

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of PAUL K. COUSINO, Deceased.

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

Appellee,

v

PAUL W. COUSINO,

Appellant.

UNPUBLISHED

April 21, 2000

No. 211121

Macomb Probate Court

LC No. 86-096297-SE

H. ROLLIN ALLEN, Temporary Personal
Representative of the Estate of PAUL K. COUSINO,
Deceased.

Appellee,

v

PAUL W. COUSINO,

Appellant.

No. 211831

Macomb Probate Court

LC No. 86-096297-SE

Before: Griffin, P.J., and Holbrook, Jr., and J.B. Sullivan*, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right two probate court orders. The first order allowing the fifth annual account, including requested fiduciary and attorney fees; the second

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

an order allowing the sixth and final annual account, including requested fiduciary and attorney fees, and appointing H. Rollin Allen as successor temporary personal representative of the Estate of Paul K. Cousino, Deceased. We affirm the challenged orders and remand for a determination of the damages incurred by the temporary personal representative in this appeal and an order imposing actual damages and sanctions against appellant.

This case concerns the estate of appellant's father, Paul K. Cousino. The petition for commencement of probate proceedings was filed on July 7, 1986. However, because of appellant's constant objections and appeals, the estate has not been closed. There have been eighteen appeals filed with this Court with regard to the estate, as well as appeals with the Michigan Supreme Court, the US Supreme Court, and the Sixth Circuit Court of Appeals.

In the instant appeal, appellant argues that the probate court erred in failing to provide a full hearing of the annual accounts. Specifically, he questions the probate court's allowance of attorney fees to temporary personal representative Kiefer. This Court reviews the actions of a probate court in approving or disapproving fees for an abuse of discretion. See *In re Sloan Estate*, 212 Mich App 357, 365; 538 NW2d 47 (1995); *In re Krueger Estate*, 176 Mich App 241, 248; 438 NW2d 898 (1989).

The probate court must review a petition for attorney fees for reasonableness with an eye toward preservation of the estate's assets for the beneficiaries. *In re Sloan Estate, supra* at 364. An attorney is entitled to reasonable compensation for necessary legal services performed on behalf of an estate in an amount approved by the court. MCL 700.541; MSA 27.5541; MCR 8.303; *In re Krueger Estate, supra* at 248. Generally, the court has broad discretion in determining what constitutes reasonable compensation. "[T]he court should consider, among other things, the amount of time spent, the amount of money involved, the character of the services rendered, the skill and experience necessary, and the results obtained." *Id.* The attorney claiming a right to compensation has the burden of proof on these considerations, which includes providing a statement of the amount of time spent in performing the described services and the presentation of evidence in support thereof. *Id.* at 249.

The record indicates that appellant was afforded the opportunity to review descriptions of the legal services performed on behalf of the estate, as required by MCR 5.707(A)(3)(b), and that he responded with written objections. The court then held proceedings to consider appellant's objections. Appellant was allowed to cross-examine Kiefer regarding his specific written objections to the accounting, and the probate court made its determinations to allow the accounts and the requested fees. Although appellant disagrees with the probate court's determinations, there is no indication in the record that he was denied an opportunity to be heard regarding his objections to the fees requested in the fifth and sixth accounts.

Appellant also argues that temporary personal representative Kiefer cannot properly bill the estate for proceeding on appeal in defense of his own fees and for proceedings in which costs were taxed against the estate. Appellant has raised this identical issue in at least two prior appeals with this Court and each time this Court has ruled against him.¹

Attorney fees incurred by a fiduciary to defend his position are properly chargeable against the estate so long as no conflict of interest or wrongdoing is proven. *In re Humphrey Estate*, 141 Mich App 412, 440-441; 367 NW2d 873 (1985); *In re Hammond Estate*, 215 Mich App 379, 387; 547 NW2d 36 (1996). However, attorney fees incurred in establishing and defending a petition for attorney fees, “fees within fees,” are not recoverable under MCL 700.543; MSA 27.5543. *In re Sloan Estate*, *supra* at 360-364. These costs “are inherent in the normal course of doing business as an attorney, and the estate may not be diminished to pay those fees and costs.” *Id.* at 363. “Nonetheless, where extraordinary fees and costs are incurred because of an opposing party’s fraud, unjustified objections raised in bad faith, or other extraordinary circumstances, 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).” *In re Sloan Estate*, *supra* at 363, n 2.

