

## PROBATE COURT OF HAMILTON COUNTY, OHIO

ESTATE OF VIRGINIA Y. HOPPE, DECEASED

CASE NO. 96-962317

### OPINION AND ENTRY SETTING ATTORNEY AND FIDUCIARY FEES

This matter came before Judge Wayne F. Wilke on November 6, 2000 regarding an application to pay attorneys fees and to set the fiduciary's commission as a condition precedent to filing of the final fiduciary's account. Present was James C. Curry, who was appointed Commissioner of this estate and who also serves as the attorney of record. Notice of the requested extraordinary fee was given to all residual beneficiaries so that all parties are before the Court.

Virginia Hoppe, the decedent, died testate on April 25, 1996. Pursuant to the terms of the decedent's last will and testament, Arthur G. Zoeklein was appointed Executor of the Estate and the will was admitted to probate on May 22, 1996. Because attorney and fiduciary fees should be justified by the quality of service provided to the Estate, a brief review of the record is in order.

The Form 1.0, "Surviving Spouse, Next of Kin, Legatees and Devisees", filed on May 21, 1996, improperly lists only Marlene Forman as a vested beneficiary under the decedent's will. In fact, there were numerous vested beneficiaries under Item II of the decedent's will. The Form 1.0 was subsequently amended on September 19, 1996.

The Executor was several months late in filing the Estate inventory. On September 1, 1996, the Court then sent notices to both the Executor and his attorney that

the inventory was overdue.<sup>1</sup> Shortly thereafter, the Executor filed an inventory indicating the estate consisted of two assets totaling \$631,110.74: cash and an annuity that had been reduced to cash.

Under R.C. §2109.30, a fiduciary must file an accounting within nine months of appointment. In this case, an accounting was due on February 22, 1997. On June 13, 1997, the Court granted the Executor an extension in which to file an account until July 21, 1997. On July 21, 1997, the Court granted the Executor yet another 30-day extension in which to file an account. On August 5, 1997, the Executor filed a first partial accounting and it indicates the Estate held assets, all of which were liquid, in the amount of \$651,879.38.<sup>2</sup>

Revised Code §2115.16 requires a probate court to set a hearing on an inventory for not later than one month after the inventory is filed. When the original inventory was filed on September 17, 1996, the Court set that inventory for hearing for October 8, 1996. Because the fiduciary failed to provide notice to all of the interested parties, the Court did not approve the inventory at that time. The Executor then filed the missing waiver over one and a half years after the Estate had been opened so the Court finally approved the Inventory on January 5, 1998.

Revised Code §2107.19 obligates a fiduciary to “promptly” give notice of the probate of the decedent’s will.<sup>3</sup> In this case, the decedent’s will was admitted to probate on May 21, 1996 but a Certificate of Service of Notice of Probate of Will was not filed until over a year and a half later, on December 30, 1997.

---

<sup>1</sup> At the time of his appointment, R.C. §2115.02 required a fiduciary to file an inventory within one month of appointment. That statute was amended in October of 1996 to expand the filing requirement to three months.

<sup>2</sup> The account recapitulation indicates the balance remaining in the fiduciary’s hands was \$658,546.05.

<sup>3</sup> The Ohio Supreme Court believes this step so important that it amended Sup.R. 59 to require this notification be completed by the fiduciary within 120 days of appointment or face removal.

Since R.C. §2109.30 requires an accounting to be filed at least yearly, the Executor was required to file a second account by August 5, 1998. The Executor had not filed an account by the end of August 1998 so that on September 1, 1998, the Court sent notices to the fiduciary and attorney that an accounting was overdue. On September 18, 1998, the Executor obtained another extension in which to file an account, and provided the explanation that “some cancelled checks were misplaced”. On December 9, 1998, the Court sent citations to both the Executor and his attorney indicating they must appear if an account was not filed by January 13, 1999. At the January 13, 1999 citation hearing, the Court granted the Executor a continuance in which to file the account until February 3, 1999. The Executor finally filed a second partial account on January 25, 1999.

Again in February of 2000, the Court sent notice to the fiduciary and attorney that an account was overdue. When an account had not been filed by the end of February, 2000, the Court sent citations to the fiduciary and attorney to appear on April 12, 2000. Despite numerous attempts to send notice to the Executor, Arthur G. Zoecklein apparently moved without informing the Court of his new address, in violation of Sup.R. 57(C). When neither appeared on April 12, 2000, the Court issued body attachments for both the fiduciary and attorney. Shortly thereafter, attorney James C. Curry informed the Court of Mr. Zoecklein’s poor health. The Court removed Arthur Zoecklein *sua sponte* and appointed Mr. Curry as commissioner to complete what should have been a rather uncomplicated task. Mr. Curry filed a third partial account on June 21, 2000.

The Court then granted Mr. Curry several continuances in which to file his final account. Mr. Curry’s proposed attorney fees exceeded the Court’s guidelines so that consistent with local rule, a hearing was to be held. On July 13, 2000, Mr. Curry filed his application to pay his attorney’s fees and the final fiduciary commission. Despite the

deplorable manner in which this estate has been administered, former fiduciary Arthur Zoecklein was granted a partial fiduciary commission of \$5,488.00 in October of 1997. There is approximately \$70,726.45 plus interest left in the Estate checking account. Mr. Curry proposes an attorney fee of \$53,085.00 with the balance to the fiduciary. For the reasons below, the Court denies that application and sets the fees as described below.

The determination of attorney fees and fiduciary commissions requires two separate tests. The test for attorney fees is one of reasonableness. The test for the fiduciary commission is whether the fiduciary fulfilled the duties statutorily imposed on that fiduciary.

