COURT OF COMMON PLEAS
PROBATE DIVISION
HAMILTON COUNTY, OHIO

ESTATE OF	:	CASE NO. 955784
JOHN FINUCAN	:	
	:	
	:	OPINION AND ENTRY
	:	SETTING ATTORNEY FEES

This matter last came before Judge Wayne F. Wilke on September 2, 1997, concerning the motion of Administratrix Janet L. Lindeman to vacate this court's order from January 24, 1996, which authorized attorney fees to be paid to Robert B. Cash for services rendered to the Guardianship of John Finucan. Also before the Court was an application brought by Robert B. Cash for additional attorney fees for services rendered to the Estate of John Finucan. Present were Daniel G. Spraul, who represents Janet L. Lindeman, the Administratrix of the Estate of John Finucan (hereinafter "Administratrix") and William M. Gustavson, who represents Robert B. Cash (hereinafter "Applicant").

FACTS

The decedent herein, John Finucan, died intestate on December 8, 1995. Before his death, the decedent's mental and physical health had deteriorated to the extent that a guardianship became necessary. On May 22, 1995, the decedent's friend, Santa B. Moscoe filed an application to be appointed the decedent's guardian of his person and estate. A competing application was filed on June 23, 1995 by Reinhold Theis, Jr. to be appointed guardian of the decedent's estate. On that same day, the Applicant filed an entry of Appearance which indicated the Applicant represented John Finucan. While the

Administratrix caused the Court to seriously question whether the Applicant impermissibly solicited the client in this case, the Court need not make a specific finding on this point in order to adjudicate this controversy. On July 14, 1995, Star Bank, who was represented by Jon Hoffheimer, also filed an application to be appointed guardian of the decedent's estate.

At the hearing on the competing applications on December 7, 1995, the parties stipulated that Star Bank would act as guardian of the decedent's estate. The Magistrate took the evidence under submission and announced a decision on the applications for the guardian of the decedent's person would be rendered by December 17, 1995. The Court never appointed a guardian of the decedent's person, however, as the decedent passed away the day after the hearing, on December 8, 1995.

The same day of the decedent's death, the Applicant filed an application for Star Bank to administer the decedent's estate. In the papers filed along with Star Bank's application, the Applicant represented that the decedent had no next of kin. By December 13, 1995, the Applicant should have been put on notice that there were next of kin after receiving a telephone call from Jeffrey Scholles, who represents the decedent's maternal heirs. Further, the evidence that the decedent was survived by next of kin was insurmountable after a family tree was provided to the Applicant by counsel for the Administratrix on December 21, 1995.

Under R.C. §2113.06, any of a decedent's next of kin who reside in Ohio have priority to administer an estate over an applicant who is not a next of kin. Accordingly, the current Administratrix filed both an application to administer the Estate and a motion to remove Star Bank as Administrator. A hearing on those applications was set for

January 25, 1996. In light of the overwhelming evidence that the decedent was, in fact, survived by many next of kin, by January 2, 1996, Star Bank communicated to the Applicant its desire to voluntarily resign as Administrator of the Estate.

On January 24, 1997, the Applicant applied for, and the Court approved, an order authorizing payment of attorney fees to Cash, Cash, Eagen & Kessel in the amount of $8,861.26. However, the Applicant failed to notify any of the interested parties of this application.

With his client, Star Bank, having been removed as Administrator, the Applicant filed a claim against the Estate in the amount of $6,861.00 for services rendered in connection with his representation of Star Bank as Administrator of the Estate on April 24, 1996. This requested fee was for services rendered to the Estate from December 9, 1995 through April 10, 1996 and indicated that the Applicant performed 42.90 hours of work. This claim has been rejected by the Estate and is presently before the Court. The Administratrix has first, asked the Court to vacate the entry allowing attorney fees to Robert Cash in the amount of $8,861.26 and second, to deny the Applicant the attorney fees sought for his representation of the Estate of John Finucan. The Court makes the following decision based upon all of the evidence presented and upon the parties' written and oral arguments.

CONCLUSIONS OF LAW

Four distinct yet overlapping provision guide the practitioner when fees for probate matters are concerned. Under the Code of Professional Responsibility, Disciplinary Rule 2-106 governs fees for legal services in general. Next, R.C. §2113.36 is the statutory provision which allows for attorney fees in connection with the administration of an estate. Third, Rule 40 of the Ohio Rules of Superintendence applies specifically to attorney fees in probate matters. Last, Hamilton County Local Rule 40.1 deals with attorney compensation and is intended to augment the Ohio Rules of Superintendence. Counsel providing legal services in any probate matter are obligated to adhere to all four of the above provisions.

The Disciplinary Rules governing attorney fees are found in DR 2-106 and the cardinal rule is that a lawyer "shall not enter into an agreement for, charge, or collect and illegal or clearly excessive fee." In addition, DR 2-106(B) lists factors to be considered as guides in determining the reasonableness of a fee. Those factors are numerous and include the time and labor required, the novelty and difficulty of the questions involved, the amount of the fee and the results obtained. No hard and fast rule exists. Instead, each fee is to be based upon the totality of the situation.

