

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In re: :
The Estate of Ernest Villiers, Jr., : No. 12AP-293
 : (Prob. No. 521311)
(James H. Villiers and Ernest A. Villiers, III, :
 : (REGULAR CALENDAR)
Appellants). :
 :

In re: :
The Testamentary Trust of Ernest Villiers, Jr., : No. 12AP-294
 : (Prob. No. 525685)
(James H. Villiers and Ernest A. Villiers, III, :
 : (REGULAR CALENDAR)
Appellants). :
 :

In re: :
The Testamentary Trust of Virginia L. Villiers, : No. 12AP-295
FBO, Ernest A. Villiers, : (Prob. No. 518951)
(James H. Villiers & Ernest A. Villiers, III, : (REGULAR CALENDAR)
Appellants). :
 :

In re: :
The Estate of Virginia L. Villiers, : No. 12AP-296
 : (Prob. No. 510377)
(James H. Villiers & Ernest A. Villiers, III, : (REGULAR CALENDAR)
Appellants). :
 :

D E C I S I O N

Rendered on June 20, 2013

*Gallagher, Gams, Pryor, Tallan & Littrell, L.L.P., and
Timothy J. Ryan, for appellants.*

J. Randolph Burchfield, for appellees Valerie Sholtes and Elissa Villiers.

APPEAL from the Franklin County Probate Court

CONNOR, J.

{¶ 1} Exceptors-appellants, James H. Villiers, and Ernest A. Villiers, III (collectively "appellants," individually "James" and "Ernest III"), appeal from a judgment of the Franklin County Probate Court assessing attorney fees incurred in connection with the exceptions they filed to the accounts of four different probate entities.

{¶ 2} Appellants bring the following sole assignment of error for our review:

THE TRIAL COURT ERRED WHEN IN RESPONSE TO A MOTION FOR ATTORNEY FEES AND COSTS FILED BY EACH OF THE FOUR PROBATE ENTITIES IN THE LITIGATION THE COURT ADOPTED THE MAGISTRATE[']S DECISION CHARGING THE ENTIRE SUM OF ATTORNEY FEES TO ONLY ONE OF THE FOUR ENTITIES, THE TESTAMENTARY TRUST OF VIRGINIA VILLIERS. A SIGNIFICANT PORTION OF THE FEES CHARGED TO THE TRUST WERE NOT INCURRED FOR THE BENEFIT OF THE TRUST, BUT WERE INSTEAD INCURRED TO ADVANCE THE INTERESTS OF THE THREE REMAINING PROBATE ENTITIES AND ALSO CARL SHOLTES, VALERIE SHOLTES, AND ELISSA VILLIERS.

{¶ 3} This matter arised out of probate proceedings following the successive deaths of Virginia L. Villiers and her son Ernest Villiers, Jr. ("Ernest Jr."). In addition to the individual parties, four different probate entities are at issue: The Estate of Virginia L. Villiers, the Testamentary Trust of Virginia L. Villiers, the Estate of Ernest Villiers, Jr., and the Testamentary Trust of Ernest Villiers, Jr.

{¶ 4} Virginia died testate on June 21, 2005 leaving three children, Ernest Jr., Valerie Sholtes, and Elissa Villiers. Elissa Villiers was appointed executor of the estate. Virginia's will generally distributed her residual estate among her three children. Most relevant to this case, the will provided that one-third of her residual estate would go to Ernest Jr., but first pass through a testamentary trust providing for gradual disbursement of his share. Valerie Sholtes and Elissa Villiers were the named trustees of this

Testamentary Trust of Virginia L. Villiers ("the Virginia Trust"), and the terms of the trust provided for 20 percent of the corpus to be distributed to Ernest Jr. immediately and the balance paid in 120 monthly installments. The terms of the Virginia Trust further provided that, upon the death of Ernest Jr., any remaining undistributed corpus would be distributed to his sons, James and Ernest III.

{¶ 5} Ernest Jr. died testate on January 23, 2007. The probate court appointed Valerie Sholtes as executor of his estate. Ernest Jr.'s will provided that the residuary of his estate would go equally to appellants, with James' share to be held in trust until James' 25th birthday through the Testamentary Trust of Ernest Villiers, Jr. ("the Ernest Jr. Trust"). Valerie Sholtes is the trustee for the Ernest Jr. Trust.

