

PROBATE COURT OF HAMILTON COUNTY, OHIO

ESTATE OF PHYLLIS E. McKIBBEN, DECEASED

CASE NO. 95-952062

OPINION AND ENTRY SETTING ATTORNEY FEES

This matter came before Judge Wayne F. Wilke on September 25, 2000 regarding a contested application for extraordinary attorney fees. Present were James S. Moskowitz on behalf of the Executor and John W. Eilers on behalf of Kay Samuels and Dianne M. Watson (“the Objectors”).¹ The Court ordered closing arguments to be submitted in writing and given their submissions, this matter is ripe for decision.

FACTS

Phyllis E. McKibben, the decedent, died testate on April 21, 1995. She was survived by three adult daughters, to wit: Joan I. McKibben, Kay Samuels and Dianne Stewart. Pursuant to the decedent’s will, which was admitted to probate on May 2, 1995, Joan I. McKibben was appointed executor of the estate that same day. Shortly thereafter, the Objectors retained counsel since the Objectors’ interests were contrary to those of the Executor.

Under the terms of the decedent’s will, the Executor was devised the decedent’s interest in her real estate and was bequeathed the decedent’s automobile and all of the decedent’s tangible personalty. The intangible property was to be distributed to Firststar Bank as Trustee under the decedent’s inter vivos trust agreement (the “Trust”). All three

¹ This court strives to eliminate any gender-based distinctions of fiduciaries, consistent with the standard established by the Ohio Supreme Court. See, e.g. *Minton v. Honda* (1997), 80 Ohio St.3d 62, footnote 1.

daughters are beneficiaries under the Trust.

On October 23, 1995, the Objectors filed a complaint to contest the validity of the decedent's will. That action was dismissed in May of 1996. On November 14, 1995, attorney James H. Moskowitz entered his appearance as special counsel for the Executor. Mr. Moskowitz's services were intended to address the will contest and the exceptions to the inventory and "all other matters involving objections raised or exceptions taken" by the Objectors. A different attorney, who was retained at the beginning of the Estate's administration, was to handle all of the routine administrative affairs. The Executor contends Mr. Moskowitz was retained as sole attorney for the Estate on or about May 22, 1996. However, a substitution of counsel was not filed until March 24, 1999.

The Executor filed her inventory on July 31, 1995, and it indicates the Estate owned assets totaling \$189,099, including the decedent's real estate appraised at \$159,000. Kay Samuels and Dianne Stewart filed exceptions to the inventory, alleging *inter alia* that at least 33 items of personalty were omitted and they also asked for a reappraisal. They later amended their exceptions to allege that the Executor failed to list over \$240,000 in certificates of deposit, savings accounts and an Individual Retirement Account. The Court, on November 6, 1995, ordered the Executor to allow her sisters to view the decedent's residence. After the reappraisal of two items, the Court ordered the inventory to be amended. The amended inventory, filed on February 6, 1996, changed the value of the Estate by \$8,919.10, to \$198,018.49. The Objectors filed exceptions to the Amended Inventory on February 9, 1996, reiterating their allegation that approximately \$240,000 in liquid assets should be listed as belonging to the Estate. The

Estate contended the property was titled as joint property with rights of survivorship and that it was properly omitted from the amended inventory. On May 16, 1996, the Objectors withdrew their exceptions to the amended inventory.

On January 24, 1997, the Objectors moved to strike their entry withdrawing their exceptions. The decedent apparently transferred the real estate listed on the inventory to the trustee of the Trust. On March 17, 1997, the Court ordered the real property to be eliminated from the inventory, so that the total probate value of the Estate was reduced to \$39,018.49. The parties agreed, on October 6, 1997, that the reference to the decedent's real estate in the fiduciary's partial account from September 11, 1997 should also be stricken. The account from September 11, 1997 indicates that the assets left in the fiduciary's hands amounted to \$4,436.57.

On October 8, 1998, the Executor received a notice that an annual accounting was overdue. After obtaining an extension, she filed a partial account on February 11, 1999. That account indicated no additional assets came into her hands but that she distributed the remaining assets in the amount of \$4,545.04.

On April 3, 2000, the Court again sent the Executor notice that she was late in filing an accounting. When she had still not filed an account by May 1, 2000, the Court sent her and her attorney a citation to appear for failing to file an account. She then filed an account on June 13, 2000, which indicated that no assets had come into her hands and that no disbursements had been made.

