[Cite as *In re Estate of Davidson*, 2009-Ohio-3014.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

In the Matter of: THE ESTATE OF WALLACE NORMAN DAVIDSON, JR.	:	Appellate Case No. 22943
	:	Trial Court Case No. 06-EST-1259
	:	(Civil Appeal from Common Pleas Court, Probate)

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O P I N I O N

Rendered on the 19th day of June, 2009.

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DON BREZINE, Atty. Reg. #0018477, Brezine Law Office, 188 West Hebble Avenue, Fairborn, Ohio 45324
Attorney for Plaintiff-Appellant, Michael Dureiko, Executor

ANNE M. FRAYNE, Atty. Reg. #0011233, Myers & Frayne Co., L.P.A., 18 West First Street, Suite 200, Dayton, Ohio 45402
Attorney for Defendant Appellees, Karen Pelphrey and Wallace N. Davidson, III

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FAIN, J.

{¶ 1} Attorney Don Brezine appeals from an order partially denying a request for attorney fees that Brezine submitted as attorney for the Estate of Wallace N. Davidson. Brezine contends that the probate court's decision is against the manifest weight of the

evidence, because the only witness, Brezine, testified that all the attorney fees were incurred on behalf of Davidson's estate. Brezine also contends that the probate court abused its discretion in interpreting the text of an agreed settlement entry signed and filed by the parties.

{¶ 2} We conclude that the probate court did not err in partially denying fees to Brezine. The court rejected fees for work performed in connection with a separate concealment action that Brezine filed on behalf of a party as legatee and heir to the estate, not as the executor for the estate. The unambiguous terms of an agreed settlement entry control, and preclude the estate from paying attorney fees to any party for work performed in connection with the concealment action. The probate court did not abuse its discretion in adhering to an agreement that the parties voluntarily made. The decision is also supported by competent, credible evidence and is not against the manifest weight of the evidence. Accordingly, the judgment of the probate court is Affirmed.

I

{¶ 3} Wallace Davidson died in April 2006, leaving his entire estate to Michael Dureiko, Gregory Land, Wallace Davidson, III, and Karen Pelphrey. Davidson, III, and Pelphrey were the children of the decedent, and Dureiko and Land were the decedent's friends. Dureiko and Land were appointed as co-executors in the will, and Terrance Small was appointed as a successor executor.

{¶ 4} At the time of his death, Davidson jointly owned a home located at 630 Runnymede Road in Oakwood, Ohio. Ownership in the home passed to Alfred

Goodman, who had lived with Davidson for many years. Goodman was not currently residing in the home, however. Goodman had been living at Lincoln Park Nursing home since August 2005, due to medical problems.

{¶ 5} In June 2006, attorney David Morse of the Brezine Law Offices filed an application to probate Davidson's will. Land and Dureiko were appointed as fiduciaries, and the action was designated as Montgomery County Probate Court Case No. 2006 EST 01259.

{¶ 6} A dispute subsequently arose regarding personal property that Dureiko had allegedly removed from the Runnymede house after Davidson's death. Consequently, Goodman filed a motion in the estate case in July 2006, asking the probate court to remove Dureiko as executor. Goodman claimed that Dureiko had improperly removed items valued in excess of $200,000. Goodman also filed a claim against the estate for money he had loaned to Davidson and for the items that had been improperly removed. Goodman provided a detailed list of items with his claim.

{¶ 7} Shortly thereafter, Dureiko filed a complaint for concealment against Goodman and Goodman's nephew, Bentley. This action was designated as Montgomery County Probate Court Case No. 2006 MSC 00207. In the complaint, Dureiko alleged that he was "a legatee, heir of the last will and testament of Wallace Norman Davidson, Jr., deceased," and that he had good cause to suspect that Alfred and Bentley had concealed or conveyed money, goods, and chattels belonging to Davidson's estate. Dureiko did not bring the action in his capacity as co-executor of Davidson's estate.

