

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

IN THE MATTER OF: : CASE NO. CA2010-11-111

ESTATE OF LINN W. DERICKSON : OPINION
: 7/25/2011

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CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
PROBATE DIVISION
Case No. 09-1527

G. Mitchel Lippert, 5651 Eagle Nest Court, West Chester, Ohio 45069, for appellant

Robbins Kelly Patterson & Tucker, Barry A. Spaeth, 7 West Seventh Street, Suite 1400,
Cincinnati, Ohio 45202, for appellee

Thomas D. Shackelford, 224 Reading Road, Mason, Ohio 45040-1665, for defendant Mary
Sue Derickson

Michael L. Tranter, 830 Main Street, Suite 806, Cincinnati, Ohio 45202, for defendant Janet
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Judith Ann Derickson Hughes, 8745 West 80th Drive, Arvada, Colorado 80005, defendant pro
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POWELL, P.J.

{¶1} An Ohio attorney appointed as the domiciliary administrator for an Ohio estate
requested his extraordinary administrator's fees and attorney fees for an attorney employed
to assist in California probate proceedings that ultimately determined decedent was domiciled

in California. The Warren County Probate Court denied both requests. We affirm the judgment, as we find no abuse of discretion in a case we have sua sponte removed from the accelerated calendar.

{¶2} Decedent, Linn W. Derickson, died in August 2009, while reportedly living in a house he owned in Warren County, Ohio. According to the decision filed by the probate court, decedent was in the process of terminating his marriage in California, and maintained business offices and real estate in California.

{¶3} Decedent's son applied for appointment as administrator of decedent's estate in California. After consultation with one of decedent's other children, attorney G. Mitchel Lippert applied for and received letters of authority to act as the Ohio estate's administrator. According to the probate court, Lippert proceeded as if decedent died intestate, although the record indicated there were possibly two wills in existence. Lippert used the services of Thomas Dominick, an attorney in California, to apply for ancillary administration for the property located in California and to object to the appointment of decedent's son as administrator in California.

{¶4} The California probate court subsequently determined that it had jurisdiction over decedent's estate and appointed decedent's son as administrator. Lippert resigned his Ohio appointment, and asked for certain fees from the Ohio probate court. The Warren County probate court noted in its decision that Lippert requested: "fiduciary fees from the Ohio estate for his services as administrator in Ohio, his application for appointment as administrator in California, his legal services in connection with the Ohio estate[,] and Dominick's legal services in connection with the California estate."

{¶5} The probate court stated that since Ohio had no jurisdiction to probate California real property or to supervise Lippert as ancillary administrator in California, Warren County had "no jurisdiction to allow attorney and fiduciary fees involved with the California

probate proceedings." The probate court awarded the attorney ordinary administrator's fees and attorney fees, but denied any fees it associated with the California proceedings, i.e., the extraordinary fiduciary fees and attorney fees for the California attorney. Lippert filed this appeal, raising two assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE WARREN COUNTY, OHIO PROBATE COURT ABUSED ITS DISCRETION, AND ACTED CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE OR CONTRARY TO LAW IN DENYING ADMINISTRATOR'S REQUEST FOR AN ALLOWANCE OF FEES FOR EXTRAORDINARY SERVICES."

{¶8} Lippert argues that the trial court erred when it refused to pay him extraordinary fees as administrator for his services in California because he was defending the Ohio administration from collateral attack.

{¶9} Executors and administrators are entitled to compensation for their services pursuant to R.C. 2113.35. *In re Estate of Lazar*, Geauga App. No.2003-G-2509, 2004–Ohio–1964, ¶16.

{¶10} R.C. 2113.35 states, in pertinent part, that:

{¶11} "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 * * *."

{¶12} 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, that allowances, in addition to those provided by R.C. 2113.35, 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.

{¶13} Sup.R. 72 states, in pertinent part, that:

{¶14} "(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)."