We find that extraordinary circumstances exist herein which allowed the probate court to grant all attorney fees. Appellant did not object to any fees on the basis that they were incurred in establishing or defending a petition for attorney fees nor does he direct this Court to specific items either. Further, this case was commenced in 1986 and, almost fourteen years later, the estate has not been closed due almost entirely to the actions of appellant. Under these circumstances, the probate court did not abuse its discretion in allowing all of the requested attorney fees.

Appellant next argues that the probate court erred in appointing H. Rollin Allen as the temporary personal representative to replace Kiefer, who was retiring from the practice of law. Appellant did not object below to Kiefer’s withdrawal as temporary personal representative but did object to Kiefer’s proffer of his former long-term law partner, H. Rollin Allen, as the successor temporary personal representative. This Court reviews the probate court’s decision for an abuse of discretion. See *In re Rice Estate*, 138 Mich App 261, 270; 360 NW2d 587 (1984).

In arguing this issue, both parties cite factual details that are not part of the lower court record in this appeal; hence they will not be considered by this Court. *Associates Discount Corp v Gear*, 334 Mich 360, 367; 54 NW2d 687 (1952). Appellant argues that an issue of conversion of estate funds by one of its beneficiaries remains open and that a conversion action on behalf of the estate cannot be brought by a temporary personal representative under MCL 700.171; MSA 27.5171. This argument is without merit. A temporary personal representative “may commence and maintain actions as personal representative.” MCL 700.175; MSA 27.5175. See also *Lindsey v Harper Hospital*, 455 Mich 56, 66; 564 NW2d 861 (1997). Thus, temporary personal representative Allen had the authority to proceed in a conversion action on behalf of the estate.

Appellant also contends that MCL 700.174; MSA 27.5174 allows for the appointment of a temporary personal representative only when “by reason of delay in granting letters of authority” a personal representative cannot be finalized. However, the statute also provides that the probate court may appoint a temporary personal representative “for other good cause.” Here, appellant has not shown that the probate court abused its discretion in this appointment under the Revised Probate Code.²

Finally, appellant argues that Probate Judge James Nowicki was disqualified from acting in this case. This issue is not properly before this Court and we decline to review it.³

We affirm the challenged orders. We further find that these consolidated appeals are vexatious because they were taken for purposes of delaying the closing of this estate, without any reasonable basis for belief that there was a meritorious issue to be determined on appeal. MCR 7.216(C)(1)(a). Accordingly, the Court assesses actual damages in an amount equal to the expenses incurred by the temporary personal representative in this appeal, including reasonable attorney fees. In addition, we award punitive damages in the same amount. MCR 7.216(C)(2). This case is remanded for a determination of damages and an order assessing actual and punitive damages against appellant personally. If the probate court is inclined to look to the estate for purposes of recovering the damages assessed, it may look only to appellant's interest in the estate.

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

/s/ Richard Allen Griffin

/s/ Donald E. Holbrook, Jr.

Joseph B. Sullivan, J., not participating.

¹ See *In re Estate of Cousino*, unpublished opinion per curiam of the Court of Appeals, decided March 2, 1999 (Docket No. 203578); *In re Estate of Cousino*, unpublished opinion per curiam of the Court of Appeals, decided October 10, 1997 (Docket Nos. 194005 & 194118).

² We note appellant's argument that *Freeman v Wayne Probate Judge*, 228 Mich 168; 199 NW 666 (1924), requires a different result. However, *Freeman* was not decided under the Revised Probate Code and, therefore, is not controlling. See *Lindsey*, *supra* at 62.

³ Appellant's delayed application for leave to appeal the circuit court order affirming the probate court's denial of appellant's motion to disqualify Judge Nowicki was denied by this Court in Docket No. 212281. Appellant's application for leave to appeal this Court's decision to the Supreme Court was also denied.