{¶ 8} The complaint for concealment was filed by attorney Don Brezine of the

Brezine Law Offices. At the time, Brezine had not yet entered an appearance in the estate case; several days after the complaint for concealment was filed, Brezine entered an appearance as co-counsel for Davidson's estate.

{¶ 9} Dureiko had also personally hired attorney Charles Slicer to represent him in connection with the alleged missing property. In fact, Slicer was corresponding with Goodman's counsel about the property allegations in June 2006, before the complaint for concealment was filed.

{¶ 10} In August 2006, Goodman filed an answer and counterclaim in the concealment case, and also filed a third-party complaint against Terrance Small. Goodman alleged in these pleadings that Dureiko and his partner, Small, had entered the Runnymede house, and had removed property valued at more than $200,000.

{¶ 11} Slicer filed an answer to the counterclaim, and a motion for restraining order to prevent the Goodmans from removing property from the Runnymede house. Brezine also filed pleadings on Dureiko's behalf in the concealment action, including: (1) notices of submission of a first set of interrogatories and request for production of documents to Bentley and Alfred Goodman (August 2006); (2) a response to Goodman's motion for continuance (August 2006); and (3) a motion for continuance of hearing (October 2006). However, Slicer filed most of the documents and responses in the concealment action. Brezine did attend various depositions that were taken in the concealment action regarding the property disputes.

{¶ 12} In October 2006, Slicer entered an appearance as counsel for Dureiko in the estate case. Also in October, the probate court scheduled a hearing on concealment of assets, which was to be held on January 11, 2007. Both Slicer and

Brezine attended the hearing. On that date, the probate court made a record, in open court, of an agreement that the parties had reached. On the record, Goodman's attorney stated on behalf of all participants, that:

{¶ 13} "And this is a settlement relating to the Estate of Wallace N. Davidson, case number 2006 EST 01259 and a miscellaneous case filed under that estate, case number 2006 MSC 00207. This is a settlement that is resolving the complaint for concealment of assets by Mike Dureiko against Mr. Goodman. As well as, various other motions that have been filed in both the estate case and the concealment case." January 11, 2007 Hearing Transcript, p. 97.

{¶ 14} Goodman's attorney then recited various agreements as to retention of property by the Goodmans, and by Land, Small, and Dureiko. She also recited agreements for the dismissal of the claim for concealment, the counterclaim and third-party complaint, a complaint Goodman had filed on his rejected estate claim, and all pending motions for contempt and for sanctions.[1] The agreement further provided that Goodman would be allowed a $20,000 claim against the estate for loans made to Davidson. After reciting these agreements, Goodman's attorney stated that:

{¶ 15} "It is agreed that everyone who is a party to this action will pay their own attorney fees, they will not come out of the estate." Id. at 100.

{¶ 16} In April 2007, an Agreed Settlement Entry was filed in both the estate and concealment cases. The entry reiterated the parties' agreement as to disposition of the disputed items of property. It also allowed Goodman's $20,000 claim as a priority claim

[1]In September 2006, the estate rejected Goodman's claim against the estate, based on lack of evidence. Goodman then filed a separate action in Montgomery

against the estate, and dismissed the pending claims, as discussed above. Paragraph 12 of the agreed entry stated that: "All attorney fees incurred by any of the parties in this matter shall be paid by such parties and not from the Estate of Wallace N. Davidson." The Agreed Settlement Entry was signed by Slicer as "Attorney for Michael Dureiko and Terry Small," and by Donald Brezine as "Attorney for the Estate of Wallace N. Davidson, Jr."

{¶ 17} In September 2006, Dureiko filed a motion asking the probate court to approve payment of attorney fees to Slicer, his private counsel, in the amount of $6,584, and to Brezine for estate work, in the amount of $15,893.71. The motion indicated that Brezine had already received payment of $7,156 from the executor. Karen Pelphrey filed a pro se objection to the payment of fees, and then, through an attorney, filed a supplemental objection.

