

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

ESTATE OF LARRY E. BREWER, ADMINISTRATOR WADE E. BREWER, ET AL	:	JUDGES: Hon. Julie A. Edwards, P.J. Hon. W. Scott Gwin, J. Hon. Patricia A. Delaney, J.
Plaintiffs-Appellants	:	
-vs-	:	Case No. 2010-CA-00096
CREDITOR FRANCES ALICE BLACK	:	<u>OPINION</u>
Defendant-Appellee	:	

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of Common Pleas, Probate Division, Case No.197391

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 2, 2010

APPEARANCES:

For Plaintiff-Appellant

ROBERT R. HUNTER, JR.  
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For Defendant-Appellee

JOHN V. BOGGINS  
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*Gwin, P.J.*

{¶1} Plaintiffs-appellants the Estate of Larry E. Brewer by Co-Administrators Wade E. Brewer and Cathie Brewer Long appeal a judgment of the Court of Common Pleas, Probate Division, of Stark County, Ohio, which removed the appellant co-administrators as fiduciaries of the estate and denied Cathie Brewer Long fees. Appellee is Frances Alice Black, a creditor of the estate. Appellants assign four errors to the trial court:

{¶2} “I. THE PROBATE COURT ERRED AS A MATTER OF LAW BY PERMITTING CREDITOR FRANCES ALICE BLACK TO PRESENT EVIDENCE IN SUPPORT OF HER MOTION AFTER SHE TWICE INDICATED THAT SHE WAS CALLING NO WITNESSES.

{¶3} “II. THE DECISION OF THE PROBATE COURT TO DENY FEES TO CO-ADMINISTRATOR CATHIE BREWER LONG IS SUPPORTED BY NO EVIDENCE.

{¶4} “III. THE DECISION OF THE PROBATE COURT TO REMOVE WADE E. BREWER AS FIDUCIARY IS NOT SUPPORTED BY THE LAW AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶5} “IV. THIS MATTER SHOULD BE REMANDED TO THE PROBATE COURT TO CONSIDER THE OHIO CIVIL RULE 11 VIOLATION ACKNOWLEDGED BY ATTORNEY BOGGINS.”

{¶6} Larry E. Brewer died on April 14, 2006, and his son, appellant Wade E. Brewer, was appointed administrator of the estate in June, 2006. In June of 2007, the Court of Common Pleas, General Division, awarded the appellee a civil judgment against the estate. The General Division case was appealed to this court twice, and

ultimately we affirmed the trial court's decision. *Brewer v. Black*, Stark App. No. 2008CA00278, 2009-Ohio-6625.

{¶7} At various times during the pendency of the General Division case, the Probate Court approved the expenditure of estate funds to defend that action. The Probate Court sent delinquent inventory notices to appellants at least four times in 2007. In January 2008, the court extended the time to file an account until March 7, 2008. On June 23, 2008, the court extended the time to file an account until September 30, 2008.

{¶8} On February 18, 2010, appellee filed a motion for the removal of the fiduciary pursuant to R.C. 2109.24. The court set a hearing on the motion for March 17, 2010. On March 12, 2010, appellants filed an amended inventory and appraisal, with a schedule of assets. On March 31, 2010, the court conducted a hearing, removed the fiduciaries, and denied them fiduciary fees.

I.

{¶9} Appellants first argue appellee presented no evidence in support of her motion to remove the fiduciaries. At the hearing, appellee informed the court she would call her witnesses as on cross, but preferred to wait and hear their direct testimony. Appellants declined to present direct testimony, and urged the court the burden of proceeding was on appellee as the moving party. The court then permitted appellee to call the appellants administrator and co-administrator as on cross.

{¶10} The trial court has the authority and discretion to exercise control over the proceedings before it. *State v. Trimble*, 122 Ohio St. 3d 297, 2009-Ohio-2961, 911 N.E. 2d 242, at paragraph 128. A trial court has discretion in admitting or excluding

evidence, *Pegram v. Painter*, Fairfield App. No. 09CA59, 2010-Ohio-2934, at paragraph 21, citing *State v. Sage* (1987) 31 Ohio St. 3d 173, 180, 510 N.E. 2d 343. In reviewing the court's decision, we look at the totality of the circumstances to determine whether the trial court acted unreasonably, arbitrarily, or unconscionably. *Id.* citing *State v. Oman* (February 14, 2000), Stark App. No. 1999CA00027.

{¶11} Our review of the record leads us to conclude the trial court did not abuse its discretion in its conduct of the hearing.

{¶12} The first assignment of error is overruled.

