

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

ESTATE OF DANIEL K. ARTMAN, : **OPINION**
DECEASED :
 : **CASE NO. 2010-T-0057**

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 2008 EST 0034.

Judgment: Reversed and remanded.

Frank R. Bodor, 157 Porter Street, N.E., Warren, OH 44483 (For Appellant Janet E. Schweitzer).

Amy Grimm, pro se, and *Alma Troyer*, pro se, 35666 Forest Avenue, Fort Wayne, IN 46805; and *Susan E. Snead*, pro se, 2552 Thorn Oak Drive, SP 45, Medford, OR 97501 (Appellees).

MARY JANE TRAPP, J.

{¶1} Janet E. Schweitzer, the Administratrix for the estate of Daniel K. Artman, appeals from a judgment of the Trumbull County Court of Common Pleas, Probate Division, regarding her fiduciary fees. Upon review of the record and applicable law, we reverse the judgment of the trial court and remand this case for further proceedings consistent with this opinion.

{¶2} **Procedural History**

{¶3} Mr. Artman died on October 8, 2007. On January 17, 2008, Janet E. Schweitzer (“administratrix”) applied to administer his estate, which consisted of some commercial real estate, a mobile home, a miniature racecar track, and a Plymouth

Voyager. The estate was initially valued at \$106,209 in the Inventory and Appraisal Report she filed with the court. The estate ultimately received \$81,262.11 in total proceeds for the sale of the estate assets. The record reveals the court issued a total of four "Citations for Delinquent Final Account or Application to Extend Administration." Each time, the administratrix responded with an application to extend administration of the estate. As of the date of this appeal, the administratrix has not filed the final account of the estate.

{¶4} On November 20, 2009, the fiduciary's attorney filed a Motion for Attorney Fees. He requested attorney fees in the amount of \$11,001.67, based on the 63 hours he spent on the estate matters, at an hourly rate of \$175 per hour.

{¶5} On the same day, he filed a "Motion for Fiduciary's Fees" requesting fees for the administratrix. A time log was attached to the motion showing she spent 157 hours administering the estate, and she requested fiduciary fees in the amount of \$7,864.17, based on an hourly rate of \$50 per hour.

{¶6} On December 22, 2009, the trial court issued a judgment awarding \$9,450 in attorney fees. However, the court reduced the administratrix's commissions to \$2,000 with no explanations. On February 4, 2010, the administratrix filed a "Motion for Reconsideration of Fiduciary Fee Allowance," maintaining that she is entitled to a minimum fee of \$4,186.27, based on the value of the estate, \$106,209, as estimated in the initial Inventory and Appraisals. Applying 4% of the first \$100,000 and 3% of the next \$300,000 to the total estimated value of the estate, she arrived at the amount of \$4,186.27. The 4% and 3% are the statutory rates prescribed for the compensation of an executor or administrator in R.C. 2113.35. She asserted that, at a minimum, she

was entitled to the statutory rates, because “[her] responsibilities were considerably more and were much more complicated than one would expect in the average estate,” due to, among other reasons cited, litigation against a purchaser of the real estate who converted estate property to his own use; poor records kept by the decedent; the solicitation of buyers for the miniature auto racetrack; and problems with bank records. The court denied this motion, again without any explanations.

{¶7} On February 24, 2010, the administratrix filed a “Motion for Alternative Computation of Administratrix Fees” to contest the amount of the administratrix’s fees. She requested \$3,250.48, which equaled the statutory rate of 4% of \$81,262.11, the total of actual proceeds from the sales of the real and personal property in the estate. She asked the court to vacate its prior orders pertaining to the administratrix’s fee and to allow a fee of \$3,250.48 as mandated by R.C. 2113.35.

{¶8} On March 30, 2010, the court denied the motion on the ground that it had already ruled on the administratrix’s compensation in its December 22, 2009 order. The administratrix then filed a “Request for Written Findings of Fact and Conclusions of Law.” On April 29, 2010, she filed the instant appeal from the court’s March 30, 2010 judgment.

{¶9} On May 18, 2010, the court issued the written findings of fact and conclusions of law regarding the motion. It stated that it granted the request for fiduciary fees in the December 22, 2009 judgment, a final appealable order regarding the fiduciary fees, and the administratrix failed to appeal from the judgment. The court also stated it denied her motion for reconsideration because the Ohio Rules of Civil Procedure do not prescribe such motions. Finally, the court explained it denied the

motion for “alternative” compensation because that motion was just another motion for a reconsideration of the court’s ruling on the fiduciary fees issue.

