IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

IN THE MATTER OF THE ESTATE OF: **HEDWIG M. JURKOSHEK,** **DECEASED**	)	CASE NO. **06-2349**
	)	On Appeal from Ninth District Court of Appeals, Case No. C.A. 23150
	)	On Appeal from the Summit County Court of Common Pleas Case No. 2003 ES 0463

FILED
DEC 22 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS, GERARD TOMASIK, et. al.

Michael A. Partlow (0037102)
MORGANSTERN, MacADAMS & DeVITO CO., L.P.A.
623 West St. Clair
Cleveland, Ohio 44113
(216) 621-4244
partlowlaw@aol.com

Attorney for Appellants

L. Terrence Ufholz
304 N. Cleveland-Massillon Road
Akron, Ohio 44333
(330) 670- 0770

Counsel for Appellants, Thomas Tomasik, et. al., and Thomas Mullen, Exr.

David Woodburn, Esq.
50 South Main Street
P. O. Box 1500
Akron, Ohio 44309
Attorney for Habitat For Humanity of Greater Akron

Stephen M. Hammersmith, Esq.
50 South Main Street
P. O. Box 1500
Akron, Ohio 44309

Attorney for St. Hillary's Church

David J. Espinoza, Esq.
101 East Town Street, 4th Floor
Columbus, Ohio 43215
Attorney for Ohio Attorney General

Haven of Rest
175 East Market Street
Akron, Ohio 44308

Kevin T. Burke, Esq.
1404 East Ninth Street
Cleveland, Ohio 44114

Attorney for Immaculate Heart of Mary Church

Thomas Tomasik
4122 South Andes Way
Aurora, Colorado 80013

Frances M. Likar
507 Marquette Avenue
Cuyahoga Falls, Ohio 44221

TABLE OF CONTENTS

TABLE OF CONTENTS i

EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST 1

STATEMENT OF THE CASE/STATEMENT OF FACTS 2

ARGUMENT 3

PROPOSITION OF LAW NO. I: A TRIAL COURT ABUSES ITS DISCRETION BY MAKING AN AWARD OF FIDUCIARY AND COUNSEL FEES IN A WILL CONTEST PROCEEDING WHERE THE RECORD REVEALS THAT: (1) ALL OF THE FEES IN QUESTION CONCERN AN APPEAL TO THE OHIO SUPREME COURT BROUGHT AT THE DISCRETION OF THE FIDUCIARY; (2) THE APPEAL DOES NOT BENEFIT THE ESTATE; AND (3) THERE IS NO LEGAL BASIS FOR THE APPEAL 3

CONCLUSION 7

CERTIFICATE OF SERVICE 8

EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND/OR INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS.

The Appellants respectfully submit that this case involves both substantial constitutional questions and questions which are of great significance to the public and, Ohio Law generally.

The sole Proposition of Law only concerns an award for attorney and fiduciary fees for proceeding to the Ohio Supreme Court. The Trial Court granted attorney and fiduciary fees for Appellees in the matter concerning the Estate of Jurkoshek and the Court of Appeals affirmed. These fees granted by the Trial Court have required a large percentage of the estate be liquidated and, further, were extremely premature and should have been denied or at least held in abeyance for further proceedings. The fees were premature because, although the Appellees were successful in the Trial Court, the Court of Appeals reversed the Judgment of the Trial Court and this Court affirmed the Decision of the Court of Appeals. **Tomasik v. Tomasik** (2006), 111 Ohio St.3d 481.

In light of the fact that the Fiduciary and his Attorney have not prevailed in the will contest action, and further considering that between the two Applications, almost all of the total estate was sought, Appellants submit that the Applications should not have been granted. Considering the size of the fee awards, and further considering the meager amount of estate assets, the Appellants respectfully submit that the litigation pursued in the Ohio Supreme Court can not be characterized as benefitting the Estate.

Considering the constitutional questions presented concerning the award of attorney and fiduciary fees, Appellants respectfully request that this Court accept jurisdiction of this cause and provide the Appellants with a full review.

