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Attorneys' Fees: A Washington Probate Lawyer Learns The Hard Way That Attorneys Can Charge Only As Much As The Courts Say They Can

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Some wags who practice in the Probate Division here in Chicago say an estate is only "fully probated" when it has been fully eaten up by lawyers' fees in litigation or other legal matters. For the literary, such quips bring to mind *Jarndyce v. Jarndyce* in Charles Dickens' novel, *Bleak House*, lampooning the 19th century English chancery courts.

But before we snicker about the British courts of old or present-day Chicago cynics, take a look at the case of a Washington, D.C. attorney who acted as the personal representative of a decedent's estate and tried to collect more fees than the court was willing to approve. The lawyer was heavy handed in trying to get paid what he thought his services were worth. Yet the case stands as a warning that all estate lawyers need to heed what the probate courts say they can charge.

On March 3, 1993, Leroy Green died intestate in the District of Columbia. His estate consisted of liquid assets worth about $46,000 plus a home on Ames Street, N.E. On July 20, 1994, attorney John Pye was appointed as successor personal representative of Green's estate.

Attorney Pye asked the court for $44,000 in fees and $1,000 in expenses for a year and a half's worth of probate work. Five of the decedent's 17 heirs filed an objection to this request.

On Aug. 5, 1998, the probate court approved only $28,041.84 of the $44,000 requested fee, and disallowed the request for expenses because of Pye's "extraordinary failure" to justify and document either.

The court also ordered Pye to file receipts from all heirs to establish that their complete and accurate final distributions were received.

About a month later, Pye filed a "Motion for Application for Entry of Judgment, for Stay of Enforcement of Order Pending Appeal." In its order granting the motion, the court directed that the filing of distribution receipts be stayed pending appeal. That winter, Pye wrote a letter to the decedent's heirs asking if they'd pay the difference between his requested and approved fees. And here's where he went too far: Pye also strongly implied that — because of the stay that had been granted by the probate court (at his request) — the heirs would not receive any portion of their share for at least a year if they didn't settle with him, regardless of the outcome on appeal. Pye also stated that none of the heirs was "receiving a substantial distribution," and that his additional fee would not significantly alter the amount of their shares. Pye concluded the letter by stating: "If you are willing to settle the matter on these terms, please sign the enclosed copy of this letter, and I will send you your distribution as originally shown on the second account after I have received everyone's response. I will then note the appeal settled and dismissed." Six of the 17 heirs quickly signed and stated they were agreeing to a reduced "distributive share." A seventh later agreed to pay Pye an additional fee.

Having pretty much gotten what he wanted from the heirs, Pye on April 6, 2000, filed a motion to voluntarily dismiss the appeal, stating: "The issues which prompted the appellant to file this appeal have been resolved with most of the interested persons of the Estate of Leroy Green." The appellate court promptly granted Pye's motion and dismissed the appeal. And, true to his implied threat, Pye did not distribute the remainder of the estate to those heirs who'd declined to pay the additional fee.

In October 2000, the Register of Wills notified Pye that a hearing would be held that December to address his failure to file receipts showing proper distribution to all of the heirs. At that hearing, the judge removed Pye as personal representative because of that failure to produce receipts. The court also held that the "side agreement" with the heirs was invalid and referred the matter to Washington's office of bar counsel "for such action as is deemed appropriate."

The judge stated that although "[i]t has long been recognized that the distributees of an estate may make arrangements with the Personal Representative for the payment of his fee with their funds, Pye's "representations to the beneficiaries in his letter requesting fees...were not accurate" and he "effectively coerced each beneficiary into accepting a reduced share." The court also relied on the fact that Pye concealed the existence of the side agreement from the court and his successor personal representative for more than two years, never filed receipts, and never filed an amended final account advising the court of the true amount he paid to each heir. Pye appealed.

Pye's argument on appeal was that he had a valid side agreement for an additional fee with seven heirs of the estate. The appellate court concurred with the lower court that the agreement was invalid but reached this conclusion for a different reason.