For probate matters specifically, R.C. §2113.36 allows for counsel fees for assisting in the administration of an estate. By virtue of R.C. §2113.36, 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. That statute states, in part:

> "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. 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."

The inverse of this statute is that unreasonable fees are not permitted. It is incumbent upon a probate court to determine the reasonableness of any particular fee, again, based upon the totality of the situation.

Rule 40 (C) of the Ohio Rules of Superintendence and Hamilton County Local Rule 40.1(C) both provide that attorney fees may be allowed if there is a written application which sets forth the amount requested and will be awarded only after a proper hearing.[1] By local rule, a proper hearing requires notice to all persons interested or affected by the proposed fee.

The issues before the Court involve an application to set aside, under Civ. R. 60(B), the attorney fees received by the Applicant for services related to establishing the guardianship of John Finucan and a request to deny the Applicant's requested fee for services related to the Estate of John Finucan. With respect to attorney fees in a guardianship, the Ohio Supreme Court has stated that a probate court should apply a three-part test to determine if those fees are merited. *In re Guardianship of Allen* (1990), 50 Ohio St.3d. 142, 146. A court, in applying the test described in *Allen* is to determine whether the attorney acted in good faith, whether the services performed were in the nature of necessities, and whether the attorney's actions benefited the guardianship. *Id*. 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.

Based on the evidence presented in this case, it is difficult to find that Mr. Cash's services were either necessary or beneficial to the deceased ward. The decedent had an established relationship with an individual named Santa Moscoe to whom the decedent had granted a power of attorney over nine years before the guardianship was to be established. Santa Moscoe first applied to be appointed guardian of the person and estate of the decedent over one month before the Applicant filed his appearance in the guardianship case. The Applicant's position that he represented the decedent contradicts the information gained by the Court's own investigator that the decedent professed that Santa Moscoe should be his guardian. To the contrary, the Court Investigator's report indicates the decedent approved of the appointment of Santa Moscoe as his guardian. The Applicant failed to demonstrate, not only that he represented or needed to represent the decedent, but that his services were in the nature of necessities. The evidence shows that the Applicant's services did little to benefit the decedent and instead, thwarted the decedent's wishes and prolonged the appointment of a guardian by over six months.

Further, the Applicant wrongly believes that Star Bank "needed no authority from the Probate Court to pay a debt of the decedent which it was obligated to do in accordance §2117.25 [sic] of the Ohio Revised Code." Had the Applicant provided notice to all those affected by his request for fees in January of 1996, this matter would have been resolved long ago with much less resources expended on everyone's behalf. The Applicant's failure to provide the proper notice as stated above justifies an

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[1] Rule 40(C) of the Rules of Superintendence has since been changed to Rule 75(C), effective

examination into the circumstances surrounding the initial approval of the requested fee. The *ex parte* hearing held before the Magistrate flies in the face of the notice requirement whose purpose is to help ensure that due process standards are satisfied. While the Applicant believes the Administratrix' motion to set aside the fees related to the guardianship is either moot or *res judicata,* this is not the case. The Administratrix' motion is proper because Civ. R. 60 is a remedial rule to be liberally construed so that the "ends of justice may be served." *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20.[2]

Consequently, as the services performed by the Applicant were neither necessary nor beneficial, the Entry from January 24, 1996, granting attorney fees in the amount of $8,861.26 is hereby set aside. In the event that the Applicant has already received payment in that amount from the Estate of John Finucan, he is to repay to the Estate any moneys so received.

Similarly, the Applicant's request for attorney fees associated with his services to the Estate must be partially denied. By applying to open the Estate the very morning of the decedent's death and by ignoring his client's decision to withdraw as Administrator when it became apparent early on that there were indeed, next of kin, the Applicant's actions created much more work than was reasonably necessary. While the Applicant has demonstrated the amount of time he spent on Estate affairs, he has not demonstrated that the requested fee is fair and reasonable. Many of the services rendered served only

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July 1, 1997.

[2] Furthermore, since both the Applicant and his expert witness believe that "there is no such things (sic) as an 'Application to Confirm Authority to Pay Debt of Decedent'" (Applicant's closing argument, p. 2), then it follows that the resulting Entry on that application must be void *ab initio*.

to control the damage caused by the Applicant's haste to file, in the Applicant's own terms, an "immediate application" (Exhibit 26). Those services were curative and would have been unnecessary had the Applicant waited, even for a short time, to determine after the funeral if one of the decedent's next of kin would apply to administer the estate or if a will existed.

According to the timesheets submitted by the Applicant, he spent 42.90 hours representing the Administrator. The evidence indicated that only 5.85 hours actually benefited the Estate. Consequently, the Court orders that the Applicant's request for attorney fees in the amount of $6,681.00 be denied and instead, orders that attorney fees in the amount of $877.50, which represents remuneration for 5.85 hours, be paid to Robert C. Cash for the services he rendered to the Estate of John Finucan.

SO ORDERED.

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WAYNE F. WILKE, JUDGE

cc: Daniel G. Spraul
William M. Gustavson