

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

JEANNE A. BERTOIA, Executor	:	CASE NO. C-97349
of the Estate of John D. Schwertman,	:	
deceased	:	
	:	<u>OPINION AND ENTRY</u>
	:	<u>SETTING ATTORNEY FEES</u>
Complainant	:	
	:	
-vs-	:	
	:	
MARILYN POYNTER	:	
	:	
Defendant	:	
	:	

This matter came before Judge Wayne F. Wilke on August 11, 1998, concerning Complainant Jeanne A. Bertoia's application for attorney's fees. Present were Ralph J. Conrad, for the Complainant, and Patrick J. Hanley, who represents Defendant Marilyn Poynter.

FACTS

While the facts of this case have been previously stated, the Court will provide a short synopsis for purposes of clarity and completeness. The decedent herein, John D. Schwertman, died testate on May 13, 1997, survived by two adult children, to wit: Marilyn Poynter and Jeanne Ann Bertoia. On May 19, 1997, Defendant Marilyn Poynter filed an application to admit to probate a will executed by the decedent in 1989 (the

"1989 will") and that nominated Defendant Poynter to serve as executor.¹ That same day, Marilyn Poynter was, in fact, appointed Executor of the Estate of John D. Schwertman.

On May 27, 1997, Complainant Jeanne A. Bertoia submitted a later will (the "1996 will") to probate. The 1996 will nominates Jeanne A. Bertoia to serve as executor. This 1997 will was admitted to probate and Complainant Bertoia was appointed Executor of the Estate of John D. Schwertman on May 27, 1997.

On June 4, 1997, Complainant Bertoia filed a complaint for the concealment of assets pursuant to R.C. §2109.50. The Executor alleged that the former fiduciary concealed, embezzled, conveyed away and had wrongfully possessed property belonging to the Estate. The Complainant further alleged that Defendant Poynter wrongfully applied to be appointed executor of the decedent's estate since she allegedly knew of the 1996 will's existence.

This court found that the Defendant knew she was no longer named as executor of the decedent's estate, that the decedent had changed the testamentary disposition of his will and that the decedent had named the Complainant as executor of his will. The decedent made it clear to the Defendant his intention to change fiduciaries from Marilyn Poynter to Jeanne A. Bertoia. This court found the Defendant had no justifiable reason to apply to be appointed executor under the 1989 will.

This court also found that the Defendant never contacted the Complainant to inform her that she had been appointed executor of their father's estate, nor did she inform the Complainant that the 1989 will had been admitted to probate. While the

¹ This court has adopted the Ohio Supreme Court's goal, announced in footnote 1 of *Minton v. Honda of America Manufacturing* (1997), 80 Ohio St.3d 62, which aspires to utilize gender-neutral terms when possible.

Defendant acted as executor, she was able to remove documents and items of personality that belonged to the estate.

CONCLUSIONS OF LAW

In this court's Opinion and Entry Finding Defendant Guilty of Concealing Assets from December 29, 1997, the Court found the Defendant's conduct amounted to wrongful or culpable conduct that justified a finding that she is guilty of concealing assets under R.C. §2109.50. Revised Code §2109.52 requires a probate court to assess the amount of damages to be recovered if a defendant is found guilty of concealment. Revised Code §2109.52 further provides that in cases where the defendant is not a fiduciary,

"the probate court shall forthwith render judgment in favor of the fiduciary *** against the person found guilty, for the amount of the moneys or the value of the chattels *** concealed, embezzled, conveyed away, or held in possession *** and all costs of such proceedings or complaint."

Finding that the chattels the defendant was guilty of concealing were of sentimental value only, the Court assessed the costs of this complaint against Defendant Poynter. The Court ordered the parties to set a hearing regarding the value of the legal services rendered to Jeanne A. Bertoia and the costs incurred in prosecuting this action.

On March 6, 1998, counsel for Complainant Bertoia filed an application for an award of attorney's fees to the firm of Wood & Lamping as costs of the complaint. The application requested attorney's fees in the amount of \$28,485.00 plus costs in the amount of \$2,146.33. While the Defendant contends attorney fees are not part of the "costs" as included in R.C. §2109.52, that contention is incorrect. Courts do not have the authority to ignore, in the guise of statutory interpretation, the plain and unambiguous language in a statute. *Bd. of Edn. v. Fulton Ct. Budget Comm.* (1975), 41 Ohio St.2d 147, 156.

"Costs", as used in R.C. §2109.52, is unambiguous. In its plain meaning, "costs" means those expenses and damages incurred by a complainant, less the amount of the value of anything restored or returned in kind to the estate. If "costs" were not meant to encompass attorney's fees, the Estate would have to bear them. Surely the General Assembly did not intend for such inequitable results in enacting R.C. §2109.52. For the reasons that follow, however, the Complainant's application shall only be partly approved.

While the Court ordered the Defendant to pay the Complainant's costs, implicit in that order was that those costs would be reasonable. Under R.C. §2101.24(C), a probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court. As a court of equity, it would be an unjust result indeed for Defendant Poynter to bear total responsibility for the sizable legal fees incurred at her sister's behest. While Defendant Poynter's actions amounted to culpable or wrongful conduct, the limits of the damages to be assessed against her are not boundless.

Complainant Bertoia was responsible for engaging the services of Wood & Lamping. As soon as it became apparent that her sister concealed little, if anything, of value, Jeanne W. Bertoia should have recognized that the law of diminishing returns and not the law of Ohio should have controlled her conduct. Ms. Bertoia failed to perform a cost-benefit analysis and to control the conduct of her attorneys when prudence called for her to do so. This court simply cannot justify an award of \$30,631.33 when the assets recovered were of minimal market value. Under the Code of Professional Responsibility, DR 2-106(B)(4) provides that one of the factors in determining a fee's reasonableness is

the amount of time involved and the results obtained. The results obtained in this case simply do not justify the requested fee.

Considering all of the facts and circumstances of this case, a more reasonable fee would be one-third of the requested fees and one-third of the requested costs. Accordingly, Defendant Marilyn Poynter is hereby ordered to pay attorney's fees in the amount of \$9,495.00 to Wood & Lamping and costs in the amount of \$715.45.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: Ralph J. Conrad
Patrick J. Hanley