{¶ 6} The estate of Virginia closed on January 4, 2007 with no remaining assets. The estate of Ernest Jr. filed its final account on December 20, 2007, with no remaining assets. The Ernest Jr. Trust filed a final account on February 10, 2009, also stating that there were no assets in the trust.

{¶ 7} On March 17, 2009, appellants filed exceptions to the accounts filed for the estate of Virginia, the Virginia Trust, the estate of Ernest Jr., and the Ernest Jr. Trust. The gist of the exceptions is that their aunts and fiduciaries, Valerie Sholtes and Elissa Villiers, as well as their uncle by marriage, Carl Sholtes, had cooperated amongst themselves to wrongfully convert assets from Virginia during her life and from her estate after her death. To the extent that allegations involved the aunts in their fiduciary capacities, the exceptions rely on the fiduciaries' failure to fulfill their obligations to recover assets that they themselves had previously converted. The exceptions asserted that these actions had reduced the rightful expectancies of appellants by depleting assets that would otherwise have devolved to them by transit through the estate of Virginia, the Virginia Trust, the estate of Ernest Jr., and the Ernest Jr. trust.

{¶ 8} On January 8, 2010, a magistrate for the probate court issued a decision dismissing all exceptions to the estate of Ernest Jr. and the Ernest Jr. Trust. On October 15, 2010, appellants withdrew their exceptions to the accounts for Virginia's estate and the Virginia Trust. On May 21, 2010, the probate court overruled objections to the magistrate's decision of January 8, 2010 and adopted the magistrate's decision.

{¶ 9} The fiduciaries for the various probate entities then filed applications for attorney fees and costs arising from the litigation prompted by appellants' filing of exceptions. The itemized attorney fees amount to \$39,150. In addition, Valerie Sholtes and Elissa Villiers, as fiduciaries, and Carl Sholtes, who was not a fiduciary for any of the probate entities, sought to recover time and travel expenses totaling \$16,060. After the hearing the magistrate granted the requested attorney fees in their entirety, but denied any award for costs incurred by the fiduciaries or Carl Sholtes. The magistrate specified that the attorney fees would be payable entirely from the Virginia Trust, which was the only remaining probate entity possessing assets from which the fees could be paid.

{¶ 10} The fiduciaries have not cross-appealed from the trial court's denial of their application for personal expenses. The sole issue before us is whether it was proper for the probate court to charge all attorney fees to the Virginia Trust, rather than allocate them among the four probate entities implicated by the exceptions. Appellants' objection to the allocation of fees is, of course, that it causes the entire burden of fees to fall on that portion of Virginia's estate bequeathed to Ernest Jr., and by succession to appellants as the principal beneficiaries of Ernest Jr.'s estate. Appellants propose that the fees should have been allocated according to the relative benefit bestowed upon each four probate entities. Appellants also propose that fees incurred in providing legal services that only benefited individuals in their personal capacities should not be payable from the trust.

{¶ 11} The fiduciaries applied for fees under each of the four separate probate court case numbers in this matter covering the four probate entities. Each application sought the full amount of \$39,150 in attorney fees from each entity, presumably anticipating application of any appropriate offsets rather than seeking quadruple recovery. Although the applications do not specify the statute under which fees were sought, the applicable sections are R.C. 5810.04 for trusts and R.C. 2113.36 for the estates. Because the probate court chose to award the entire fee amount from the Virginia Trust, it by implication granted that application and denied the other three. The statute governing this award of fees, therefore, is that applicable to trusts.

{¶ 12} R.C. 5810.04 governs the award of attorney fees for the administration of a trust, and provides that the court may award, "as justice and equity may require," costs, expenses, and reasonable attorney fees "to be paid by another party, from the trust that is

the subject of the controversy, or from a party's interest in the trust that is the subject of the controversy." We review an award of attorney fees made pursuant to R.C. 5810.04 under an abuse of discretion standard. *Wills v. Kolis*, 8th Dist. No. 93900, 2010-Ohio-4351, ¶ 52; *Damas v. Damas*, 6th Dist. No. L-10-1125, 2011-Ohio-6311, ¶ 59.

{¶ 13} Appellants assert that both the testimony of counsel for the trusts, estates, and fiduciaries, as well as billing documentation submitted to the court, establish that numerous billing entries could be separately assessed among the probate entities and fiduciaries, but that counsel failed to sufficiently itemize his billing records to do so.