The appellate court stated that Pye's actions — asking for a stay, writing a letter to the heirs without the probate court's knowledge, violating the stay for those heirs who agreed to pay an additional fee, and initiating an appeal — showed that he placed his interest in obtaining a larger fee before the heirs' best interests. The court opined that it would be reaching a different result if Pye had simply sought a stay and then appealed, or if he had paid the lesser (undisputed) amount to all the heirs and held the remainder in escrow pending resolution of his claim.

The court stated that while a personal representative has a right to reasonable compensation for his services, that right does not supersede the best interests of the heirs and, as recited in Section 170 of the *Restatement of Trusts*, the personal representative "is in a fiduciary relation to the [heirs] and as to matters within the scope of the relation he is under a duty not to profit at the expense of the [heirs]."

The court therefore held that Pye took advantage of the stay and the appellate process to further his own interest in obtaining a larger fee and, accordingly, the side agreement was invalid because Pye breached his fiduciary duty to the heirs.

Although the Washington appellate court states (in what is essentially dicta) that parties are free to make their own fee arrangements and that a less coercive approach by attorney Pye would not have breached his duty to the heirs, practitioners should also heed their jurisdiction's ethical rules. The issue is the reasonableness of the fee. Most, if not all, state ethics rules forbid a lawyer from charging unreasonable fees. At least one sitting judge/commentator has advanced the theory that once a court has determined the fee of a lawyer, that fee is the upper limit of the "reasonable" fee. Charge any more, even if by prior agreement with the client, and you have breached the ethical rule relating to fees. (See Hon. Jeffrey A. Malak, "Fee Simple: Attorneys' Fees in Probate Estates," 17 *CBA Rec.* 31 (May 2005).

In jurisdiction where courts (often guardianship courts) set limits on the hourly fee they will approve, the ethical rule concern, to the extent the logic is correct, will often have the effect of precluding large firm representation with its usually higher hourly rates. This would not seem fair to the consumer who sees value in the larger firm representation and is willing to pay the difference between the amount the court will allow to be paid from the estate or trust and what the lawyer charges.

Where "In Terrorem" Should Spark Fear

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In Florida, no-contest clauses — aka in terrorem clauses — are void as against public policy, thought to chill citizens' access to the courts for redress. In Washington, D.C., they are strictly enforced. In Illinois, courts say they are enforceable but go to great lengths to find reasons not to do so. California law allows a plaintiff to check the water temperature before jumping in the pool.

Consider the following two recent cases, one out of strict Washington D.C. and the other from the more forgiving California:

In Washington, D.C.'s *Ackerman v. Genevieve Ackerman Family Trust,* 908 A.2d 1200 (D.C. App. 2006), the settlor and her husband created and funded similar trusts that would be irrevocable when the first of them died and, when the survivor died, be divided between their son, Stephen J. Ackerman, Jr., and daughter, Mary Frances Abbott. Both trusts named the couple's son-in-law as trustee. The settlor's husband died first. Each trust contained a no-contest clause stating that a contestant's interest in both trusts would be forfeited and the contestant treated as predeceased, if he filed a contest to any of either trust's provisions. The trusts included a residence where the son lived.

After the husband died, the son filed a petition to reform the trust to exclude the residence, contending that the settlors never intended to place the residence in the trust, but rather intended to leave the property directly to him. As the court noted, "This was not a unilateral hope on appellant's part. Before her death, his aunt, who then owned the [residence]...jointly with...[Genevieve] Ackerman, had voiced her intention to leave it to appellant. Before she created the trust, his mother had stated the same intention."

But the court found no evidence that the residence was improperly included in the trust and so enforced the no-contest clause against the son, causing him to forfeit his entire interest in both trusts.

Of particular note is the fact that the court reached this result notwithstanding the settlor/mother's own testimony that she had misunderstood her attorney's inclusion of the language and that she found the provision to be "inhuman." The court stated that Washington precedent allows for no exceptions to enforcing a no-contest provision.