{¶15} Compensation for extraordinary services concerns the fiduciary alone and does not concern the matter of counsel fees. *In re Estate of Jurkoshek*, Summit App. No. 23150, 2006-Ohio-5881, ¶16. Extraordinary services by an administrator or executor include participation, initiation, and defense of the various forms of litigation involved in probating a will and protecting the estate. *Id.*

{¶16} Where a request for extraordinary administrator fees is made, the trial court must review the total fees payable to the fiduciary when it contemplates making a payment of fees beyond the commission authorized for ordinary services. *Id.*; see R.C. 2113.36.

{¶17} We review for an abuse of discretion the probate court's decision on whether to allocate extraordinary fiduciary fees in the administration of an estate. See *Estate of Bretschneider*, Geauga App. No. 2005-G-2620, 2006-Ohio-1013, at ¶32. Under this standard of review, an appellate court may not merely substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122.

{¶18} As we previously noted, Lippert argues that he should receive extraordinary expenses for services he provided in defending the Ohio administration from collateral attack. A collateral attack is an attempt to defeat the operation of a judgment, in a proceeding where some new right derived from or through the judgment is involved. *State ex rel. Painter v. Brunner*, 128 Ohio St.3d 17, 2011-Ohio-35, ¶47.

{¶19} It does not appear the Warren County probate court interpreted Lippert's efforts in California to involve defending a collateral challenge to Ohio's administration, but, rather,

found his efforts pertained to an attempted ancillary administration in California. See R.C. Chapter 2129 (ancillary administration); R.C. 2107.11 (jurisdiction to probate); see R.C. 2113.01 (what court shall grant letters).

{¶20} We find no merit to Lippert's contention that extraordinary fees should be paid out of Ohio estate assets or that he was defending a collateral attack in California on the administration of the Ohio estate. The probate court indicated that "it is the San Bernadino Superior Court, not this Court that should determine what fees should be allowed for the proceedings in California." We find no abuse of discretion in that regard. See *In re Spidel's Estate* (App.1952), 64 Ohio Law Abs. 71. Lippert's first assignment of error is overruled.

{¶21} Assignment of Error No. 2:

{¶22} "THE WARREN COUNTY, OHIO PROBATE COURT ABUSED ITS DISCRETION, AND ACTED CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE OR CONTRARY TO LAW IN DENYING ADMINISTRATOR'S REQUEST FOR AN ALLOWANCE OF ATTORNEY FEES FOR THE SERVICES OF ATTORNEY THOMAS W. DOMINICK."

{¶23} Lippert's arguments here are similar to those arguments presented under the first assignment of error. Specifically, Lippert argues that Dominick's attorney fees should be paid because he was employed to defend in California a collateral attack on the Ohio administration.

{¶24} The allowance of fees for services rendered by attorneys employed by an executor or administrator is a matter within the discretion of the probate court and we will not disturb the court's determination, save an abuse of discretion. *In re Estate of Bretschneider*, 2006-Ohio-5881, at ¶15; see *In re Stillwell* (Apr. 10, 2000), Butler App. No. CA99-06-112, 2000 WL 360129.

{¶25} Sup. R. 71, entitled, "Counsel fees," states, in part, that:

{¶26} " * * *

{¶27} "(B) Attorney fees for the administration of estates shall not be paid until the final account is prepared for filing unless otherwise approved by the court upon application and for good cause shown.

{¶28} "(C) Attorney fees may be allowed if there is a written application that sets forth the amount requested and will be awarded only after proper hearing, unless otherwise modified by local rule.

{¶29} " * * *

{¶30} "(G) An application shall be filed for the allowance of counsel fees for services rendered to a guardian, trustee, or other fiduciary. The application may be filed by the fiduciary or attorney. The application shall set forth a statement of the services rendered and the amount claimed in conformity with division (A) of this rule.

{¶31} "(H) There shall be no minimum or maximum fees that automatically will be approved by the court."

{¶32} Based on the same reasons as set forth in the first assignment of error, we find no abuse of discretion by the probate court in its decision that it would not authorize payment of attorney fees from the Ohio estate for any services rendered in California by California attorney Dominick. Lippert's second assignment of error is overruled.

{¶33} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.