On August 8, 2000, the Executor filed an application for extraordinary attorney fees for Mr. Moskowitz in the amount of \$12,643.75 plus costs of \$758.00 for a total of

\$13,401.75. The Objectors contend the application should be denied in its entirety or at most, Mr. Moskowitz may be paid on the basis of *quantum meruit*.

CONCLUSIONS OF LAW

This court is granted exclusive jurisdiction to determine the reasonableness of attorneys' 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 Mary Florence 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. For this estate, the guideline fee would approximate the following:

$$\begin{array}{rcl} \$ 39,694.43 \times 5.5\% & = & \$2,183.19 \\ \$513,704.30 \times 1.0\% & = & \$5,137.04 \\ \text{total} & = & \$7,320.23 \end{array}$$

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.

One method to gauge the reasonableness of a fee under DR 2-106(B) is to examine the time and labor required. The fee application indicates Mr. Moskowitz expended approximately 134.25 hours on this matter.² One of the issues of this case is whether the Estate should bear the legal expenses for services rendered by an attorney but which benefited one particular beneficiary. Before answering that question, the Court will review the fee application itself.

The application contains the note that the "total time does not include time spent by applicant's attorney assisting her in purchasing Decedent's property" but a review of

² The Court's review indicates 132.80 hours were expended in total.

the records reveals otherwise. At least 6.75 hours were rendered in connection with Joan I. McKibben's purchase of her mother's home.³ Mr. Moskowitz's fee application avers that he spent 84.25 hours working to transfer the property into the estate after (unilaterally) determining "it was [the] decedent's intention that the property pass to [the Executor]". The application also contends Mr. Moskowitz expended 12 hours pursuing a legal malpractice claim. From Mr. Moskowitz's timesheets, it appears that another attorney was involved in that action. (Incidentally, that attorney has not submitted a fee application with this court.) Those three topics areas alone account for 103 hours of the attorney's time. Indeed, from what can be determined from the timesheet entries, it appears that only between 30.25 and 26.75 hours were spent on matters unequivocally related to the administration of the Estate.⁴

Extraordinary legal services may be paid from the Estate if those services actually benefited the Estate. *In re Keller* (1989), 65 Ohio App.3d 650. In *Keller*, the Eighth District Court of Appeals recognized a probate court's equitable powers under R.C. §2101.24(C) and determined that "equity and common sense" dictate allowing a beneficiary to have her legal expenses paid from the estate. *Id.* at 656. The court held that "in unusual circumstances *** a probate court may allow payment of reasonable fees from the estate to an attorney employed by an heir or beneficiary where such attorney's

³ Entries from 5/5/97; 5/6/97; 2/19/98; 8/5/98; 8/2/99; 9/14/99; 9/21/99; 9/23/99; 9/24/99; and 9/28/99.

⁴ These tasks included obtaining extensions, filing the amended inventory, preparing and filing accounts, filing notices and correspondence to counsel on the following dates: 5/8/96; 5/10/96; 5/29/96; 6/6/96; 6/12/96; 6/13/96; 6/20/96; 6/24/96; 6/25/96; 6/26/96; 6/27/96; 7/25/96; 7/26/96; 7/30/96; 8/6/96; 8/8/96; 8/16/96; 8/20/96; 12/17/96; 2/6/97; 3/6/97; 3/7/97; 3/17/97; 6/11/97; 8/12/97; 8/28/97; 9/2/97; 9/4/97; 9/6/97; 9/11/97; 9/12/97; 9/24/97; 10/6/97; 10/26/98; 10/27/98; 10/28/98; 2/8/99; 2/10/99; 2/11/99; 3/15/99; 3/16/99; and 3/24/99. Mr. Moskowitz's memorandum from Sept. 22, 2000 indicates he expended 30.25 hours on administrative matters. The Court calculated 26.75 hours but will resolve the ambiguity in Mr. Moskowitz's favor.

services were necessarily and successfully rendered to the benefit of the whole estate.” *Id.* Applying the “common fund” theory of recovery to a probate matter, the court in *Keller* determined that persons who employ attorneys for the preservation of a common fund may be entitled to have their attorney’s fees paid out of that fund but that the decisive factor was whether those services benefited the estate. *Id.* at 657. In this case, only a small portion of Mr. Moskowitz’s services actually benefited the Estate. The majority of his services only benefited Joan I. McKibben individually.