{¶10} On appeal, the administratrix presents the following assignment of error for our review:

{¶11} “The trial court (Probate Division) committed prejudicial error and abused its discretion in failing to grant appellant-Administratrix’s Motion for Alternative Computation of Fiduciary Fees mandated by R.C. 2113.35 and failing to conduct a hearing for extraordinary fees.”

{¶12} **Law and Analysis**

{¶13} Executors and administrators are entitled to compensation for their services pursuant to R.C. 2113.35. *In re Estate of Lazar*, 11th Dist. No. 2003-G-2509, 2004-Ohio-1964, ¶16. R.C. 2113.35 states:

{¶14} “Executors and administrators shall be allowed commissions upon the amount of all the personal estate, including the income from the personal estate, that is received and accounted for by them and upon the proceeds of real estate that is sold as follows:

{¶15} “(A) For the first one hundred thousand dollars, at the rate of four per cent;

{¶16} “(B) All above one hundred thousand dollars and not exceeding four hundred thousand dollars, at the rate of three per cent;

{¶17} “(C) All above four hundred thousand dollars, at the rate of two per cent.

{¶18} “Executors and administrators also shall be allowed a commission of one per cent on the value of real estate that is not sold. Executors and administrators also shall be allowed a commission of one per cent on all property that is not subject to

administration and that is includable for purposes of computing the Ohio estate tax, except joint and survivorship property.

{¶19} “The basis of valuation for the allowance of such commissions on real estate sold shall be the gross proceeds of sale, and for all other property the fair market value of the other property as of the date of death of the decedent. The commissions allowed to executors and administrators in this section shall be received in full compensation for all their ordinary services.”

{¶20} “*If the probate court finds, after hearing, that an executor or administrator, in any respect, has not faithfully discharged his duties as executor or administrator, the court may deny the executor or administrator any compensation whatsoever or may allow the executor or administrator the reduced compensation that the court thinks proper.*” (Emphasis added.)

{¶21} The probate court may deny or reduce the compensation due the administrator if he or she has not faithfully discharged his or her duties. *Lazar* at ¶16. The probate court’s decision reducing or denying this compensation will not be disturbed on appeal in the absence of an abuse of discretion. *In re Estate of Veroni* (Dec. 31, 1998), 11th Dist. No. 98-L-024, 1998 Ohio App. LEXIS 6381, *16-17. An abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black’s Law Dictionary (8 Ed.Rev.2004) 11.

{¶22} On the other hand, if the administrator provides “extraordinary” services, R.C. 2113.36 permits additional compensation beyond that set forth in R.C. 2113.35. R.C. 2113.36 states, in pertinent part:

{¶23} “Allowances, in addition to those provided by section 2113.35 of the Revised Code for an executor or administrator, which the probate court considers just and reasonable shall be made for actual and necessary expenses and for extraordinary services not required of an executor or administrator in the common course of his duty.”

{¶24} In regard to extraordinary services, Ohio Sup.R. 72 also governs the executor’s and administrator’s commissions. Sections (A) and (B) of the rule states:

{¶25} “(A) Additional compensation for extraordinary services may be allowed upon an application setting forth an itemized statement of the services rendered and the amount of compensation requested. The court may require the application to be set for hearing with notice given to interested persons in accordance with Civil Rule 73(E).

{¶26} “(B) The court may deny or reduce commissions if there is a delinquency in the filing of an inventory or an account, or if, after hearing, the court finds that the executor or administrator has not faithfully discharged the duties of the office.”

{¶27} Furthermore, R. 72.2 of the Local Rules of Trumbull County Probate Court provides the following:

{¶28} “The itemized statement for extraordinary services required by Sup.R. 72(A) shall itemize the services performed, the date services were performed, the time spent in rendering the services, and the rate charged per hour.”

{¶29} Here, the record reflects that the initial motion for the extraordinary fees filed by the administratrix contained an itemized list of the services performed, the date of services, and the time spent in rendering the services, pursuant to Loc.R. 72.2 and Ohio Sup.R. 72(A). The trial court denied the request and arbitrarily reduced it to \$2,000, well below the statutory rate for ordinary service, without providing any reasons.

The court conducted no hearing on this matter, nor did it make the finding that the administratrix had not fully discharged her duties warranting a reduction of the statutory fees.

{¶30} When the administratrix subsequently requested the ordinary fees based on the statutory rate provided in R.C. 2113.35, the court denied that motion, on the ground that the amount of fiduciary fees in this case was already adjudicated in its December 22, 2009 order and that order was a final appealable order.

