

[Cite as *In re Estate of Marsh*, 2009-Ohio-6693.]

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

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	:	C.A. CASE NO. 2008-CA-0109
IN THE MATTER OF THE	:	
ESTATE OF CLARA A. MARSH	:	T.C. CASE NO. 38434-08-192
	:	(Civil Appeal from
	:	Common Pleas Court,
	:	Probate Division)

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O P I N I O N

Rendered on the 18th day of December, 2009.

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GRADY, J.:

{¶ 1} This is an appeal from an order of the Probate Court granting applications to pay attorney fees and guardian fees.

{¶ 2} Clara Marsh was the mother of Richard Marsh and Elaine Grayson, who is married to John Grayson. John was appointed

guardian of Clara's person and estate. Clara died on March 26, 2008. John Grayson was then appointed executor of Clara's estate.

Richard Marsh is a beneficiary under the last will and testament of his mother that was filed for probate.

{¶ 3} On November 26, 2008, John Grayson, through his attorney, David Pendry, moved for an order authorizing the following payments out of Estate assets: (1) attorney fees to Pendry in the sum of \$7,480.00 for his services regarding the guardianship of Clara A. Marsh; (2) attorney fees to Pendry in the sum of \$1,494.00 for his services regarding the estate of Clara A. Marsh; and (3) guardian fees to John in the amount of \$6,100.00 for his services as guardian of Clara A. Marsh. John attached to his written motion billing statements from Pendry for legal services Pendry had provided. (Dkt. 47.) On December 3, 2008, John filed a memorandum in support of guardian fees. (Dkt. 48.) Certificates of service indicate that copies of these fee applications were served on the counsel of record for Richard Marsh.

{¶ 4} The applications for fees were not set for hearing. Richard Marsh represents in his brief that his counsel and counsel for John Grayson met briefly with the probate court in chambers for an informal discussion of the applications, but no hearing was held relating to the fee applications. John did not file an appellate brief. Therefore, pursuant to App.R. 18(C), we accept

Richard's representation.

{¶ 5} On December 8, 2008, the probate court authorized John Grayson, as executor of the estate of Clara Marsh, to pay \$3,988.00 in attorney fees to Pendry and \$6,000.00 in guardian fees to himself. Richard Marsh filed a timely notice of appeal.

ASSIGNMENT OF ERROR

{¶ 6} "THE AWARD OF ATTORNEY'S AND GUARDIANSHIP FEES WAS AN ABUSE OF DISCRETION AS THE DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW."

Guardian Fees

{¶ 7} John sought \$6,100.00 in guardian fees. The probate court found: "It is clear that John C. Grayson, as guardian, provided valuable services to the guardianship of Clara A. Marsh.

These services were provided under very difficult circumstances, and Mr. Grayson provided these services with a very high degree of professionalism. His guardian fee is approved in the amount of \$6,000.00."

{¶ 8} The "Rules of Superintendance for the courts of Ohio are applicable to all courts of appeal, courts of common pleas, municipal courts, and county courts in this state." Sup.R. 1(A).

Sup.R. 73 provides, in pertinent part:

{¶ 9} "(A) Guardian's compensation shall be set by local rule.

{¶ 10} "(B) Additional compensation for extraordinary services, reimbursement for expenses incurred and compensation of a guardian of a person only may be allowed upon an application setting forth an itemized statement of the services rendered and expenses incurred and the amount for which compensation is applied.

The court may require the application to be set for hearing with notice given to interested parties in accordance with Civil Rule 73(E)."

{¶ 11} Greene County Probate Court Local Rule 73.1 provides that:

{¶ 12} "Guardian's compensation shall be 5% of the income. There shall be no fee based upon corpus value, and no fee based upon distribution.

{¶ 13} "Additional compensation may be considered upon application, notice to next of kin and hearing."

{¶ 14} It is undisputed that John Grayson sought guardian compensation that exceeds 5% of the income the guardianship realized. Indeed, an attachment to his memorandum in support of guardian fees noted that 5% of income is \$1,359.00. The \$6,100.00 he requested is based on the statutory fee structure used in calculating a fiduciary's fee in an estate. In his memorandum, John Grayson requested that the probate court use the fee schedule for computation for fiduciaries in an estate because "the Fee

Computation for Guardian, pursuant to statute, does not adequately compensate the Guardian for the time and effort required in this case." (Dkt. 48.)