The fact that Joan I. McKibben serves as Executor and is also a beneficiary of the Estate clouds the fee analysis somewhat. Even still, the Ohio Supreme Court has held that attorney fees will not be paid from an estate where a party participated in litigation solely in attempts to gain portions of the estate for itself. *Kirckbride v. Hickok* (1951), 155 Ohio St. 165, 170. The efforts expended by Mr. Moskowitz, however, seem to do just that. They advanced Joan I. McKibben’s interests to the detriment of Ms. McKibben’s sisters.

On its very face, the devise of the decedent’s real estate adeemed since the property was transferred to the decedent’s Trust almost ten months before her death. The principle of ademption refers to a “taking away” of a specific devise or bequest and occurs when the object of the legacy ceases to exist. *In re Estate of Hegel* (1996), 76 Ohio St.3d 476, 477, citing *Bool v. Bool* (1956), 165 Ohio St. 262, 267. Ademption means if a testator makes changes to her estate and does not alter her will to accommodate those changes, the results are deemed intended since the testator could have made the necessary adjustments. 76 Ohio St.3d 478, (Stratton, J., dissenting). The real estate known as 8388 Arborcrest was transferred in June of 1994 but the decedent

did not change her will in the intervening months. The Executor independently determined the decedent “intended” that the real estate pass through the estate. Without a judicial decree ordering otherwise, however, the Executor had no obligation to take steps to transfer the property out of the Trust and into the Estate. The Applicant has not demonstrated that the efforts to retitle that property in the name of Joan I. McKibben alone benefited the Estate.⁵

Similarly, tests for recovery under the common fund theory have not been met for the other issue, the malpractice claim. Under *Keller, supra*, the services must be necessarily and successfully rendered to the benefit of the estate. Without even examining the necessity of the malpractice claim to the Estate, the Executor’s efforts in this arena were unequivocally unsuccessful. The fee for Mr. Moskowitz’s services relating to the malpractice claim shall not be paid from the Estate.

Disciplinary Rule 2-106 requires an assessment of the quality of work to help determine a fee’s reasonableness. Since the time Mr. Moskowitz served as sole counsel for the Estate, the Executor was late in filing her account on two separate occasions, necessitating even a citation to appear in May of 2000. For such a small estate, the filing of an account should not have presented any challenges.

Under all the circumstances of this case, the Court finds the reasonable value of Mr. Moskowitz’s services that are to be paid from the Estate amount to \$3,018.75. This amount consists of the amount of time that actually benefited the Estate as recorded in the

⁵ One of the questions of this case that will go unanswered is why the former attorney, who provided legal services to Phyllis McKibben, included the real property on the original inventory. Because of recurring problems involving the title to real property, the Court, in September of 1998, included new Local Rule 61.2(A) that obligates the attorney for the estate to examine record title to the real estate.

timesheets submitted by Mr. Moskowitz.⁶ The Court's guideline fee cannot be strictly applied because many of the Executor's duties were completed before Mr. Moskowitz became attorney of record, even the *de facto* attorney for the Estate. The former attorney assisted in the preliminary steps in the Estate's administration, such as the Executor's appointment, the admission of the will, the appropriate service of documents, many of the issues relating to the inventory and reappraisal of property and the preparation and filing of the Estate Tax Return.

Accordingly, the Executor is hereby ordered to pay from the Estate \$3,018.75 to Mr. Moskowitz as payment for his attorney's fees. The Executor is also ordered to reimburse Mr. Moskowitz administrative expenses in the amount of \$178.00.⁷ The Executor must indicate these payments on her final accounting and she must also show the source of the payment, whether from the Trust or herself individually.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: James S. Moskowitz / 64190
John W. Eilers / 8329

⁶ 29.75 hours at \$100 per hour; .25 hours at \$50 per hour; and .25 hours at \$125 per hour.

⁷ Mr. Moskowitz's application seeks reimbursement for \$758.00. The Court denies filing fees paid in the amount of \$420 on 5/22/97; \$150 on 8/10/99; and \$10 on 9/22/99 as the expenditure of these costs did not benefit the Estate.