property [was] involved; also sale of Weltner Ave."

Ms. White finally filed the second partial account on July 29, 1999. On the Status Report filed contemporaneously with the account, attorney Lee Bortz and Ms. White indicated the estate administration should be concluded by October 15, 1999, after the sale or transfer of the real estate at Weltner Avenue.

On January 18, 2000, attorney Lee Bortz first filed his motion for extraordinary attorney fees in the amount of \$9,500. In the application, Mr. Bortz indicates that the Weltner property “is being transferred to the six heirs by Certificate of Transfer”. In support of his application, Mr. Bortz submitted timesheets reflecting the amount of time he spent on this matter. At the hearing on May 22, 2000, Mr. Bortz submitted 31 documents that were admitted into evidence. Those documents indicate that by September of 1998, two years after the Estate was opened, Mr. Bortz began advocating the sale of the Weltner property to either Lonnie Daniels or to a third party. Mr. Bortz testified, however, that he was “completely unaware” about the numerous liens on the property¹ and that as late as December of 1999, he had not examined the title to the property. Lonnie Daniels, one of the heirs, acknowledged the amount of time Mr. Bortz spent on this estate but characterized much of Mr. Bortz’ efforts as “useless”.

CONCLUSIONS OF LAW

This court is granted exclusive jurisdiction to determine the reasonableness of attorneys’ fees which are to be paid by a fiduciary and which are allowed as part of the expenses of administration. *In re Estate of Cercone* (1969), 18 Ohio App.2d 26, 31. Revised Code §2111.36 provides that

¹ Exhibit C indicates there were fifteen certified judgments filed against the property in the amount of \$92,199.34.

“When an attorney has been employed in the administration of the estate, reasonable attorney fees paid by the [fiduciary] shall be allowed as a part of the expenses of administration. The court may at any time during administration fix the amount of such fees and, on application of the executor or administrator or the attorney, shall fix the amount thereof.”

Disciplinary Rule 2-106(B) lists numerous factors to be considered as guides in determining the reasonableness of a fee. Those factors include the time and labor required, the novelty and difficulty of the questions involved, the fee customarily charged in the locality for similar legal services, and the amount involved and the results obtained. While the amount of time expended is a factor, it is not the only factor to consider.

At the time this estate was opened, Hamilton County Probate Court Local Rule 40.1 also provided a guide for the legal fees to be charged by an attorney for services rendered in the complete administration of an estate.² The Executor evidently now intends to transfer the real estate. Accordingly, the guideline fee would approximate the following:

$$\begin{array}{r r r r r} \$ 83,310.81 & \times & 4.5\% & = & \$ 3,748.99 \\ 26,700.00 & \times & 2.0\% & = & \$ 534.00 \\ & & \text{total fee} & = & \$ 4,282.99 \end{array}$$

While this court’s guidelines have never been intended as a schedule of minimum or maximum fees to be charged, the guideline fee represents a presumptively reasonable fee for the complete administration of an estate. As the Ohio Supreme Court has held, an attorney requesting a fee for legal services has the obligation to introduce sufficient evidence of the services performed and of the reasonable value of such services. *In re Estate of Verbeck* (1962), 173 Ohio St. 557, 559. An attorney who seeks a fee in excess of the guideline simply has an increased burden to demonstrate why the greater fee

² That rule has been changed to Local Rule 71.1 to be consistent with changes to the Ohio Rules of Superintendence. The guideline fee under the new rule would approximate \$ 4,782.99.

should be granted. In this case, the applicant has not demonstrated that the requested extraordinary attorney fee was earned.

The legal issues presented in this case were neither novel nor unusually complicated. Mr. Bortz indicates that he has expended 131.25 hours on this estate. The complexity, however, arose largely because of personal issues between the heirs. Much of the time expended by Mr. Bortz could have been avoided if Mr. Bortz would have taken the time to research the Weltner property title at the time the estate administration began rather than over three years later. The facts suggest that after the proceeds from the sale of the Lewiston Court property were distributed, the Executor had little equity to pay the attorney fee that Mr. Bortz decided was due to him. Instead of easily transferring one-sixth of the property to each of the heirs, he and the Executor unreasonably insisted on their plan to sell the property in order to generate that liquidity.

Under DR 2-106, an assessment of a requested fee's reasonableness requires an analysis of the results obtained. The amount of time spent cannot be the sole consideration because in this case, although much time has been spent, there is still much left to do. After three and a half years, one of the chief assets of the Estate has yet to be administered. Given the results obtained by Mr. Bortz, the requested fee is unreasonable.

The fiduciary has been overdue in filing an account on two occasions. Although the fiduciary and her attorney have repeatedly assured the Court that matters will be concluded in a timely fashion, they have failed to do so. The manner in which the Executor administered this estate is a reflection of the service provided by the attorney. Taking into consideration the Disciplinary Rule as well as the Court's guideline as discussed above, the Court finds a reasonable attorney fee amounts to \$ 4,283.00 for the complete administration of this estate. The Executor shall transfer the property known as

5344 Weltner Street within 2 weeks of the date of this entry and shall file a final account within 30 days.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: Lee Bortz
Deborah White
Richard Daniels
Rosie Myers
Quincy Daniels
Lonnie Daniels
Marlene Daniels