

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

ESTATE OF HERBERT EUGENE : **OPINION**
BARRY, DECEASED :

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Civil Appeal from the Geauga County Court of Common Pleas, Probate Division, Case No. 09 PE 0000195.

Judgment: Affirmed.

Joseph P. Sontich, Jr., 8401 Chagrin Road, Suite 20B, Chagrin Falls, OH 44023 (For Appellant Paul Barry).

Philip G. King, Philip G. King, Co., L.P.A., 137 Main Street, Suite 1, Chardon, OH 44024 (For Appellee Michelle Tallon).

A. Pearce Leary, 401 South Street, Bldg. 4-A, Chardon, OH 44024 (Master Commissioner).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Paul Barry (“Paul”), appeals from the April 4, 2013 judgments of the Geauga County Court of Common Pleas, Probate Division, ordering him to pay \$23,514.30 to the Estate of Herbert Eugene Barry, Deceased; \$4,812.50 to A. Pearce

Leary (“Leary”), the master commissioner; and \$4,372 in attorney fees for appellee, Michelle Tallon (“Michelle”).

{¶2} In 1975, Herbert Barry (“Herbert”) executed a last will and testament, leaving all real and personal property to his wife, Odette, who preceded him in death. According to the terms of that document, Robert and Agnes Sidaway (“the Sidaways”) were to serve as executors. Under item V, the executors were granted authority to administer the estate in so far as to manage, sell, transfer, or alter the decedent’s property. Herbert’s son, Paul, was to serve as the Sidaways’ alternate. Upon the death of Odette, all assets were to pass to a trust which required an equal distribution between Paul and Michelle, Herbert’s daughter. Michelle was not aware that a trust existed. However, she did not object to an equal distribution of assets between her and her brother.

{¶3} In March 2009, Herbert, a widower, passed away, leaving behind his two surviving children. Paul resides in Florida and Michelle is a resident of California. On May 11, 2009, Paul filed an application to probate his father’s will and an application for authority to administer the estate. Presuming that the Sidaways were not able to serve as authorized in Herbert’s last will and testament, Michelle did not object to Paul serving as executor of their late father’s estate.

{¶4} On June 15, 2009, the probate court appointed Paul as fiduciary to administer Herbert’s estate. Herbert’s children described him as a “pack rat” and a “hoarder,” due to the fact that he left behind a great volume of personal items at the time of his death. Jeff English (“English”) was appointed as real estate appraiser, Steve Roth for firearms, and Thomas Hall for antiques and other personal property. English

prepared two appraisals. In one, he appraised the real property, Herbert's residence, Parcel No. 02-019400, and a contiguous vacant lot, Parcel No. 02-177400, at a combined value of \$135,000, which was dated May 5, 2009. An inventory and schedule of assets were filed on September 29, 2009. Michelle filed exceptions to the inventory and a creditor's claim the following month. However, the creditor's claim was rejected as it was filed beyond the six-month statutory bar for claims against a decedent's estate.

{¶5} A hearing on the inventory and exceptions to the inventory was held on January 26, 2010. Immediately prior to the commencement of the hearing, the exceptions to the inventory were orally withdrawn by Michelle's counsel. The probate court approved the inventory and schedule of assets.

{¶6} On June 21, 2010, Michelle filed a motion to set aside the appraisal and to re-appraise the real property, indicating that the vacant lot was subject to a transfer on death deed and not an essential part of the probate administration. Thereafter, Paul filed a motion to amend inventory. He agreed to remove the vacant lot from the inventory and proposed an amount of \$110,000, English's other 2009 appraisal. Michelle agreed to the \$110,000 proposed appraisal but further moved the court to order that Paul list the real property for sale with a realtor, to which Paul opposed.

{¶7} During the period of time between the inventory approval on January 26, 2010 and a July 27, 2010 hearing, Paul did not list the real property for sale. Due to the delay, Michelle requested court assistance. At the July 27, 2010 hearing, Paul indicated that there was no further progress towards possible resolution of the real estate and that he and his sister had reached an "impasse." He advised the court that he would purchase the real property from the estate for the appraised "AS-IS" condition of

\$110,000, which was agreed to by Michelle. However, at least a month before Paul agreed to purchase the real property, he began expending estate assets to repair and improve the property. Even after his agreement, one example involved repairs to the septic system, a major expenditure totaling \$15,500.

{¶8} The probate court filed a judgment on August 3, 2010, amending the real estate value of Parcel No. 02-019400, to \$110,000. The court further held that the vacant lot, Parcel No. 02-177400, is not included as an estate asset. The court indicated that the parties had agreed on a purchase arrangement in which Paul could purchase Michelle's interest in the real estate by paying one-half of the \$110,000 appraised value, and granted an extension of time for the administration of the estate.

