

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of PAUL K. COUSINO, deceased.

JOHN B. KIEFER, Temporary Personal
Representative of the Estate of PAUL K. COUSINO,
Deceased,

UNPUBLISHED
October 10, 1997

Petitioner-Appellee,

v

PAUL W. COUSINO,

Nos. 194005; 194118
Macomb Probate Court
LC No. 89-096297-SE

Respondent-Appellant.

Before: Smolenski, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

In Docket No. 194005, respondent appeals a probate court order authorizing petitioner to list and sell the real estate and a mobile home owned by the estate. In Docket No. 194118, respondent appeals as of right from two orders entered by the probate court: an order allowing petitioner's third annual account and an order imposing sanctions in the amount of \$63,232 against respondent for vexatious proceedings, the reasonable expenses incurred, including fiduciary and attorney fees, and \$500 in costs for an unpaid sanction imposed in a previous appeal.

We affirm the orders allowing the account and authorizing petitioner to list and sell the real estate. We also affirm the order imposing sanctions to the extent that those sanctions include expenses for frivolous claims filed in the probate court pursuant to MCR 2.114(F). To the extent that the order included sanctions for vexatious appeals before this Court, we note that the probate court lacked authority to impose sanctions. However, this Court, possessing such authority, sanctions respondent pursuant to MCR 7.216(C)(1) for vexatious appeals and proceedings in this Court and remands pursuant to MCR 7.215(C)(2) for a determination of actual and punitive damages.

This case concerns the estate of respondent's father, Paul K. Cousino. Respondent and his sister are the two principal beneficiaries of the estate. The petition for commencement of probate proceedings was filed on July 7, 1986. However, because of numerous objections and appeals filed by respondent, the case has not yet been concluded.

Petitioner was appointed as personal representative in October 1992 and temporary personal representative in April 1993. In February 1996, petitioner filed petitions with the probate court seeking authorization to list and sell the real estate, allowance of the third account, and sanctions against respondent for filing frivolous appeals. The probate court granted the petitions.

This Court reviews the actions of the probate court for an abuse of discretion. *In re Rice Estate*, 138 Mich App 261, 270; 360 NW2d 587 (1984). Because a trial court's decision to award sanctions pursuant to MCR 2.114 involves findings of fact, this Court reviews the trial court's ruling to determine whether it was clearly erroneous. *Contel Systems v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990).

Respondent first argues that petitioner cannot recover his fees because an executor cannot be paid from the estate for following a case to higher courts. MCL 700.543; MSA 27.5543 enables a fiduciary of an estate to employ an attorney to perform legal services on behalf of the estate and provides that the attorney shall receive reasonable compensation for those services. To be chargeable to the estate, the services must have been beneficial to and on behalf of the estate. *In re Valentino*, 128 Mich App 87, 94-95; 339 NW2d 698 (1983). For example, this Court has allowed an executor to recover from the estate fees incurred in defending his position as executor, provided that there was no wrongdoing on the part of the executor. *In re Hammond Estate*, 215 Mich App 379, 387; 547 NW2d 36 (1996); *In re Humphrey Estate*, 141 Mich App 412, 441; 367 NW2d 873 (1985). Therefore, the probate court did not abuse its discretion in allowing petitioner's third annual account, including fiduciary and attorney fees for services rendered while defending his position as personal representative.

This Court has also concluded that MCL 700.543; MSA 27.5543 does not allow the estate to pay attorney fees incurred in defending a petition for attorney fees. *In re Sloan Estate*, 212 Mich App 357, 360-361; 538 NW2d 47 (1995). These "fees for fees" claims are normally not recoverable because they do not benefit the estate by increasing or preserving the estate's assets. *Id.* at 363. However, this Court also noted that the probate court may be authorized to award these costs in exceptional circumstances:

Nonetheless, where *extraordinary* fees and costs are incurred because of an opposing party's fraud, unjustified objections raised in bad faith, or other extraordinary circumstance, the probate court is authorized to impose appropriate sanctions via various fee-shifting mechanisms. See, e.g., MCR 5.114; MCR 2.114(B)-(F). [*Id.* at 363, n 2.]

We conclude that the present case presents extraordinary circumstances in which it is appropriate to award fees and costs as a sanction against respondent pursuant to MCR 2.114(F). Respondent's

actions in this case have turned a straightforward matter into a proceeding which has lasted more than ten years. Respondent has appealed almost every order entered by the probate court during that period, filing some eleven appeals in this Court alone. MCR 2.114(F) allows the court to impose sanctions for frivolous claims. Costs awarded may include court costs and reasonable attorney fees. MCL 600.2591(2); MSA 27A.2591(2). Therefore, we conclude that while fees for fees are not recoverable under MCL 700.543; MSA 27.5543, the probate court neither abused its discretion nor clearly erred in imposing sanctions against respondent for frivolous claims filed in the probate court.

However, the probate court did not have authority to impose sanctions for vexatious appeals pursuant to MCR 7.216(C)(1). That authority lies with this Court. We find that the appeals filed by respondent have been taken to delay the closing of the estate without any reasonable basis for believing a meritorious issue was involved and were grossly lacking in the requirements of propriety. Therefore, this Court sanctions respondent for the reasonable expenses incurred by respondent's vexatious appeals. Pursuant to MCR 7.216(C)(2), we remand to the probate court to determine actual costs incurred by the estate, including reasonable attorney fees. We also award punitive damages in an added amount equaling the amount of actual damages.

Respondent also argues that the probate court could not authorize the sale of the real estate. First, respondent suggests that authorizing the sale after respondent and his sister failed to reach an agreement concerning the disposition of the real estate impinged on his right to appeal. However, authority cited by respondent does not support this position, and we conclude the argument is without merit. This Court will not search for authority to support or reject a party's position. *Hover v Chrysler Corp*, 209 Mich App 314, 319; 530 NW2d 96 (1995).

Second, respondent contends that by authorizing the sale, the probate court is, in essence, rewriting the will to reflect the intent of the court instead of that of the testator. We disagree. The language contained in the will indicated only a desire to keep the real estate in the family for as long as practicable. It did not create a command that the real estate must never be sold. See *In re Stuart's Estate*, 274 Mich 282, 285; 264 NW 372 (1936) (language indicating a desire that something be done is precatory language). Petitioner presented sufficient evidence to the probate court that maintaining the real estate has cost the estate approximately \$8,300 annually. Therefore, we conclude that the probate court did not abuse its discretion in authorizing petitioner to list and sell the real estate.

Affirmed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ E. Thomas Fitzgerald

/s/ Hilda R. Gage