{¶ 18} The probate judge held a hearing on the request in February 2008, and found that under the settlement agreement, all attorney fees incurred by any party to the concealment case should be paid by the parties and not by the estate. The judge stated that any work done by Brezine for the estate should be billed to the estate, and that any legal work Brezine performed for an individual should be billed to that individual. The court then set a hearing before a magistrate on all issues and any clarification of the court's order.

{¶ 19} A magistrate then held a hearing to consider the issue of attorney fees. Donald Brezine was the only witness who testified about fees, and he was cross-examined by counsel for Karen Pelphrey. The magistrate subsequently filed a decision,

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County Common Pleas Court on the rejected claim.

indicating that the parties had stipulated that the number of billable hours in the case was 92.2 hours, that Brezine's hourly rate was $160 per hour, and that interest charges of $1,117.71 should not be included. The magistrate credited Brezine's testimony that, to the best of his knowledge, all the billable hours were for work done on the estate. The magistrate further found that the concealment action filed by Dureiko by and through Brezine benefitted the entire estate, because it increased the value of the estate and ultimately benefitted all estate beneficiaries. Accordingly, the magistrate concluded that Brezine should be allowed to pay himself an additional amount of $7,596 from the estate, conditioned upon a proper application for fees being filed.[2]

{¶ 20} Pelphrey filed objections to the magistrate's decision, contending that the transcript of the hearing, the entries on Brezine's bill, and the pleadings in the case indicated that a substantial amount of Brezine's work was performed in connection with the complaint for concealment. Pelphrey also asked the court to take judicial notice of Brezine's representation of himself as counsel for Dureiko, individually and in his capacity as heir and legatee in the concealment action. Finally, Pelphrey argued that the agreed entry prohibited the Estate from paying Brezine for these hours.

{¶ 21} The probate judge held a hearing on the objections, and subsequently modified the magistrate's decision to eliminate fees attributable to the concealment action. In this regard, the judge focused on the fact that Brezine had filed the concealment action on Dureiko's behalf as legatee and heir, and not for Dureiko as administrator for the estate. The court also focused on Brezine's failure to amend the

[2]This represents the total amount of fees minus interest ($14,752), minus what Brezine had already been paid ($7,156).

complaint to name Dureiko in his capacity as executor of Davidson's estate. The judge agreed with Pelphrey that the settlement agreement prohibited the estate from paying any attorney fees that had resulted from the concealment action. Based on Brezine's invoices, the judge concluded that 62.3 hours and $26 in court costs were attributable to the concealment action, leaving Davidson's estate obligated only for 29.9 hours of Brezine's work. The judge, therefore, ordered Brezine to repay $2,381 to the estate, since Brezine had already received $7,165 in attorney fees.

{¶ 22} Brezine now appeals from the order modifying the magistrate's decision and requiring repayment of fees.

II

{¶ 23} Brezine's First Assignment of Error is as follows:

{¶ 24} "IT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO FIND THAT NONE OF THE HOURS BILLED BY ATTORNEY FOR THE ESTATE DURING THE BATTLE PERIOD OF ASSET ALLOCATION BETWEEN THE ESTATE AND OTHER CLAIMANTS WERE EXPENDED FOR THE ESTATE WHEN THE ONLY WITNESS TO THE QUEST AT HEARING WAS THE ATTORNEY HIMSELF WHO TESTIFIED:

{¶ 25} " 'I CAN'T RECALL A SINGLE MOMENT OF EFFORT IN THOSE HEARINGS AND SO ON, AND PREPARATION FOR THEM, THAT WAS NOT FOR THE ESTATE.' TRANSCRIPT, 5/8/08 HEARING.

{¶ 26} " 'AND SO ALL OF THAT EFFORT WAS TO TRY AND BE SURE THERE WAS SOMETHING LEFT IN THE ESTATE AND WHEREAS WE FARED LESS THEN

WE HAD HOPED AT THOSE HEARINGS. STILL, I THINK THAT MORE WAS LEFT IN THE ESTATE THAN WOULD HAVE BEEN HAD WE ACQUIESCED IN THE EARLY LISTS THAT WERE SUBMITTED.' IBID. P. 9:20-24."

