COURT OF COMMON PLEAS
PROBATE DIVISION
HAMILTON COUNTY, OHIO

ESTATE OF	:	CASE NO. 922641
STELLA MAE WESLEY	:	
	:	<u>OPINION AND ENTRY</u>
	:	<u>SETTING ATTORNEY</u>
	:	<u>FEE</u>
	:	

This matter came before Judge Wayne F. Wilke on November 20, 1996, regarding an application for authority to pay attorney fees. Present were Frank M. Diedrichs, Applicant herein and attorney for the Estate; and Co-Executors Robert L. Wesley and Clifford Wesley, both of whom oppose the fee.

FACTS

The decedent herein, Stella Mae Wesley, died testate on March 24, 1992. The decedent's will was admitted to probate on June 9, 1992, the same day that Clifford Wesley and Robert Wesley were appointed Co-Executors. The decedent's will provided that the estate residue be distributed to the decedent's eight children or their issue *per stirpes*. Two of the decedent's children predeceased her, so that at the time of her death, the residual beneficiaries of her estate were six of the decedent's children and seven of her grandchildren.

On September 14, 1992, the Inventory of this estate was filed, indicating that the Estate contained assets valued at $201,357.04. On October 11, 1996, Frank M. Diedrichs filed an application for authority to pay attorney fees in the amount of $12,000.00. Applicant Diedrichs characterized a portion of this fee as extraordinary since the

requested fee exceeded this court's guideline. In support of his application, Mr. Diedrichs filed timesheets indicating the effort expended on this case by the firm of Cors & Bassett. Those timesheets indicate that 132.80 hours were spent on this estate. Furthermore, Mr. Diedrichs' application indicated that services worth an additional $1,000.00 were required to complete the estate administration. The Applicant stipulated that he and the Co-Executors failed to enter into a written fee agreement regarding the calculation of the fee to be charged to the estate.

The Court held a hearing regarding the fee application on November 20, 1996, and the Applicant showed that all thirteen residual beneficiaries had been notified of the hearing. None of the beneficiaries filed consents to the requested fee. The Co-Executors appeared and objected to the requested fee, believing it to be unreasonable. The Court was necessarily obligated to set a fee as the parties were unable to agree as to what would amount to a reasonable fee.

CONCLUSIONS OF LAW

The statutory basis for the allowance of attorney fees in probate matters is found in R.C. §2113.36. That section provides

> "[w]hen 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."

By virtue of R.C. §2113.36, this court is granted exclusive jurisdiction to determine the reasonableness of an attorney fee that is to be paid by a fiduciary and is allowed as part of the expenses of administration. *In re Estate of Cercone* (1969), 18 Ohio App.2d 26, 31.

A court may examine numerous factors when called upon to investigate the reasonableness of any given 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; and the amount of the fee and the results obtained. Each fee is to be based upon the totality of the situation. As described below, another tool used as a indicator of reasonableness is this court's guideline fee.

The Rules of Superintendence allow probate courts to adopt local rules that expand those promulgated by the Ohio Supreme Court. C. P. Supt. R. 44(A) states that "[t]he probate division of the court of common pleas may adopt supplementary rules concerning local practice in their respective courts which are not inconsistent with these rules. Such rules shall be filed with the Supreme Court." The Probate Court of Hamilton County has adopted and published two such rules that directly concern the subject of attorney fees and have a substantial impact upon the case *sub judice*. These Local Rules have been filed with the Ohio Supreme Court in accordance with C.P. Sup. R. 44(A).

At the time this estate was opened, this court's written policy with respect to attorney fees was embodied in the Local Rules that became effective July 1, 1991. Local Rules 40.1(C) and 40.1(E)[1] were adopted over eleven months before this estate was opened. Local Rule 40.1(C) [now Local Rule 40.1(H)] provided a guideline for

[1] Among others, these two rules were renumbered by the version of Local Rules adopted by this court effective July 1, 1994. The substance of the two provisions discussed above are now contained in Local Rules 40.1(A) and 40.1(H), respectively.

determining the reasonableness of attorney fees to be charged to complete the administration of a decedent's estate. The guideline specifically stated that it was not to be considered or represented to clients as a schedule of minimum or maximum fees, but it was designed to provide a measurable standard of review based upon the ranges of attorney fees observed by the Court.

Pursuant to Local Rule 40.1, the guideline fee for this estate would be the following:

First	$100,000	x 4.5%	=	$4,500.00
Next	$120,179.06	x 3.5%	=	4,206.27
		total fee	=	$8,706.27

Consequently, the requested fee of $12,000.00 exceeds the guideline by $3,293.73.

More problematic for this case, however, is that counsel and the Co-Executors failed to enter into a written attorney fee agreement. Effective July 1, 1991, Local Rule 40.1(E) required that

> "[c]ounsel shall enter into a written fee agreement with the fiduciary for the estate. Fees based upon a compensation formula shall be specifically delineated within the contract. In fee contracts based upon an hourly rate, counsel shall consider all relevant factors under the Code of Professional Responsibility in establishing the hourly rate and shall give an estimate of the total fee."

Counsel's failure to comply with this requirement created two problems. First, in the absence of a written agreement, the Court is obligated to perform a quantum meruit analysis. Second, neither the Co-Executors nor any of the residual beneficiaries had any meaningful concept of what the attorney fees for this estate would be. The Court rule requiring a written fee agreement is designed to "de-mystify" the issue of attorney fees and to provide mutual protection to the attorney for the estate and to the beneficiaries.

This approach sets realistic expectations at the begining of the attorney-client relationship and usually avoids time-consuming confrontations at the conclusion of the estate.

The Court finds the nature of the administration of this estate does not justify an extraordinary fee sought by Applicant. For example, there was no will contest; there were no exceptions to the inventory or to any of the accounts; the heirs were identified and easily located; the estate was solvent and there were no disputes with regard to estate debts. Simply put, there were no novel or difficult issues to be resolved.

An examination of the services provided and the results obtained indicate $12,000.00 would be an unreasonably high fee. The Court finds that the reasonable value of services rendered to the Estate of Stella Mae Wesley by Applicant is $8,706.27 and therfore orders the Co-Executors to make payment to Frank M. Diedrichs in that amount.

SO ORDERED.

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WAYNE F. WILKE, JUDGE

cc: Frank M. Diedrichs
Clifford Wesley
Robert L. Wesley