

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

ESTATE OF	:	CASE NO. 955194
SARAH EZER, deceased	:	
	:	<u>OPINION AND ENTRY</u>
	:	<u>DENYING PAYMENT OF</u>
	:	<u>ATTORNEY FEES FROM</u>
	:	<u>ESTATE</u>
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This matter came before Judge Wayne F. Wilke on December 17, 1997 concerning an application to pay attorney fees. Present were the applicant, William P. Whalen, Jr., Donald C. Moore, Jr., the Administrator of the within estate, and counsel for the Administrator, James C. Cissell. Also present were Theodore J. Froncek, who represents the former fiduciary; and Colleen Laux, who represents beneficiaries Harry Eden and Helen Roth.

FINDINGS OF FACT

The decedent herein, Sarah Ezer, died testate on September 4, 1995 and her will was admitted to probate on November 2, 1995. Attorney William P. Whalen, Jr. began his representation of the Estate of Sarah Ezer that same day. The decedent was survived by three siblings, to wit: Rachel Vigodner, Harry Eden and Helen Roth. Under Item II of the decedent's will, each is to receive one-third of the residual estate.

On November 2, 1995, Rachel Vigodner was appointed Executrix of the decedent's estate. Under Rachel Vigodner's administration, the Estate was poorly and clumsily handled, necessitating the eventual appointment of a disinterested third party to administer the estate.

Numerous examples demonstrate how poorly the Executrix, with the advice of her attorney, administered this estate. To begin, R.C. §2115.02 requires all fiduciaries to file an inventory of the decedent's property within three months of the date of appointment. In this instance, the Executrix filed her inventory on February 22, 1996, some twenty days late. The inventory indicated the estate contained assets totaling \$210,646.30 and that the Executrix' daughter, Kitari, appraised the estate chattels pursuant to court appointment. This appointment was later set aside on March 14, 1996 as violating Hamilton County Probate Court Local Rule 28.1(A)(4), which prohibits a person related by blood to the fiduciary from appraising estate assets. The Executrix filed a Second Amended Inventory and Appraisal on June 20, 1996, after Harry Eden and Helen Roth had filed exceptions to the First Inventory and Appraisal.

As stated above, the decedent's will was admitted to probate on November 2, 1995. Revised Code §2107.19 requires all interested parties to receive notice of the admission of the will to probate so that the statute of limitations for a will contest may begin. Rachel Vigodner waived the right to such notice on November 2, 1995. Harry Eden and Helen Roth waived the right to notice of the probate of the decedent's will on March 21, 1996. Revised Code §2107.19(A)(3) requires the filing of a certificate of notice or waiver of notice of the admission of a will to probate. Accordingly, the Executrix should have filed this certification immediately after all parties had notice of the will's admission, yet the certificate was never filed.<sup>1</sup>

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<sup>1</sup> The significance of this omission cannot be overemphasized. The Ohio Supreme Court has amended Superintendence Rule 59 (effective October 1, 1997) to provide for the removal of any fiduciary who fails to file a Certificate of Service of Notice of Probate of Will within one hundred twenty days of his or her appointment.

Next, R.C. §2109.30 requires every fiduciary to render an account of the fiduciary's administration within nine months after appointment. Since she was appointed Executrix on November 2, 1995, Ms. Vigodner was obligated to file an accounting of the estate's administration by August 2, 1996. Executrix Vigodner resigned as fiduciary of the Estate on October 24, 1996 but was still required to file an accounting of her administration. The Executrix failed to obtain a continuance to file an account so that by November of 1996, both the fiduciary and her counsel received notices that an accounting was overdue. The first notice was sent to the fiduciary's address of record but was returned to the Court as Ms. Vigodner neglected her duty to notify the Court that she changed her address. A second notice that her account was overdue was sent to Ms. Vigodner's new address on January 6, 1997. On February 12, 1997, Ms. Vigodner was cited into court for remaining delinquent in filing an account. Ms. Vigodner's first and final account was finally filed, without attorney Whalen's assistance, on April 23, 1997. That same day, Ms. Vigodner filed a Third Amended Inventory and Appraisal on April 23, 1997. This third inventory indicated the estate held assets totaling \$204,178.67.

The Court appointed Donald C. Moore, Jr. as Administrator, W.W.A. on November 1, 1996. On November 26, 1996, the Administrator notified the Court that James C. Cissell would serve as attorney of record for the Estate, replacing William P. Whalen, Jr., who, as stated above, had been representing the Estate since November of 1995. Revised Code §5731.21 requires a fiduciary to file an estate tax return within nine months of the date of the decedent's death. The former fiduciary failed to file such a return and she never requested an extension to file a return later. This omission caused

the Ohio Tax Commissioner to assess a late penalty to the Estate. One of the Administrator's first acts was to file an Ohio Estate Tax Return that the former fiduciary had failed to file.

On November 21, 1997, William P. Whalen, Jr. (hereinafter "Applicant") filed an application for attorney fees totaling \$4,965.88 for services he allegedly rendered to the Estate of Sarah Ezer from September 5, 1995 through April 23, 1997. In support of his application, the Applicant submitted an undated letter memorializing a purported fee agreement between the Applicant and the former fiduciary. The Applicant also submitted "Time Slips for the Sarah Ezer [sic] Case", which purport to indicate the services he provided to the Estate. While the Applicant ceased to serve as attorney of record for the Estate beginning at least on November 26, 1996, his timesheets indicate he continued to render services to the Estate until April 23, 1997.

#### CONCLUSIONS OF LAW

Revised Code §2113.36 provides that when an attorney has been employed in the administration of an estate, "reasonable attorney fees paid by the executor or administrator shall be allowed as a part of the expenses of administration." By virtue of R.C. §2113.36, this court is granted exclusive jurisdiction to determine the reasonableness of attorney's fees associated with the administration of an estate. *In re Estate of Cercone* (1969), 18 Ohio App.2d 26, 31; see also *In re Estate of Love* (1965), 1 Ohio App.2d 571, 577. The Ohio Supreme Court has stated that such fees shall 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, 558. Further, after an employment relationship is created between an attorney and client, the burden of

establishing the fairness and reasonableness of an attorney fee is upon the attorney. *Jacobs v. Holston* (1980), 70 Ohio App.2d 55,59. In this case, the Applicant has not met his burden.

A court may examine numerous factors when called upon to determine the reasonableness of an attorney fee. For example, Disciplinary Rule 2-106 provides that a determination of reasonableness ought to include an inquiry of the time and labor required; the novelty and difficulty of the questions involved; the amount of the fee and the results obtained. The record clearly indicates the administration of this estate was progressing in a deplorable manner while the Applicant was attorney of record. No Estate Tax Return had been filed. No Certificate of Service of Probate of Will was filed. The Inventory was late and took three attempts to provide one that was reasonably accurate. An accounting was overdue and was eventually filed six months late with the assistance of another attorney. Under these circumstances, the Court is compelled to deny the payment of the Applicant's requested fees from the assets of the Estate.

Accordingly, William P. Whalen, Jr.'s application that the Court order the Administrator to pay the Applicant \$4,965.88 from the Estate of Sarah Ezer is denied.

SO ORDERED.

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WAYNE F. WILKE, JUDGE

cc: James C. Cissell  
Donald C. Moore, Jr.  
Colleen B. Laux  
Theodore J. Froncek