We can only image the strain this ruling put on relations between the Ackerman children. In sharp contrast, California law provides for a procedure in which a potential contestant may seek a preliminary declaratory judgment as to whether a contemplated action would trigger the no-contest clause. *Hearst v. Ganzi,* 2006 WL 3720244 (Cal. App. 2d Dist. 2006) illustrates this nicely.

Hearst involves the fate of the fortune of famed yellow newspaper magnate William Randolph Hearst, who died in 1951 at age 88. Three of the Hearst Family Trust's 17 trust income beneficiaries petitioned for a determination as to whether their proposed action against the trustees would amount to a "contest" of their grandfather's will. The three — William R. Hearst II, Deborah Hearst and Phoebe Hearst Cooke — alleged that the trustees had breached their fiduciary duty of impartiality by favoring remainder beneficiaries over income beneficiaries. The best known of the heirs, Patricia Hearst Shaw, is both an income and a potential remainder beneficiary. She was not a party to the litigation, but filed an amicus brief supporting her three cousins.

Because the operative document gave the trustees discretion to treat the income and remainder beneficiaries differently, presiding Justice Joan Dempsey Klein, writing for the Court of Appeals, agreed with the trial judge that the proposed action would be a "contest" of the operative document and therefore trigger the no-contest clause. The would-be contestants beat a hasty retreat. No harm, no foul.

What would cause jurisdictions to treat their citizens so differently? The answer probably lies in the competing goals of protecting the testator's or settlor's intent with providing a forum for legitimate complaints. The Uniform Probate Code (UPC) Section 3-905 states: "A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." See also UPC Section 2-517 related to trusts. This position is somewhere in between those of the two cases we've noted here, and likely reflects the stance adopted by the majority of jurisdictions, as more amend their state probate acts with an eye on the UPC for guidance.

Clearly, though, estate planners should stay abreast of their jurisdiction's laws on no-contest clauses and inform clients of the likelihood of enforcement should their documents meet with a challenge.

Pernicious, Perfidious, Insidious = Tortious

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Although other states have increasingly recognized the tort of intentional interference with an inheritance, New Jersey has been slow to do so. Many practitioners prefer to bring a tort action rather than a straight undue influence claim because of the availability of punitive damages, often in the form of attorneys' fees. But a New Jersey Superior Court seems to have found a new approach. It has allowed the shifting of attorneys' fees in an undue influence case, *Blumeling v. Stalker,* 2006 WL 721837 (N.J. Super. March 20, 2006.)

Gladys Blumeling owned a home in Bergenfield, N.J., from 1939 until January of 2004. Her grandson, Jon Stalker, lived with her for a time. In January of 2004, Gladys, then 91-years-old, deeded her property to Jon and executed a will naming him as executor and primary beneficiary. She also signed a power of attorney designating Jon as her agent. Shortly thereafter, Jon died.

In July of 2004, Gladys was judicially declared incapacitated. Her son, Charles, was appointed as guardian of her person and estate. Charles brought legal action against Norman Stalker, Jon's father, as administrator of Jon's estate. Charles' complaint alleged that Jon had committed undue influence upon Gladys and improperly induced her to execute the deed and will. Charles' complaint sought compensatory and punitive damages as well as attorneys' fees. Charles wanted the house given back to Gladys.

Norman defended against the action, claiming that Gladys had deeded the property to Jon and included him in her will because of the excellent care and dedication he'd shown her. One of the items introduced at the trial was a videotape of Gladys' execution of the documents. But apparently that tape was damning.

The lower court declared that the tape showed Jon to be the "impresario" of a "charade" to deprive Gladys of her primary asset (her home) and that Gladys was not competent to execute the deed or will. Accordingly, the trial court invalidated both deed and will, having found that they did result from undue influence.

On July 29, 2005, Charles filed a complaint seeking attorneys' fees and costs incurred to prosecute the guardianship action and to set aside the deed and will. Norman requested summary judgment. Charles filed a cross motion for summary judgment.

The court's analysis of the attorneys' fees issue began by stating the general rule that New Jersey has a strong public policy against shifting attorneys' fees, thus parties usually must bear their own fees and costs (the so-called "American Rule.") The court noted an exception to the American Rule: when a plaintiff has been forced by the wrongful conduct of a tortfeasor to institute litigation against a third party.