{¶ 27} Under this assignment of error, Brezine contends that the order of the probate court from which this appeal is taken is against the manifest weight of the evidence, because it is contradicted by the evidence submitted at the hearing before the magistrate. Brezine also contends that the trial court's decision misreads the Agreed Settlement Entry.

{¶ 28} R.C. 2113.36 provides for payment of attorney fees in probate cases, and states that:

{¶ 29} "When an attorney has been employed in the administration of the estate, reasonable attorney fees paid by the executor or administrator shall be allowed as a part of the expenses of administration. The court may at any time during administration fix the amount of such fees and, on application of the executor or administrator or the attorney, shall fix the amount thereof."

{¶ 30} Decisions on payment of attorney fees are within a probate court's sound discretion. *In re Estate of Kendall*, 171 Ohio App.3d 109, 2007-Ohio-1672, at ¶ 25 (citation omitted). An abuse of discretion is " ' "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." ' " *Whitt v. Whitt*, Greene App. No. 2003-CA-82, 2004-Ohio-5285, at ¶ 22, quoting from *Blakemore v. Blakemore*, (1983), 5 Ohio St.3d 217, 219. A judgment will also not be reversed as being against the manifest weight of the evidence if it is "supported by some competent, credible evidence going to all the essential elements of the case." *Kendall*, 2007-

Ohio-1672, at ¶ 25.

{¶ 31} The settlement agreement was first placed on the record in open court in January 2008. At that time, Goodman's attorney outlined the following agreement, in pertinent part:

{¶ 32} "And this is a settlement relating to the Estate of Wallace N. Davidson, case number 2006 EST 01259 and a miscellaneous case filed under that estate, case number 2006 MSC 00207. This is a settlement that is resolving the complaint for concealment of assets by Mike Dureiko against Mr. Goodman. As well as, various other motions that have been filed in both the estate case and the concealment case.

{¶ 33} " * * * *

{¶ 34} "It is agreed that everyone who is a party to this action will pay their own attorney fees, they will not come out of the estate." Transcript of January 11, 2008 Hearing, pp. 97-100.

{¶ 35} In April 2008, the parties also filed an "Agreed Settlement Entry," bearing the captions of both the estate and concealment actions. Paragraph 12 of the Agreed Settlement Entry provides that: "All attorney fees incurred by any of the parties in this matter shall be paid by such parties and not from the Estate of Wallace N. Davidson."

{¶ 36} At the magistrate's hearing on attorney fees, Brezine testified that the vast majority of his time had been spent preparing for hearings to decide what share of the assets belonged either to Goodman or to Davidson, and to decide what share the two men jointly owned. The following exchange also occurred during Brezine's direct testimony:

{¶ 37} "All of that effort was to try and be sure there was something left in the

estate and whereas we fared less then we had hoped at those hearings. Still, I think that more was left in the estate than would have been had we acquiesced in the early lists that were submitted.

{¶ 38} " * * * *

{¶ 39} "I can't recall a single moment of effort in those hearings and so on, and preparation for them, that was not for the estate.

{¶ 40} " * * * *

{¶ 41} "He [Dureiko] was never my client as an individual in spite of the reference there to him as legatee in that one motion.

{¶ 42} " * * * *

{¶ 43} "THE COURT: So if I can summarize your position. You're stating that all the hours that lead up to the total amount of fourteen thousand-some-odd dollars was devoted entirely to processing the estate. Is that correct?

{¶ 44} "MR. BREZINE: That's correct." Transcript of May 1, 2008 Hearing, pp. 9-11.

{¶ 45} During cross-examination, Brezine admitted that most of the discovery and other work was done in the concealment action, not in the estate case. However, Brezine also maintained that the concealment action was integral to creating and preserving estate assets. For example, the following exchange occurred during cross-examination:

{¶ 46} "Q. Isn't it true that all the discovery was done in concealment action and not in the estate case?