{¶31} The trial court's denial of the extraordinary fees in no way disposed of the fiduciary fees' issue in this case, because the administratrix could still request the ordinary fees, which she did. As an administratrix, Ms. Schweitzer is entitled to the statutory fees pursuant to R.C. 2113.35, which states unequivocally "[e]xecutors and administrators *shall* be allowed commissions based upon the amount of all the personal estate ***." (Emphasis added.) The court may *only* deny or reduce the fees *if* it finds, after hearing, that she has not "faithfully discharged" her duties. See *In re Testamentary Trust Under the Will of Ford*, 7th Dist. Nos. 04 MA 255 & 04 MA 256, 2005-Ohio-5121, ¶13 (although a probate court's discretion is broad, it is not unfettered; the probate court abused its discretion when it denied a trustee's fees without hearing).

{¶32} Therefore, the court abused its discretion in awarding the administratrix a fee below the mandatory statutory fee without hearing and without a finding that she has not faithfully discharged her duties. The trial court should have granted her February 24, 2010 motion and vacated its December 22, 2009 order, which arbitrarily reduced her fee without the requisite statutory finding.

{¶33} Upon remand, the trial court is to vacate its December 22, 2009 order and award the administratrix the statutory fee, unless it makes the finding, after hearing, that she has not faithfully discharged her duties regarding the administration of the estate.

{¶34} The assignment of error is sustained.

{¶35} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas, Probate Division, is reversed, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

TIMOTHY P. CANNON, J., concurs,

CYNTHIA WESTCOTT RICE, J., dissents with Dissenting Opinion.

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{¶36} Because I do not agree with either the analysis or the judgment of the majority, I respectfully dissent.

{¶37} On November 20, 2009, appellant filed a motion for fiduciary fees. As noted by the majority, pursuant to R.C. 2113.35 and 2113.36, a fiduciary's ordinary and extraordinary services are treated differently for purposes of computing a fiduciary's fees. For their ordinary services, fiduciaries are entitled to a statutory percentage of the amount of the estate. R.C. 2113.35. This amount can only be reduced if the court finds, after a hearing, that the fiduciary has not faithfully discharged his or her duties. In addition, R.C. 2113.36 provides that the court shall award fees for a fiduciary's extraordinary services, which the court considers just and reasonable. However, in her

November 20, 2009 motion, appellant combined her request for fees for both types of services in one motion. Thus, instead of calculating the fees for her ordinary and extraordinary services separately, she calculated them together by multiplying the total hours worked by an hourly rate, and asked for a total fee of \$7,864.17. On December 22, 2009, the trial court granted appellant's motion, but, without a hearing, reduced the amount of the award to \$2,000. Appellant did not appeal that judgment.

{¶38} Then, on February 4, 2010, appellant filed a motion for reconsideration, this time asking only for fees for her ordinary services, which she calculated by multiplying the estimated value of the estate by the statutory percentage, resulting in a fee of \$4,186.27. On February 12, 2010, the court denied the motion, and, once again, appellant did not appeal the court's ruling.

{¶39} On February 24, 2010, appellant filed a "motion for alternative computation of executrix fees." In that motion she asked that the court "vacate" its two previous rulings on the fee issue. This time she sought a fee of \$3,250.48 for her ordinary services only, which she calculated by multiplying the proceeds from the sale of the estate's assets by the statutory rate. On March 30, 2010, the court denied the motion, finding the court had previously ruled on the fees due to the fiduciary. It is from this last order that appellant appeals, arguing that the court erred in not granting her third motion for fees and in failing to conduct a hearing before reducing her fee.

{¶40} The trial court's order reducing appellant's request for fees to \$2,000 for both her ordinary and extraordinary services was a final, appealable order. While I agree with the majority that the court should have held a hearing on the motion before reducing the fees, appellant failed to appeal the court's December 22, 2009 judgment

within 30 days, as required by App.R. 4(A). By failing to timely appeal the court's judgment, she waived this issue. Her later motions for reconsideration and for alternative computation of executrix fees are not recognized by the Ohio Rules of Civil Procedure. They are therefore nullities and ineffective to toll the time in which appellant was required to file her appeal from the court's initial ruling. *Pitts v. Ohio Dep't of Transp.* (1981), 67 Ohio St.2d 378, 380.

{¶41} In view of the foregoing, I believe the court's ruling on appellant's initial motion for fees was a final, appealable order and, because she failed to timely appeal the court's ruling, I would dismiss the appeal.

{¶42} For the foregoing reasons, I respectfully dissent.