The court then engaged in a lengthy discussion of a 2003 New Jersey case: *In re Niles,* 176 N.J. 282, 823 A.2d 1 (2003).

Niles was an undue influence case involving Laura Niles. Laura's sister-in-law, Serena Bono, and Serena's son, Salvatore, unduly influenced Laura to execute various living trusts heavily favoring them. The trusts also named Salvatore as trustee, allowing Salvatore and Serena to embark on what the court described as a 16-month "looting spree" of Laura's trust estate. The lower court found a clear case of undue influence, declared the trusts to be void and said there was an exception to the American Rule where an executor or trustee has committed undue influence. In other words, it held that when a fiduciary commits undue influence, reasonable fees and costs may be assessed against that fiduciary. The *Niles* court focused on the "'special status' of the undue influence tort" as an "egregious intentional tort that...establishes a basis for punitive damages."

The *Blumeling* court, in deciding to award attorneys' fees, refined the *Niles* decision, stating that the fiduciary status (or lack thereof) of one who commits undue influence is not a necessary condition in determining whether attorneys' fees should be shifted, and the focus should be on the undue influence itself. The *Blumeling* court used several "ious" adjectives to describe undue influence — including "pernicious," "perfidious" and "insidious" — that would justify fee shifting in such cases.

The court also rejected Norman's argument that Jon did not receive a significant benefit from his undue influence (a mere $250,000, while the wrongdoers in *Niles* received more than $1 million). As in fraud cases, the court said, there are no meaningful gradations of undue influence.

Moreover, the *Blumeling* court rejected Norman's efforts to distinguish the case at bar from *Niles* because *Niles* involved "strangers organizing and plotting" to swindle the victim, whereas Blumeling involved a grandson taking care of his grandmother. The court found that the relationship between the person committing undue influence and the victim is not pivotal.

So, what are the "take aways" from this case? Several — and they're pretty interesting.

- Many states recognize a presumption of fraud when a fiduciary benefits at the expense of his principal. The handmaiden of fraud is, of course, punitive damages. The *Blumeling* court starts from that model, then appears to minimize the relationship as part of the required elements, although it should be noted that Jon held a power of attorney for his grandmother.
- Undue influence is now a tort in New Jersey and allows at least for the shifting of fees, if not outright punitive damages. It remains to

be seen whether New Jersey extends this holding to other forms of inheritance such as trusts and life insurance which are generally covered by tortious interference.

- New Jersey is now yet another forum that allows the validity of a will to be adjudicated while the testator is still alive, although in this case, the testator was legally incompetent.
- Finally, Jon's dad learned the hard way that videotape is no panacea. Be warned: Will proponents are often better off without such evidence when a testator is likely to look frail or confused.

Who's in Charge? Oregon Case Examines "de son tort" vs. "de facto" Trustees

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In the context of an invalid appointment of a successor trustee, the Oregon appellate court in *Allen Trust Co. v. Cowlitz Bank,* 152 P.3d 974 (Or. Ct. App. 2007) recently grappled with the question of what it means to be a "trustee de facto" — and what kinds of fees and attorney expenses such a trustee might demand.

In this case, Ronald and Jean Harriman established a trust in 1995 as part of their divorce proceedings. The trust, which was for their benefit, allowed the acting trustee to name successor trustees if the acting trustee was unable to serve. After the original trustee died without naming a successor, Ronald and Jean agreed to the appointment of a man named Arlie Hutchins as the trustee. After Hutchins accepted the office, he designated a person — whom the court simply identifies as "Wilkins" — as successor trustee, and designated one of Ronald and Jean's daughters, Valerie, as the next successor trustee if Wilkins were unable to service.

Hutchins later resigned and in his resignation revoked Wilkins' trustee designation, intending that Ronald and Jean would name a successor.

Harboring the belief that Hutchins' resignation left her as the successor trustee, Valerie, who did not want to serve because of family reasons, sought an alternative trustee. After learning that Allen Trust Company would agree to act as trustee, Valerie accepted the position of successor trustee in order to appoint Allen Trust as her successor. After making the appointment, Valerie resigned as trustee.