{¶ 47} "A. Well, the estate case – in a sense that's true. The estate case,

which of course – the purpose of the executor whom we represented, is to get the assets, assemble the assets. And early on, part of our effort to assemble those assets was a motion for concealment and we made that decision in the filing that I've mentioned before.

{¶ 48} "You're right. That became the action in this whole thing until it was resolved. And after that, it's been the probate paperwork. That does not indicate that all the time he spent on that or really, as far as I can see, any of the time I spent on that, was not time that was needed for the representation of the estate." Id. at p. 20.

{¶ 49} In rejecting Brezine's request for fees, the probate judge did not dispute Brezine's belief that his work on the concealment action benefitted the estate. Instead, the judge concluded that the settlement agreement controlled how fees could be paid. Since Brezine filed the action for concealment on Dureiko's behalf as legatee and heir, and not as administrator or executor of Davidson's estate, the judge found that the estate did not have to pay attorney fees related to the concealment action. We agree with the probate judge.

{¶ 50} "A settlement agreement is a contract designed to terminate a claim by preventing or ending litigation. * * * Settlement agreements are highly favored in the law. * * * When parties voluntarily enter into an oral settlement agreement in the presence of the court, the agreement constitutes a binding contract. * * * As a result, unless a party has moved to set aside such an agreement, the trial court can enter judgment consistent with that agreement." *In re Estate of Poling*, Hocking App. No. 04CA18, 2005-Ohio-5147, at ¶ 20 (citations omitted).

{¶ 51} "A general rule of contract interpretation is that if language in the contract

is ambiguous, the court should construe the language against the drafting party. * * * However, when interpreting a contract, the court must first examine the plain language of the contract for evidence of the parties' intent. * * * If the language of the contract is ambiguous a court should consider extrinsic evidence to determine the parties' intent. * * *" *Klug v. Klug*, Montgomery App. No. 19369, 2003-Ohio-3042, at ¶ 13 (citations omitted).

{¶ 52} General rules of contract interpretation indicate that "[c]ommon words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Shifrin v. Forest City Enterprises, Inc.,* 64 Ohio St.3d 635, 638, 1992-Ohio-28. "If no ambiguity appears on the face of the instrument, parol evidence cannot be considered in an effort to demonstrate such an ambiguity." Id.

{¶ 53} The language of the settlement agreement is not ambiguous on its face. The settlement agreement was entered into at the hearing on the concealment action, and the parties did not restrict the agreement to just the concealment action. In addition, the Agreed Settlement Entry bears the captions of both the estate and concealment cases.

{¶ 54} Read literally, the settlement agreement could preclude the estate's attorney from being paid any fees by Davidson's estate, even for work performed on the estate's behalf. Brezine argues that this provision makes the agreement self-contradictory and unconscionable. However, the agreement must be read in light of R.C. 2113.36, which mandates the allowance of "reasonable attorney fees paid by the executor or administrator * * * as a part of the expenses of administration." The parties,

therefore, presumably would have entered into their settlement agreement with this statutory mandate in mind.

{¶ 55} Furthermore, Dureiko would not have been entitled to collect attorney fees from the estate for pursuit of personal property that he allegedly removed from the Runnymede house and claimed as his own – or for the pursuit of his separate interest as a beneficiary in the property of the estate. See *In re Estate of Poling*, Hocking App. No. 04CA18, 2005-Ohio-5147, at ¶ 44 (noting that R.C. 2113.36 "does not authorize the trial court to award attorney fees to an executor who retains legal counsel to pursue his individual and beneficiary interests"). In *Poling*, the court relied on the fact that attorney fees cannot generally be awarded in the absence of statutory authority or a finding that a losing party has acted in bad faith. Id. at ¶ 43-44.