{¶ 14} Appellants also argue that the posture of the case and the evidence heard at the hearing reflect that counsel for appellees not only undertook advocacy for the interest of the trusts and estates, but represented the personal interests of Valerie Sholtes, Carl Sholtes, and Elissa Villiers, and that this personal advocacy for the individuals should not come at the expense of the probate entities and in particular at the expense of the Virginia Trust. Appellants point out that Carl Sholtes testified at the hearing admitting that his personal interests were represented by counsel in the case, despite the fact that he was at no time a fiduciary to any probate entity. Appellants also argue that analysis of the detailed fee statements for counsel reveals significant time billed for conversations between counsel and Carl Sholtes. Since Mr. Sholtes was not a fiduciary, appellants argue, any time devoted to his interests by counsel could not further the interests of the trusts and estates.

{¶ 15} At the hearing, the fiduciaries offered the testimony of a legal expert, attorney Jay Michael, to establish the reasonableness of their attorney fees. While Mr. Michael testified that the fees were reasonable with respect to the amount of time expended and the amount billed for that time, he also conceded on cross-examination that it would be appropriate to split the fee amount among the four probate entities. (Tr. 15.)

{¶ 16} Reviewing the record under an abuse-of-discretion standard, we find that the trial court had the latitude under R.C. 5810.04 to allocate the fees as it did. R.C. 5810.04 clearly contemplates that when exceptions to a trust accounting are filed, the share of the party initiating the litigation and subjecting the accounts in dispute may be charged. In the present case, charging the attorney fees entirely to the Virginia Trust

rather than all probate entities equally essentially placed the entire burden for the costs of litigation upon appellants, who had filed the exceptions to the various accounts of the probate entities. The trial court could have gone through the vain and ministerial process of charging only the appellants' share of Virginia's estate, the Virginia Trust, Ernest Jr.'s estate, and Ernest Jr. Trust, but the essential equitable result achieved here is identical.

{¶ 17} Moreover, the record supports the court's conclusion that the attorney fees in this case should not be broken out to reflect independent work done for the benefit of the fiduciaries in their personal capacities or for Carl Sholtes individually. Whether that work was an inevitable corollary to the work on behalf of the trust, or whether it involved additional commitment beyond that required by the defense of the probate entities' affairs, is an issue of contested fact resolved by the trial court in favor of appellees. We exercise due deference to the trial court's conclusions on this question.

{¶ 18} While the exceptions raised allegations of misconduct by those individuals prior to the death of Virginia Villiers, the formal basis for the exceptions must involve their conduct as fiduciaries. The outcome of the court's ruling on the exceptions is not here challenged. On this record, the trial court could reasonably conclude there was simply no separable benefit to any particular probate entity or individual from the legal work performed. Once the required legal representation was undertaken on behalf of the Virginia Trust to resolve the exceptions, the benefit to the other probate entities and fiduciaries devolved as a matter of course and involved no additional expense beyond what would have been incurred had only one entity, the Virginia Trust, been implicated.

{¶ 19} In summary, given the posture of the case, the origin of the litigation, the outcome of the trial court's decision regarding the exceptions (which is not contested in this appeal), and the clear alignment of the parties, it was not error for the trial court to assess the fees and allocate them as it did.

{¶ 20} In so holding, we need not expressly disagree with the holding in *In re Estate of Coleman*, 55 Ohio App.3d 261 (6th Dist.1998). In that case, the court of appeals found error where the trial court had allocated all attorney fees to the share of an estate receivable by the beneficiaries whose actions had precipitated the fee. The court held that, the attorney fees were administrative expenses to be paid out of the estate before division, with the burden equally shared by the beneficiaries. *Id.* at 264. *Coleman*, however, is not

a case decided under R.C. 5810.04, as it did not directly concern expenses charged to a trust.

{¶ 21} For the same reasons we do not apply the case of *In re Estate of Wiehe*, 1st Dist. No. C-830419 (May 9, 1984), in which the surviving spouse filed exceptions to the final account of the estate. The court of appeals held that the additional attorney fees created by the exceptions should be divided pro rata according to the various beneficiaries' proportionate share of the estate, but did so through application (by analogy) of R.C. 2109.33, which controls the allocation of the testator's debts. That case, whose reasoning appears strained in any event, is not applicable on these facts.

{¶ 22} In conclusion, we find that the probate court did not abuse its discretion in allocating fees to be solely borne by the Virginia Trust. Appellants' sole assignment of error is overruled, and the judgment of the Franklin County Probate Court is affirmed.

Judgment affirmed.

KLATT, P.J., and DORRIAN, J., concur.