Allen Trust accepted the office of trustee, believing that Valerie's appointment was valid. Jean approved the appointment of Allen Trust, but Ronald objected to it. Because of Ronald's objections, Allen Trust petitioned the trial court to confirm its appointment. The trial court denied the appointment of Allen Trust, finding that Valerie had never become a trustee. According to the court, it wasn't that Wilkins had been unable to serve as trustee, but rather that Hutchins had revoked Wilkins' appointment. As a result, the contingency that would have made Valerie the trustee never occurred. Therefore, Valerie was never the trustee and her appointment of Allen Trust as successor trustee was invalid.

During the period between Valerie's attempted appointment of Allen Trust as trustee and the trial court's ruling, Allen Trust acted as trustee and received a trustee's fee for its services. Allen Trust also used trust funds to pay its attorneys' fees in connection with its petition to confirm its appointment, on the theory that such a judicial determination would benefit the trust. After the trial court found the appointment of Allen Trust to be invalid, Ronald filed a petition to require Allen Trust to repay the trustee's fee it had received and the funds paid by the trust for Allen Trust's attorney. The trial court granted summary judgment on the petition in favor of Ronald, and Allen Trust appealed.

The parties' arguments focused on the status of Allen Trust as a trustee *de facto* versus a trustee *de son tort.* The appellate court defined a trustee *de facto* as one "who has at least a colorable claim to be a trustee, who acts as one, and, in some instances, who seeks the benefits of one." A trustee *de son tort,* on the other hand, is someone who becomes "a trustee by construction by intermeddling with, and assuming the management of, trust property without authority." Allen Trust argued that it was a trustee *de facto* and was entitled to a trustee's fee for the services it had performed. Ronald argued that Allen Trust was a trustee *de son tort,* because it undertook the duties of trustee without authorization and therefore was not entitled to a trustee's fee.

After noting the lack of Oregon case law addressing the status of a trustee de facto, the court surveyed cases from outside Oregon to shed light on this issue. One was a California Supreme Court case from 1971, *Crocker-Citizens Nat'l Bank v. Younger,* 481 P.2d 222 (Cal. 1971), in which the court held that a trustee *de facto* is entitled to a trustee's fee if under the trust terms, a duly appointed trustee in the same circumstances would be entitled to a fee. In that case, the court found that the trustee *de facto* had provided legitimate services to the trust and therefore, under the trust terms, she was entitled to compensation for those services. However, she was not entitled to

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reimbursement of attorneys' fees incurred from the litigation over her status as a trustee *de facto,* because the trust instrument did not provide for such payment.

Turning back to Oregon law, the appellate court noted a 1937 Oregon Supreme Court case, *In re Workman's Estate,* 65 P.2d 1395 (Or. 1937), which dealt with the improper appointment of an executor of an estate. In that case, the Supreme Court concluded that the actions of a person erroneously appointed as executor are valid and binding, just as if the position had been held by the proper person. Although *In re Workman's Estate* dealt with an executor rather than a trustee, the appellate court found that it was the "best available indication of the direction" the Oregon Supreme Court would take when deciding an issue of trustee de facto status, and that, as applied to trusts, the decision was consistent with the law outside of Oregon.

Applying the rules governing trustees de facto, the appellate court found that Allen Trust was a trustee *de facto* during the period of time it administered the trust. Not only did it perform the duties of a trustee, but also it assumed the position of trustee under a color of right, as it reasonably believed that it had been validly appointed as trustee. Following the decision in *Crocker-Citizens Nat'l Bank,* the court further found that Allen Trust was entitled to a trustee's fee in the same circumstances that a properly appointed trustee would be. The trust specifically provided for reasonable compensation to the trustee, but did not contain any provisions allowing a trustee to use trust funds for the defense of its trustee status. Thus, the court concluded that even though Allen Trust was a trustee de facto and entitled to its own fees, it was not entitled to pay attorneys' fees — from the trust to defend its trust status.