With respect to attorney's fees, this court is granted exclusive jurisdiction to determine the reasonableness of attorney's fees that are to be paid by a fiduciary and allowed as part of the expenses of administration. *In re Estate of Cercone* (1969), 18 Ohio App.2d 26, 31; see, also, *In the Matter of the Estate of Schumacher* (June 14, 1996), Hamilton App. No. C-950638, unreported. Several distinct yet overlapping provisions concern the payment of attorney fees for services related to a decedent's estate. The actual authority for the payment of fees is codified at R.C. §2113.36, which provides, in part:

“When an attorney has been employed in the administration of the 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.”

Superintendence Rule 71 provides guidance with respect to the payment of attorney fees for probate matters and it refers the practitioner to Disciplinary Rule 2-106 under the Code of Professional Responsibility.

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 services, the nature and length of the professional relationship with the client, and the amount involved and the results obtained. While the amount of time expended is certainly a factor, it is not the only factor to be considered.

Last, Hamilton County Probate Court Local Rule 71.1(H) serves as a guide in determining the reasonableness of a fee for legal services of an ordinary nature rendered as attorney for the fiduciary in the complete administration of a decedent's estate. At the time this estate was opened, the guideline fee would approximate the following:

|                  |   |             |
|------------------|---|-------------|
| \$100,000 x 4.5% | = | \$ 4,500.00 |
| \$300,000 x 3.5% | = | \$10,500.00 |
| \$283,955 x 2.5% | = | \$ 7,098.88 |
| total            | = | \$22,098.88 |

While this court's guidelines are not intended as a schedule of minimum or maximum fees to be charged, the guideline fee provides a yardstick of a fee's reasonableness. The attorney seeking a fee still has the burden to demonstrate the fee is reasonable. 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. Mr. Curry has failed to demonstrate that his services to the Estate were worth \$53,085.

Disciplinary Rule 2-106 requires an assessment of the quality of legal work to help determine a fee's reasonableness. From the outset, this estate administration has

been plagued by errors, omissions, delays and sloppy work. While the Executor's advancing age and declining health certainly affected his ability to carry out his duties, he necessarily relied upon his attorney for guidance and expertise. The record itself reflects the quality of that legal advice.

There is nothing in the record to indicate that there were any unusual legal problems or issues for this estate. There was no will contest, exceptions to the inventory, will construction, unidentified heirs, or difficult assets (such as abandoned real estate) with which to deal. There was no protracted litigation of any kind. In fact, all of the assets were liquid and should have presented no problem whatsoever to the administration of this estate. While estate income tax returns were required, an estate like this consisting predominantly of cash is a dream to most probate attorneys. The heirs, once they were properly notified of their status as beneficiaries, have been compliant and agreeable. In short, there is nothing extraordinary in the record to justify an extraordinary fee.

Indeed, what stands out about this estate is how poorly it has been administered. Although its administration should have been straightforward given the level of cooperation provided by the beneficiaries, the Court has had to remind and cite the Executor and his attorney on numerous times to complete the statutorily-mandated duties. In addition, the administration of this estate seemed to lack direction and merely ambled along with little purpose. As an example, Mr. Curry's time records indicate he was involved with the inventory of the decedent's safe deposit box in August of 1997, almost fifteen months after the decedent's death. The decedent's nursing home bill was still being addressed until July of 1997, presumably for the first time. Issues like those reasonably should have been addressed immediately after the decedent's death. The

Estate could and should have been completely administered in much less than the nearly 5 years that it has taken. Given all of the circumstances surrounding the Estate's administration, the Court finds that a reasonable attorney fee for the complete administration of this estate amounts to \$22,000.00.

With respect to the fiduciary's commission, R.C. §2113.35 provides for a commission of the following amount:

|                |   |             |
|----------------|---|-------------|
| \$100,000 x 4% | = | \$ 4,000.00 |
| \$300,000 x 3% | = | \$ 9,000.00 |
| \$283,955 x 2% | = | \$ 5,679.10 |
| total          | = | \$18,679.10 |

Pursuant to R.C. §2113.35, if the probate court finds that an executor has not faithfully discharged his duties, the court may deny the executor any compensation or may reduce the compensation. At one point, Mr. Zoecklein had actually resigned as executor then later asked the Court to permit him to continue serving. He was paid \$5,488.00 in October of 1997. Mr. Zoecklein was removed in May of 2000 due to his failing health and apparently had not performed any duties for the Estate in some time.

Again, the record indicates the manner in which this estate was administered and directly reflects the manner in which the Executor performed his duties. The Court finds that the Executor, Arthur Zoecklein, has been fully compensated for the services he provided to the Estate and is entitled to no additional compensation. The Court further finds that because of his frailties, Mr. Zoecklein abdicated his responsibility for all intents and purposes and that Mr. Curry had to perform duties that would have otherwise been performed by Mr. Zoecklein. For this reason, Mr. Curry should be compensated for some

of these duties and therefore, is to receive \$5,000.00 as compensation for the fiduciary-type services he rendered to the estate.

Accordingly, the Court orders the Commissioner to pay \$22,000.00 to James C. Curry as full payment for attorney fees. The Commissioner is to pay \$5,000.00 as the balance of the fiduciary commission to James C. Curry. The Commissioner is to account for these payments on his final account and to distribute the remainder of the Estate assets in accordance with the terms of the decedent's last will and testament.

SO ORDERED.

---

WAYNE F. WILKE, JUDGE

cc: James C. Curry  
Arthur Zoecklein  
Marlene Forman  
Women's Club  
American Diabetes Assn  
Covenant First Presbyterian Church  
Charles Stewart  
Deaconess Hospital  
Cincinnati Assn for the Blind