STATEMENT OF THE CASE AND FACTS

Gerard Tomasik, Martha Tomasik, Daniel Tomasik, Elaine Tomasik, and Cecilia Tomasik, Appellants herein, filed a will contest in the Summit County Court of Common Pleas, Probate Division. The Appellants, save Cecilia Tomasik, were heirs and nephews of the deceased and there was no controversy that they would have taken as beneficiaries under the deceased's prior will or that they had standing to bring the present action. The will being admitted to Probate was being challenged due to the fact that it had purportedly been executed by the deceased well after she was found to be incompetent and placed under guardianship by the Probate Court. Appellees filed a Motion to Dismiss the Complaint, pursuant to Civ. R. 12(B), which the Trial Court granted in an order dated January 23, 2004. Subsequently in Case No. 21980, the Court of Appeals reversed the Trial Court's decision. The Decision of the Court of Appeals was affirmed by this Court in an Entry dated December 6, 2006.

On February 24, 2005, the Trial Court issued an order authorizing payment of $200.00 per hour for all future proceedings in this matter. On September 26, 2005, Attorney L. Terrence Ufholz filed an Application for Attorney's fees for payment of his services in the Estate and Will Contest proceedings from the date of his hire. Likewise, the Estate's Executor, Thomas T. Mullen, filed an Application for Fiduciary Fees on August 3, 2005, seeking ordinary fees of $1,281.10 and extraordinary fees of $4,024.10, which he then supplemented to an Amended Application, seeking an additional $960.70 in extraordinary fees for the period between July 22, 2005 and August 15, 2005. The Magistrate granted all of these Applications.

Appellants filed Objections to the Magistrate's Decision on November 23, 2005 and

Supplemental Objections to such on December 12, 2005. Attorney Ufholz, as Attorney for the Applicants, filed a response on December 27, 2005. Following a hearing on January 24, 2006, the Trial Court issued an order on February 15, 2006 in which it overruled Appellant's Objections to the Magistrate's Decision. Appellants then filed an appeal and the Court of Appeals filed it's Decision and Journal Entry on November 8, 2006. This appeal follows.

ARGUMENT

PROPOSITION OF LAW NO. I: A TRIAL COURT ABUSES ITS DISCRETION BY MAKING AN AWARD OF FIDUCIARY AND COUNSEL FEES IN A WILL CONTEST PROCEEDING WHERE THE RECORD REVEALS THAT: (1) ALL OF THE FEES IN QUESTION CONCERN AN APPEAL TO THE OHIO SUPREME COURT BROUGHT AT THE DISCRETION OF THE FIDUCIARY; (2) THE APPEAL DOES NOT BENEFIT THE ESTATE; AND (3) THERE IS NO LEGAL BASIS FOR THE APPEAL.

The Applications for Attorney and Fiduciary fees are extremely premature and should have been denied or at least held in abeyance for further proceedings in the future. As the Trial Court was well aware, a will contest in this matter was still pending. See **Tomasik v. Tomasik**, Summit Probate Court Case No. 2003-CV-145. Although the will contest was initially dismissed by the visiting judge assigned to the case, that decision was reversed on appeal. See **Tomasik v. Tomasik** (Oct. 20, 2004), Summit App. No. 21980, unreported 2004-Ohio-5558.

Rather than coming back into the Trial Court and defending the will contest on its merits, the last thing that the Fiduciary wanted to do in this matter, appeal was then sought to the Supreme Court of Ohio and the decision of the Court of Appeals was affirmed by Ohio Supreme Court Case No. 04-2004. In fact, all of the fees sought by and granted in this matter appear to be in conjunction with prosecution of that appeal to the Ohio Supreme Court. The Decision of the Court of Appeals was

affirmed by the Ohio Supreme Court and, therefore, the Fiduciary has **not** prevailed in this action.

R.C. 2107.75 does give a Trial Court discretion in awarding reasonable defense fees to the Fiduciary and his Attorney for the unsuccessful defense of a will contest proceeding. However, Ohio case law is quite clear that the **totality of the circumstances** surrounding such must be taken into consideration and, in fact, under Ohio law an executor has absolutely no duty to defend a will contest at all. **Estate of Lavoy** (Nov. 27, 1992), Lucas App. No. L-92-130, unreported, 1992-WL-348161.

The Administrator did present the testimony of Attorney Dennis J. Bartek in support of the two Applications for Attorney Fees and Fiduciary Fees now in question. However, a careful review of the transcript reveals that Attorney Bartek does not even consider himself to be a probate lawyer. At the hearing of this matter, the hourly rates now charged were not in question. Rather the "necessity" of the services rendered was in controversy. Once again, most of the fees now in question all pertain to an appeal to the Supreme Court of Ohio which affirmed the Decision of the Court of Appeals. In that regard, Attorney Bartek testified that he essentially believes that an appeal to the Supreme Court of Ohio is always necessary if one loses in the Court of Appeals. In determining the "necessity" of the fees now in question, Attorney Bartek only reviewed the merit briefs in the Supreme Court Appeal. He did not review the jurisdictional memoranda and, therefore, had no idea whether or not a great deal of duplication was involved in these two briefing matters. When asked to justify the extremely expensive nature of this type of appeal, in consideration of the small amount of funds available in the estate, Attorney Bartek relied solely upon a "judgment" that supposedly exists in an amount in excess of $350,000.00. However, Attorney Bartek was not aware that said judgment had been vacated. Further, a review of this Court's decision in **Wertz v. Tomasik** (Fed. 7, 2001), Summit App. No. 20209, unreported, reveals that said judgment was

reversed. In addition, a review of the docket of the probate court in Case No. CJ98 03 08, reveals that, while the Trial Court did review the applicability of the "family gift presumption" to the facts of this case and found that such did not apply, it never reinstated the money judgment which this Court vacated in the aforementioned appeal. Consequently, Attorney Bartek's basis for determining that the fees now in question were "necessary" was totally unfounded as such was vacated years ago and has never been reinstated.

As explained by the Seventh District Court of Appeals in **Estate of Campbell** (Nov. 29, 2005), Mahoning App. Nos. 04 MA 278, 04 MA 282, unreported, 2005 -Ohio- 6445,

> {¶ 19} "Reasonable attorney fees must be based upon the actual services performed by the attorneys and upon the reasonable value of those services as determined from the evidence which must substantiate the award of fees as being reasonable." *Watters v. Love* (1965), 1 Ohio App.2d 571, 578, 206 N.E.2d 39. Fees that are reasonable must be reasonable both from the standpoint of the attorney rendering the services and from the standpoint of the estate out of which payment is being made. Id. In determining the reasonableness of attorney fees, one must consider the factors set out in DR 2-106. Sup.R. 71. They are:
>
> {¶ 20} "(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> {¶ 21} "(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> {¶ 22} "(3) The fee customarily charged in the locality for similar legal services.
>
> {¶ 23} "(4) The amount involved and the results obtained.
>
> {¶ 24} "(5) The time limitations imposed by the client or by the circumstances.

> {¶ 25} "(6) The nature and length of the professional relationship with the client.
>
> {¶ 26} "(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> {¶ 27} "(8) Whether the fee is fixed or contingent." DR 2-106(B).

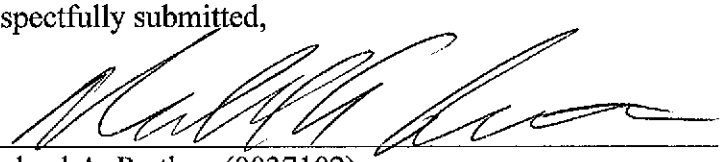
See, Also, **Estate of Bretschneider** (March 3, 2006), Geauga App. No. 2005-G-2620, unreported, 2006 -Ohio- 1013 (holding that "parties who participate in litigation not directed toward the general benefit of the estate will not be awarded attorney fees").

In the case at bar, the merits of the will contest proceeding in question have not even been addressed. Frankly, it is highly doubtful that the Fiduciary can prevail since the Decedent had been found to be incompetent by the Probate Court and placed under a Guardianship **well prior to execution of the Will now in controversy.** In light of the fact that the Fiduciary and his Attorney have not prevailed in this will contest action, and further considering that between the two Applications now in question almost all of the total estate is being sought, Appellants respectfully submit that the Trial Court's grant of said Applications, and affirmed by the Court of Appeals is extremely premature and unwarranted, and constitutes an abuse of discretion. Considering the size of the fee awards now in question, and further considering the meager amount of estate assets, the Appellants respectfully submit that **the litigation pursued in the Ohio Supreme Court can not be characterized as generally benefitting the Estate**, as it would clearly have been less expensive to simply try the will contest on its merits. Consequently, the Appellants respectfully submit that the Trial Court and Court of Appeals erred and abused their discretion in making the awards in question.

CONCLUSION

In light of the above, the Appellants respectfully submit that this Court should accept jurisdiction of the sole proposition of law and the matter should be scheduled for a full briefing and argument.

Respectfully submitted,



Michael A. Partlow (0037102)
Morganstern, MacAdams & DeVito, Co. L.P.A.
623 West Saint Clair
Cleveland, Ohio 44113
(216) 621-4244
Partlowlaw@aol.com

Attorney for Appellants

CERTIFICATE OF SERVICE

A copy of the foregoing **Memorandum in Support of Jurisdiction**, is being served via regular U.S. Mail, postage prepaid on this 21st day of December, 2006, upon:

L. Terrence Ufholz
304 N. Cleveland-Massillon Road
Akron, Ohio 44333

Kevin T. Burke, Esq.
1404 East Ninth Street
Cleveland, Ohio 44114
Counsel for Immaculate Heart of Mary

David Woodburn, Esq.
50 South Main Street
P. O. Box 1500
Akron, Ohio 44309

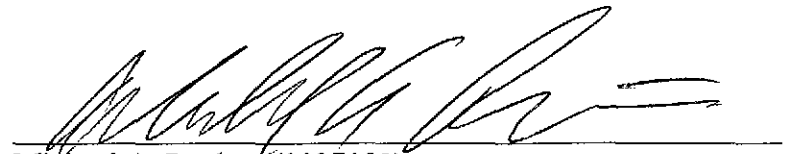
Thomas Tomasik
4122 South Andes Way
Aurora, Colorado 80013

Stephen M. Hammersmith, Esq.
50 South Main Street
P. O. Box 1500
Akron, Ohio 44309
Counsel for St. Hillary's Church

Frances M. Likar
507 Marquette Avenue
Cuyahoga Falls, Ohio 44221

Haven of Rest
175 East Market Street
Akron, Ohio 44308

David J. Espinoza, Esq.
101 East Town Street, 4th Floor
Columbus, Ohio 43215
Counsel for Ohio Attorney General



Michael A. Partlow (0037102)
Attorney at Law

COPY

COURT OF APPEALS
DIANA ZALESKI
2006 NOV -8 AM 7:18
SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN THE MATTER OF THE ESTATE OF:
HEDWIG M. JURKOSHEK,
DECEASED

C. A. No. 23150

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 2003 ES 0463

DECISION AND JOURNAL ENTRY

Dated: November 8, 2006

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BOYLE, Judge.

{¶1} Appellants, Gerard Tomasik, Martha Tomasik, Elaine Tomasik, Cecilia Tomasik, and Daniel Tomasik, appeal from the judgment of the Summit County Court of Common Pleas, Probate Division that granted $12,444.94 to Appellee, Attorney L. Terrence Ufholz, for attorney fees, and $5,185.90 to Appellee, Attorney Thomas T. Mullen, for fees for extraordinary services of the executor. This Court affirms.

COPY

I.

{¶2} Hedwig Jurkoshek died testate on March 19, 2002. Ms. Jurkoshek was survived by her sister, Cecilia Tomasik, and her nieces and nephews, Gerard Tomasik, Martha Tomasik, Elaine Tomasik, and Daniel Tomasik, the Appellants in this action. Ms. Jurkoshek's will was admitted to probate on April 15, 2003. Appellants filed a will contest, which the probate court dismissed for being untimely. This Court subsequently reversed the dismissal of the will contest. See *Tomasik v. Tomasik*, 9th Dist. No. 21980, 2004-Ohio-5558. The will contest issue is currently pending in the Ohio Supreme Court and is not the subject of the present appeal. See *Tomasik v. Tomasik*, Ohio Supreme Court No. 2004-2004.

{¶3} The instant appeal stems from the grant of payment of attorney fees and extraordinary fiduciary fees for the appeal of the will contest to Ohio Supreme Court. Appellee Ufholz filed an Application for Attorney Fees seeking payment for his services and expenses incurred from January 17, 2005 to August 22, 2005. Additionally, Appellee Mullen filed an Application-Computation of Fiduciary Fees on August 3, 2005 and October 3, 2005 seeking both ordinary and extraordinary fees. Both parties briefed the merits of the claims for attorney and fiduciary fees and an evidentiary hearing was held. The magistrate issued a decision granting Appellee Ufholz $12,444.94 for attorney fees and Appellee Mullen $5,185.90 for extraordinary fiduciary fees. Appellee Mullen's request of

COPY

$1,281.10 for ordinary fiduciary fees was held in abeyance until the conclusion of the administration of the estate.

{¶4} Appellants filed an objection to the Magistrate's Decision. Both sides filed briefs regarding the objection and a hearing was held. The trial judge subsequently overruled Appellants' objections and adopted the Magistrate's Decision. Appellants timely appealed, asserting one assignment of error for review.

II.

"THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY GRANTING THE APPLICATIONS FOR FIDUCIARY AND COUNSEL FEES."

{¶5} In their sole assignment of error, Appellants allege that the award of attorney fees and extraordinary fiduciary fees related to the will contest was premature as the will contest issue is still pending before the Ohio Supreme Court. Appellants argue that Appellees' defense and subsequent appeal regarding the will contest issue was unnecessary and did not benefit the estate. We disagree.

{¶6} A decision to modify, affirm, or reverse a magistrate's decision lies within the discretion of the trial court and should not be reversed on appeal absent an abuse of discretion. *Mealy v. Mealy* (May 8, 1996), 9th Dist. No. 95CA0093, at *2. Additionally, we review the probate court's allocation of attorney fees and extraordinary fiduciary fees in the administration of an estate for an abuse of discretion. *Estate of Bretschneider*, 11th Dist. No. 2005-G-2620, 2006-Ohio-

COPY

1013, at ¶15, 32. An abuse of discretion is more than an error of law or judgment, but rather, it is a finding that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. 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.* (1993), 66 Ohio St.3d 619, 621.

{¶7} Typically in probate court, attorney fees for the administration of the estate are paid after the final accounting is prepared and filed. Sup.R. 71(B). However, the probate court may award attorney fees prior to the final accounting upon an application and for good cause shown. Id. This exception includes attorney fees generated in the defense of a will contest. *Estate of Kaziakos v. Georgekopoulos* (June 25, 1986), 9th Dist. No. 12426, at *2. See R.C. 2107.75; R.C. 2113.36.

{¶8} Only a fiduciary may charge the attorney fees generated in defending a will contest to the administration of the estate. *In re Estate of Zonas* (1989), 42 Ohio St.3d 8, syllabus. The attorney fees are recoverable from the estate regardless of the outcome of the will contest. *In re Estate of Dawson* (1996), 117 Ohio App.3d 51, 58, citing *Estate of Kaziakos,* at *2.

{¶9} A fiduciary has a duty to probate the will by "*protecting, preserving,* and distributing the assets in accordance with the provisions of the will."

COPY

(Emphasis added.) *In re Estate of Dawson*, 117 Ohio App.3d at 56, citing *Heckler v. Schuler* (1967), 12 Ohio St.2d 58, 61. While the Ohio

> "Supreme Court has held that a fiduciary does not have a duty to defend a will contest[,] *** we note that there is no case law or statutory authority prohibiting the defense of a will contest[.] [O]bviously the General Assembly, by the enactment of R.C. 2107.75, at least condones, if not encourages, the defense of will contests [by the fiduciary]." (Internal citations omitted.) *In re Estate of Dawson*, 117 Ohio App.3d at 58.

Accordingly, a fiduciary may undertake the defense of a will contest even though he is not duty bound to do so. Id. at 59. "[T]he Supreme Court's reasoning behind the 'no duty to defend' holding reveals that the holding was primarily intended to apply to fiduciaries who retain attorneys for their personal benefit rather than for the benefit of the estate[.]" Id.

{¶10} In the instant case, Appellee Mullen hired Appellee Ufholz to represent the estate in the appeal to the Ohio Supreme Court regarding the will contest proceeding brought by Appellants. Appellee Mullen is not a named beneficiary and was acting solely in his capacity as fiduciary when he hired Appellee Ufholz to defend the will contest. Thus, Appellee Mullen was not acting for his own benefit, but for the benefit of the estate by filing an appeal regarding the will contest.

{¶11} In the trial court, Appellants' will contest was dismissed based on a technicality: their failure to file the will contest within the statute of limitations. Appellants successfully appealed the statute of limitations ruling and the will

COPY

contest was remanded to the trial court. Appellee Mullen then hired Appellee Ufholz to file a discretionary appeal to the Ohio Supreme Court regarding the issue of the statute of limitations in a will contest. The Ohio Supreme Court accepted the discretionary appeal and the parties are awaiting the Supreme Court's decision.

{¶12} To date, neither party has prevailed in the will contest. However, the end result of the will contest is immaterial to the grant of attorney fees. R.C. 2107.75. Appellee Ufholz filed an application for attorney fees for his services rendered in the appeal of the will contest and the probate court found that there was good cause shown for the award of attorney fees. The probate court relies on the point, and we concur, that "[t]he novelty of the issue presented to the Supreme Court and the fact that the Supreme Court has recognized this issue to be of importance presents sufficient cause to allow for the payment of attorney fees to date."

{¶13} Further, the fact that the will contest is still pending before the Ohio Supreme Court does not necessarily make the request for attorney fees premature. The attorney fees granted by the probate court simply covered the costs incurred by Appellee Ufholz through August 22, 2005. See *Lindsey v. Markley* (1950), 87 Ohio App. 529, 534. It is important to remember that the merits of the will contest have never been addressed. The pending will contest appeal deals strictly with the applicability of the statute of limitations in filing the will contest. Accordingly, it

COPY

is possible that there may be future litigation regarding the will contest and future awards for attorney fees. See id.

{¶14} We also reject Appellants' argument that the defense of the will contest through an appeal to the Ohio Supreme Court was unnecessary and does not benefit the estate. Clearly, the Ohio Supreme Court's acceptance of the will contest issue establishes that there is an issue of public or great general interest. Thus, Appellee Mullen's appeal to the Ohio Supreme Court was in fact necessary and prudent in protecting the estate.

{¶15} Further, Appellants' position poses a double standard wherein they are allowed to appeal the probate court's decision, but Appellee Mullen is not allowed to appeal the appellate court's decision. Even though Appellee Mullen does not have an absolute duty to defend the will, he does have the *right* to defend the will, including filing an appeal from an adverse decision. See *In re Estate of Dawson*, 117 Ohio App.3d at 58. Accordingly, "[t]hose attacking [the validity of a will] cannot complain of its being defended, or the costs of such defense being taxed against the estate." *Lindsey*, 87 Ohio App. at 532

{¶16} As to the extraordinary fiduciary fees, R.C. 2113.36 permits a fiduciary to receive fees for "extraordinary services not required of a[] [fiduciary] in the common course of his duty." Compensation for extraordinary services "concerns the fiduciary alone and does not concern the matter of counsel fees." *In re Estate of Haggerty* (C.P. 1955), 70 Ohio Law Abs. 463, 128 N.E.2d 680, 685.

COPY

Extraordinary services by a fiduciary include participation, initiation, and defense of the various forms of litigation involved in probating a will and protecting the estate; i.e., the defense of a will contest action. Id. at 686. The recovery of extraordinary fiduciary fees due to the pursuit or defense of litigation involving the will may be charged to the estate "regardless of whether [the] will is ultimately determined to be valid or invalid." *Richmond v. Allison* (1965), 9 Ohio App.2d 333, 335. Upon a request for extraordinary fiduciary fees, 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." *In the Matter of the Estate of Thomas* (April 12, 2000), 9th Dist. No. 19588, at *4; see R.C. 2113.36.

{¶17} In this case, the record clearly shows that Appellants pursued a will contest action and Appellee Mullen has taken steps to defend against this litigation. The probate court reviewed Appellee Mullen's request for ordinary fiduciary fees and extraordinary fiduciary fees. After a thorough review of the description of the services, the probate court separated out those services which were fiduciary work from attorney work. The probate court only granted extraordinary fees for the services it deemed as attorney work, which is beyond the fiduciary's common course of duty. The request for ordinary fiduciary fees was properly held in abeyance until the conclusion of the administration of the estate.

COPY

{¶18} Based upon the above discussions, we find the trial court did not abuse its discretion in adopting the Magistrate's Decision and granting Appellee Ufholz' request for attorney fees and Appellee Mullen's request for extraordinary fiduciary fees. Appellants' sole assignment of error is overruled.

III.

{¶19} Appellants' assignment of error is overruled. The judgment of Summit County Court of Common Pleas, Probate Division is affirmed.

Judgment affirmed.