{¶ 15} Pursuant to Sup.R. 73 and Greene County Probate Court Local Rule 73.1, the probate court was required to hold a hearing prior to awarding John Grayson guardian fees in excess of 5% of income. Therefore, the probate court abused its discretion in awarding \$6,000.00 in guardian fees without first holding a hearing. The assignment of error is sustained with respect to the \$6,000.00 awarded in guardian fees.

Attorney Fees

{¶ 16} We review attorney fee awards for an abuse of discretion. *Berry Network Inc. v. United Propane Gas, Inc.*, Montgomery App. No. 22875, 2009-Ohio-2537, at ¶71 (citation omitted). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (citations omitted).

{¶ 17} The probate court found "It is clear that David L. Pendry provided valuable legal services to the guardian of Clara A. Marsh. The attorney fees are established at \$8,730.00 and \$6,236.00 of same have been paid. It is clear that David L. Pendry has provided valuable legal services to the estate of Clara A. Marsh in the

amount of \$1,494.00.” (Dkt. 49.) The probate court then directed John Grayson, as executor of the Estate of Clara Marsh, to pay \$3,988.00 to Pendry from estate assets. This amount reflected \$2,494.00 that had not yet been paid in attorney fees for legal services provided by Pendry to the guardian, plus \$1,494.00 in attorney fees for legal services provided by Pendry to the Estate of Clara A. Marsh.

{¶ 18} Richard Marsh argues that the probate court abused its discretion in awarding attorney fees without first holding a hearing. Sup.R. 71(C) provides: “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.” Sup.R. 71. Therefore, attorney fees sought in probate cases should not be awarded without a hearing, unless a local rule provides otherwise. *In re Adoption of Bruner*, Mahoning App. No. 05MA68, 2006-Ohio-497, at ¶40.

{¶ 19} Greene County Probate Court Local Rule 71.1 is captioned “ATTORNEY FEES IN ESTATES”, and provides, in pertinent part:

{¶ 20} “Attorney fees, which do not exceed the guidelines hereinafter set forth, and fiduciary fees, established by statute will be approved without hearing, unless the amount of such fees is challenged. . . .

{¶ 21} "The schedule of compensation for attorney fees is merely a guide. It is not a minimum fee or a maximum fee. However, fees in excess of this schedule will be approved only upon application, notice to beneficiaries and hearing. . . .

{¶ 22} "5% of the first 30,000

{¶ 23} "4% of the next \$70,000

{¶ 24} "3% of the next \$200,000

{¶ 25} "2% of the balance"

{¶ 26} The probate court awarded \$1,494.00 in attorney fees to Pendry for legal services provided to the Estate of Clara Marsh.

This amount is well below the schedule of compensation for attorney fees provided in Local Rule 71.1. Richard Marsh had notice of the application but failed to challenge the amount of attorney fees sought by John Grayson for Pendry's legal work for the Estate of Clara Marsh. Therefore, the probate court was not required to hold a hearing prior to making the award of \$1,494.00 in attorney fees. Local Rule 71.1. The assignment of error is overruled with respect to the \$1,494.00 that was awarded in attorney fees to Pendry for the legal services he provided to the Estate.

{¶ 27} Greene County Probate Court Local Rule 71.2 is captioned "ATTORNEY FEES IN TRUSTS AND GUARDIANSHIPS" and provides:

{¶ 28} "Fees shall be based upon the number of hours of legal services provided, charged at a reasonable hourly rate.

{¶ 29} "All such fees are subject to review and possible modification by the Court."

{¶ 30} Local Rule 71.2, unlike Local Rule 71.1, does not dispense with the hearing that Sup.R. 71(C) otherwise requires before an award of attorney fees may be granted. Therefore, the probate court was required to hold a hearing on the request for attorney fees prior to making an award. *In re Adoption of Bruner*.

The assignment of error is sustained with respect to the attorney fees that were awarded for legal services provided by Pendry to the guardian.

{¶ 31} The assignment of error is sustained in part and overruled in part. The judgment of the trial court will be affirmed in part and reversed in part, and the cause is remanded for further proceedings consistent with this opinion.

DONOVAN, P.J. and FAIN, J., concur.

Copies mailed to:

Matthew C. Sorg, Esq.
David L. Pendry, Esq.
John Grayson, Esq.
Hon. Robert A. Hagler