{¶9} Thereafter, Paul filed numerous motions for enlargement of time to file a final account and attempted to file several final accounts, which were rejected by the probate court as being incomplete, inaccurate, and not acceptable for filing. Ultimately, Paul filed a final distributive account on January 13, 2012. Michelle filed objections and exceptions to the final distributive account. A hearing was held on February 14, 2012. The court did not approve Paul's January 13 account, but granted him an extension to file a final distributive account, which he did. However, the account was returned again as incomplete, inaccurate, and not acceptable for filing.

{¶10} The court subsequently appointed a master commissioner, Leary, on September 19, 2012. The master commissioner filed a report on November 1, 2012. Paul filed exceptions, to which Michelle filed a response. On November 21, 2012, the probate court instructed the master commissioner to hear Paul's objections and to file a second report. The master commissioner complied, held a hearing, and filed a second

report on January 2, 2013. Paul filed exceptions and a supplemental brief, to which Michelle filed a response and a motion for attorney fees.

{¶11} A hearing was held on March 19, 2013. Pursuant to one April 4, 2013 judgment, the probate court accepted the second master commissioner's report, with modifications. The court ordered Paul to pay \$23,514.30 to the estate, and \$4,812.50 to the master commissioner. In another April 4, 2013 judgment, the probate court ordered that Michelle receive \$4,372 in attorney fees. It is from those two judgments that Paul filed a timely appeal and asserts the following assignments of error:¹

{¶12} “[1.] The trial court prejudicially erred in holding that Appellant Paul Barry must reimburse the Estate of Herbert Barry in the amount of \$23,514.30 and pay the entire amount of the master commissioner's fees.

{¶13} “[2.] The trial court prejudicially erred in assessing payment of appellee's attorney fees in the amount of \$4,372.00.”

{¶14} In his first assignment of error, Paul contends the probate court erred in ordering him to reimburse the estate and pay the entire amount of the master commissioner's fees.

{¶15} “We review the probate court's decision under an abuse of discretion standard of review.” *Letson v. McCardle*, 11th Dist. Trumbull No. 2009-T-0125, 2010-

1. During our initial consideration of this appeal, an issue arose concerning whether we had a final appealable order. On November 15, 2013, this court ordered the parties to submit additional briefing on the “finality” issue. In each of their separate submissions, the parties appeared to agree that all pending questions regarding the final account were resolved. However, on October 24, 2014, this court determined that the “final accounting” issue was still pending before the trial court and that there was no final order upon which this appeal could be based at that time. In our entry, this court remanded this matter to the trial court for the purpose of issuing a new, modified judgment to state whether Exhibits 7 and 8 have been approved or disapproved as the estate's final accounting. Upon remand, the probate court reviewed Exhibits 7 and 8. On November 3, 2014, the probate court supplemented its April 4, 2013 judgment entry, adopted and made findings of fact and conclusions of law, and accepted Exhibits 7 and 8 as the estate's final accounting. As the appealed judgments are now final, this court will now consider Paul's assigned errors.

Ohio-3676, ¶18, quoting *Estate of Niemi v. Niemi*, 11th Dist. Trumbull No. 2008-T-0082, 2009-Ohio-2090, ¶35, citing *Levy v. Thompson*, 2d Dist. Montgomery No. 20641, 2006-Ohio-5312, ¶18. The term “abuse of discretion” is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court “applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.” *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.).

{¶16} An executor, administrator or other personal representative of a testamentary estate is a fiduciary. *In re Usiak*, 172 Ohio App.3d 262, 2007-Ohio-3038, ¶35 (7th Dist.2007). R.C. 2109.01 defines a “fiduciary” as: “any person * * * appointed by and accountable to the probate court and acting in a fiduciary capacity for any person, or charged with duties in relation to any property, interest, trust, or estate for the benefit of another[.]”

{¶17} A fiduciary relationship involves high trust and confidence. *In re Howell*, 11th Dist. Lake No. 92-L-144, 1993 Ohio App. LEXIS 3341, *5 (June 30, 1993). “The fiduciary duties of an executor are primarily to collect the estate assets, pay debts, and make distributions.” *In re Usiak, supra*, at ¶35. “The executor also owes various duties to the beneficiaries of the estate, duties involving keeping proper accounts, giving timely notice, preserving assets, avoiding the commingling of property, and basic duties of trust and loyalty.” *Id.* The executor, as a fiduciary, serves as a representative of the entire estate and owes a duty to act in a manner which protects the beneficiaries’ interests. *Elam v. Hyatt Legal Serv.*, 44 Ohio St.3d 175, 176 (1989).

{¶18} In order to prove a breach of fiduciary claim, a plaintiff must establish the following: (1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom. *Spalla v. Fransen*, 188 Ohio App.3d 666, 2010-Ohio-3461, ¶28-29 (11th Dist.2010).