### III

{¶13} R.C. 2109.301 provides in pertinent part:

{¶14} “(B)(1) Every administrator and executor, within six months after appointment, shall render a final and distributive account of the administrator's or executor's administration of the estate unless one or more of the following circumstances apply:

{¶15} “(a) An Ohio estate tax return must be filed for the estate.

{¶16} “(b) A proceeding contesting the validity of the decedent's will pursuant to section 2107.71 of the Revised Code has been commenced.

{¶17} “(c) The surviving spouse has filed an election to take against the will.

{¶18} “(d) The administrator or executor is a party in a civil action.

{¶19} “(e) The estate is insolvent.

{¶20} \*\*\*

{¶21} “(4) Not later than thirteen months after appointment, every administrator and executor shall render an account of the administrator's or executor's administration,

unless a certificate of termination is filed under division (B)(2) of this section. Except as provided in divisions (B)(1) and (2) of this section, after the initial account is rendered, every administrator and executor shall render further accounts at least once each year.”

{¶22} Our standard of reviewing a Probate Court’s decision to remove a fiduciary or guardian is the abuse of discretion standard. *In Re: Estate of Russolillo* (1990), 69 Ohio App. 3d 448, 590 N.E.2d 1324. The Supreme Court has repeatedly defined the term abuse of discretion as implying the court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E. 2d 1140. In applying the abuse of discretion standard, this court may not substitute our judgment for that of the trial court. *Pons v. Ohio State Medical Board* 66 Ohio St. 3d 619, 621, 1993 -Ohio- 122, 614 N.E.2d 748.

{¶23} Appellant Wade Brewer testified he was not aware of his filing duties, and was unaware of any letters from the court. Brewer testified he was unaware until the morning of the hearing that he was required to file an accounting on behalf of the estate. Brewer conceded his mailing address had not changed throughout the administration of the estate.

{¶24} R.C. 2109.24 provides in pertinent part:

{¶25} “ \*\*\* If a fiduciary fails to make and file an inventory as required by sections 2109.58, 2111.14, and 2115.02 of the Revised Code or to render a just and true account of the fiduciary's administration at the times required by section 2109.301, 2109.302, or 2109.303 of the Revised Code, and if the failure continues for thirty days after the fiduciary has been notified by the court of the expiration of the relevant time, the fiduciary forthwith may be removed by the court and shall receive no allowance for

the fiduciary's services unless the court enters upon its journal its findings that the delay was necessary and reasonable.\*\*\*”

{¶26} Appellant Wade Brewer argues he did not breach any duty to the estate, and filed the requisite documents within the final time limit set by the Probate Court in February, 2010. He asserts the delay in the administration of the estate was caused by the General Division litigation, and not any by dereliction of his fiduciary duties. Co-administrator Cathie Brewer Long was appointed to assist in defending the action in the General Division, and as such her involvement in the estate had ended.

{¶27} We have reviewed the record, and we find the trial court did not abuse its discretion in removing the fiduciary for failure to comply with his duties in administering the estate.

{¶28} The third assignment of error is overruled.

## II

{¶29} In their second assignment of error, appellants argue the Probate Court's decision to deny fees to co-administrator Cathie Brewer Long is not supported by the evidence. The Probate Court found she was appointed co-administrator for the purpose of assisting in the General Division litigation. Appellants argue she was never given any duties relating to the actual administration of the estate in the Probate Court, and there was no evidence she failed to perform any of her duties.

{¶30} R.C. 2109.24 directs that a fiduciary shall receive no allowance for services unless the court finds the delay was necessary and reasonable. Appellee argues as a co-fiduciary she bore equal responsibility with Wade Brewer for any neglect of fiduciary duties, and we agree.

{¶31} We find the trial court did not abuse its discretion in determining appellee Cathie Brewer Long was not entitled to fees from the estate. The second assignment of error is overruled.

IV.

{¶32} In their fourth assignment of error, appellants argue we should remand this matter to the Probate Court with instructions to consider whether counsel for appellee violated Ohio Civ. R. 11. Appellants never filed a motion to bring this issue before the Probate Court. Issues not raised in the trial court cannot be raised for the first time on appeal. *Holman v. Grandview Hospital & Medical Center* (1987), 37 Ohio App. 3d 151, 157, 524 N.E. 2d 903.

{¶33} The fourth assignment of error is overruled.

{¶34} For the foregoing reasons, the judgment of the Court of Common Pleas, Probate Division, of Stark County, Ohio, is affirmed.

By Gwin, J.,

Edwards, P.J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY