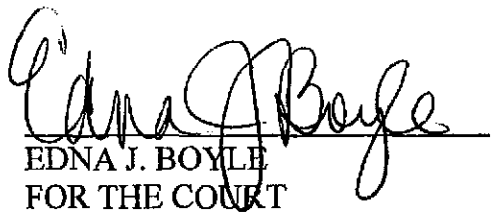
The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

COPY

Costs taxed to Appellant.



EDNA J. BOYLE
FOR THE COURT

SLABY, P. J.
CONCURS

MOORE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶20} I concur in the judgment of the majority to affirm the trial court's decision. I write separately, however, to clarify an issue regarding the analysis of whether the estate's appeal to the Ohio Supreme Court was in the best interest of the estate.

{¶21} In affirming the trial court's award of fees, the majority presumes that by retaining Appellee Ufholz to represent the estate in the appeal to the Supreme Court, Appellee Mullen acted in the best interest of the estate. This discussion merely scratches the surface. It is not enough to say, as the majority does, that because Appellee Mullen was not a named beneficiary and was acting solely in his capacity as fiduciary when he hired Appellee Ufholz, that he was acting for the benefit of the estate. The fact that Appellee Mullen was not a named beneficiary does not mean that he was acting in the best interest of the estate in his decision to appeal this Court's judgment to the Ohio Supreme Court. A more thorough analysis takes into account the factors set forth in *In re Estate of Endslow* (Apr. 14, 2000), 5th Dist. No. 99 CA 36. While not binding on this Court, these

COPY

factors establish a framework for lower courts to determine whether the time spent by an attorney, for the estate, actually benefited the estate. As set forth in *Endslow*, a lower court should consider:

> "1. Whether the services rendered by the attorney executed the terms of the decedent's will, including the distribution of the assets, appointment of the executor, and other terms contained in the will?
>
> "2. Whether the services rendered properly secured the assets of the estate?
>
> "3. Whether the services rendered were consistent with the normal administration of an estate?
>
> "4. Whether the services rendered were remedial in nature?
>
> "5. Whether the remedial services were necessitated by prior errors of the executor based upon advice or lack of advice of the attorney?
>
> "6. Whether the services were required due to the executor's failure to follow the instructions of his or her attorney or were the services required by errors in administration based upon direct conduct or misconduct of the attorney?" *Endslow*, supra, at *5

These factors are not meant to be an exhaustive list. The lower court should consider these and other factors relevant to the case to determine if the action was in the best interest of the estate. While neither the lower court nor the majority discussed any factors, a review of the record below contains sufficient evidence to support the trial court's decision. *Endslow,* supra, at *3 ("The attorney has the burden to introduce, into the record, sufficient evidence of the services to justify reasonable fees in the amount sought or awarded."). Accordingly, the trial court did not abuse its discretion.

COPY

{¶22} The majority also finds that the fact that the Supreme Court accepted the estate's appeal for review establishes that the issue was of great public or general interest and was therefore necessary and prudent in protecting the estate. I find this logic flawed as well. The Supreme Court may review cases of "public or great interest." See Section 2(B)(2)(e), Article IV, Ohio Constitution. Therefore, the benefit is to the *public*, but this does not necessarily lead to the conclusion that it is to the benefit of the *estate*, taking into account the factors set forth in *Endslow*. Were this an appeal by an interested person or corporation, the majority's analysis would suffice. Here, however, counsel for the estate serves in a fiduciary capacity and it is incumbent upon the court to examine whether the decision to appeal to the Ohio Supreme Court served to benefit this estate.

{¶23} Because I find that there was sufficient testimony before the probate court to determine that the appeal did benefit the estate, I would find that the trial court did not abuse its discretion in determining that the appeal to the Ohio Supreme Court was in the best interest of the estate. I concur with the judgment of the majority.

APPEARANCES:

MICHAEL A. PARTLOW, Attorney at Law, for Appellants.

L. TERRENCE UFHOLZ, Attorney at Law, for Appellee.

DAVID WOODBURN, Attorney at Law, for Appellee.

COPY

KEVIN T. BURKE, Attorney at Law, for Appellee.

THOMAS TOMASIK, pro se, Appellee.

STEPHEN M. HAMMERSMITH, Attorney at Law, for Appellee.

DAVID J. ESPINOZA, Attorney at Law, for Appellee.

FRANCES M. LIKAR, pro se, Appellee.

HAVEN OF REST, Appellee.