{¶19} In the case at bar, Paul and Michelle are the only beneficiaries of their father's estate. Paul, as executor, owed a duty to preserve estate assets, and was required to keep proper accounting records. During the July 27, 2010 hearing, instead of listing the real property for sale, Paul agreed to purchase it himself for the "AS-IS" appraised value of \$110,000. As stated, however, at least a month before indicating his wishes to buy the property, the record establishes that Paul expended estate funds to improve the real estate for his direct and personal benefit. In fact, estate funds were used to make repairs and improvements even after his agreement. Thus, Paul's acts represent a breach of his fiduciary duty as executor of the estate.

{¶20} Specifically, the January 2, 2013 second master commissioner's report ruled that the following expenditures were clear improvements to the "AS-IS" condition of the real estate that Paul agreed to purchase for the appraised value of \$110,000, and thus, were improper: trash removal to improve the property in the sum of \$325; one-half the cost for PODS trash containers reimbursed to Paul's credit card account for \$422; one-half the cost of diesel fuel and gasoline used in connection with trash removal for \$42; Solon Hardware for minor repairs and new keys in the amount of \$56.63; Roto Rooter to repair a leak in a valve for \$65; Bagster for trash removal in the sum of \$89; chimney repairs directly benefitting the real estate purchased by Paul in the amount of \$2,200; Home Depot for a property repair in the sum of \$174.09; Wal-Mart for

miscellaneous security and repair items for \$120; Scott Trucking Co. for the removal of trash in the sum of \$1,070; Cornerstone Home Inspection to assess the property for \$620; Clover Electric for electrical repairs, garage door repair, tree service, well pump repair and clean up and/or improvements in the total amount of \$4,725.58; and septic system repair as a clear improvement to the “AS-IS” condition of the real estate for \$16,400.

{¶21} Although the total amount equaled \$28,814.30, following the March 19, 2013 hearing, the total amount surcharge to Paul was reduced to \$23,514.30. The evidence establishes that Paul used estate funds to make improvements to the real estate, which he later purchased, to benefit himself. He never discussed any expenditure or improvement with Michelle, a beneficiary of the estate. As such, Paul’s improper actions constitute a breach of his fiduciary duty.

{¶22} Thus, because Paul had (1) a duty arising from a fiduciary relationship, (2) he failed to observe the duty, and (3) an injury resulted proximately therefrom to Michelle in the amount of \$11,757.15, the trial court did not abuse its discretion in ordering him to reimburse the estate and pay the master commissioner’s fees. See *Spalla, supra*, at ¶28-29; R.C. 2101.07 (“[t]he court shall allow the [master] commissioner those fees that are allowed to other officers for similar services, and the court shall tax those fees with the costs.”)

{¶23} Paul’s first assignment of error is without merit.

{¶24} In his second assignment of error, Paul argues the probate court erred in assessing payment of Michelle’s attorney fees in the sum of \$4,372. He again asserts

that the challenged expenditures were proper and should have been chargeable to the estate.

{¶25} “The denial or allowance of attorney fees is within the probate court’s discretion; nevertheless, its determination is subject to review under an abuse-of-discretion standard.” *Guardianship of Hards*, 11th Dist. Lake No. 2002-L-032, 2003-Ohio-1207, ¶15, citing *In re Rider*, 68 Ohio App.3d 709, 712 (6th Dist.1990).

{¶26} “[A] probate court may allow payment of reasonable fees from the estate to an attorney employed by an heir or beneficiary where such attorney’s services were necessarily and successfully rendered to the benefit of the whole estate.” *In re Keller*, 65 Ohio App.3d 650, 656 (8th Dist.1989); see also *In re Brown*, 83 Ohio App.3d 540, 542 (12th Dist.1992); *In re Fugate*, 86 Ohio App.3d 293, 298 (4th Dist.1993).

{¶27} In this case, the record establishes that Michelle required the services of an attorney as a result of the suspect actions undertaken by her brother as executor of their father’s estate. As stated, Paul’s mismanagement included expending estate funds for his personal benefit to make repairs and improvements to the real property, which he later purchased. Funds were used to repair, inter alia, the chimney and garage as well as to replace the septic system, a major expenditure, which occurred well after he agreed to purchase the property.

{¶28} Due to the breach of Paul’s fiduciary duty, attorney services were necessary to insure that the estate account met statutory requirements and that the final distributive award was accurate and complete. Michelle’s attorney submitted an itemized statement of the services performed, including dates, times, and rates. Through Michelle’s actions in hiring an attorney, the estate received a surcharge in the

amount of \$23,514.30. Thus, the entire estate received the benefit of the services provided by Michelle's attorney.

{¶29} The interests of justice require an award of Michelle's attorney fees, as the award is reasonable under the circumstances. See *In re Keller, supra*, at 659. Since the entire estate benefited, the probate court did not abuse its discretion in assessing payment of Michelle's attorney fees in the sum of \$4,372.

{¶30} Paul's second assignment of error is without merit.

{¶31} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgments of the Geauga County Court of Common Pleas, Probate Division, are affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.