{¶ 56} In view of these facts, the probate court's decision on attorney fees is supported by competent, credible evidence – namely, the agreement of the parties recited in open court, and the subsequent Agreed Settlement Entry that was signed and filed. Davidson's estate was not a party to the concealment action, and therefore, fees for representation in that action were not necessarily required to be paid by the estate, either under the Agreed Settlement Entry, or under the probate court's statutory authorization to award fees.

{¶ 57} As noted by the probate court, Brezine filed the concealment action on Dureiko's behalf as legatee and heir, not as co-executor. The concealment action was also filed before Brezine entered an appearance in the estate case. Furthermore, as the probate court observed, Brezine did not thereafter attempt to amend the complaint to add Dureiko in his capacity as an executor. As a result, the probate court correctly

concluded that the Davidson's estate should not pay fees for Brezine's work in the concealment action. Brezine's invoices and also testimony support the court's decision that 62.3 hours and $26 in costs are attributable to the concealment action. Although Brezine believed that his work was performed on behalf of the estate, he also admitted during cross-examination that a substantial amount of work was done in connection with the concealment action. The probate court was entitled to consider these facts.

{¶ 58} Accordingly, the order modifying the magistrate's award of fees is not against the manifest weight of the evidence. Brezine's First Assignment of Error is overruled.

III

{¶ 59} Brezine's Second Assignment of Error is as follows:

{¶ 60} "IT IS ABUSE OF DISCRETION IN RULING ON OBJECTIONS TO A MAGISTRATE'S DECISION ON A MOTION FOR PAYMENT OF ATTORNEY FEES TO RELY ENTIRELY ON A DOCUMENT, WHEN THAT DOCUMENT AS A WHOLE WITNESSES TO THE ROLE PLAYED BY ATTORNEY FOR THE ESTATE IN SAVING THE ESTATE FROM INSOLVENCY, WHEN ATTORNEY FOR THE ESTATE SIGNED THE DOCUMENT AS ATTORNEY FOR THE ESTATE, AND WHEN THE RELIANCE OF THE COURT IS ON ONE SECTION IN THE DOCUMENT AND A SECTION THAT IS SELF-CONTRADICTORY AND THEREFORE UNWORTHY OF RELIANCE FOR THE VERY MATTER THAT IS THE SUBSTANCE OF THE CONTRADICTION."

{¶ 61} Under this assignment of error, Brezine contends that the probate court abused its discretion by relying solely on the language of the Agreed Settlement Entry,

and in disregarding the only testimony offered about attorney fees. Because these arguments simply reiterate matters that have already been addressed, we need not discuss them in detail.

{¶ 62} Brezine's main contention in this regard is that enforcement of the Agreed Settlement Entry is unconscionable if the entry is construed to preclude the Estate from paying its own attorney. For the reasons we have previously mentioned, the court was not precluded from allocating attorney fees to Brezine for work on the estate. In addition to having statutory authorization to award fees, probate courts have also been permitted to disregard prior agreements between parties as to attorney fees, and to intervene to alter attorney fee arrangements. See, *e.g.*, *In re Estate of York* (1999), 133 Ohio App.3d 234, 243 (affirming authority of probate court to disregard contingent fee agreement between beneficiary and attorney, and to disregard the probate court's own initial determination that a contingent fee agreement was fair and reasonable).

{¶ 63} Courts generally "presume that the intent of the parties to a contract resides in the language they chose to employ in the agreement." *Shifrin*, 64 Ohio St.3d 635, 638. As we have noted, the Agreed Settlement Entry is not ambiguous on its face. In addition, Brezine is an experienced attorney, who participated in the hearing where the agreement was read into the record, and who also signed the agreed entry that was filed. There is nothing unconscionable, arbitrary, or unreasonable about a decision that abides by an agreement parties have voluntarily made.

{¶ 64} Brezine's Second Assignment of Error is overruled.

IV

{¶ 65} Breziene's First and Second Assignments of Error having been overruled, the order of the probate court from which this appeal is taken is Affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

Don Brezine
Anne M. Frayne
Charles W. Slicer, III
Hon. Alice O. McCollum