[Cite as *Conway v. Conway*, 2009-Ohio-6231.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

SEANNA CONWAY, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2009-L-013**
- vs -	:	
NEIL J. CONWAY, SR. AND JEANNE L. CONWAY EDUCATIONAL TRUST NO. 1, et al.,	:	
Defendants-Appellees,	:	
(I. JAMES HACKENBERG, SUCCESSOR TRUSTEE,	:	
Appellee).	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 05 CV 000667.

Judgment: Affirmed.

Neil J. Conway and *James R. Dugan*, 162 Main Street, Painesville, OH 44077 (For Plaintiffs-Appellants).

Dorothea J. Kingsbury, 30195 Chagrin Boulevard, #110-N, Cleveland, OH 44124-5703 (For Defendants-Appellees).

David E. Cruikshank, 376 Society Bank Building, 8 North State Street, Painesville, OH 44077 (For Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Seanna Conway and her father, Neil J. Conway III, appeal from the judgments of the Lake County Court of Common Pleas, denying their motion for

attorney fees and their motion for reconsideration, stemming from litigation involving a family trust fund. For the reasons discussed in this opinion, we affirm the judgment entries of the trial court.

{¶2} In November 1986, Neil J. Conway II and his wife, Jeanne L. Conway, established the Neil J. Conway, Sr. and Jeanne L. Conway Educational Trust No. 1 (the "Trust") for the benefit of their grandchildren and great-grandchildren. The Conways' seven surviving children, including Neil J. Conway III, were all trustees. Eventually, Neil J. Conway III was removed by his siblings as a trustee. He and his daughter sued the Trust and the remaining trustees for money damages, punitive damages, and removal of the trustees. See, e.g., *Conway v. Neil J. Conway, Sr. and Jeanne L. Conway Educational Trust No. 1*, 11th Dist. No. 2006-L-143, 2007-Ohio-1377, at ¶2 ("*Conway I*"). This action settled the day trial was scheduled to commence. Id. at ¶6. As part of the settlement, Attorney Anthony J. Aveni was appointed Special Master by the trial court, to promulgate new rules for the Trust's administration, and determine the effect and validity of any existing rules governing the Trust.

{¶3} In May 2006, the Special Master filed his report, which included the conclusion that the other trustees lacked authority to remove Neil J. Conway III as a trustee. Cf. *Conway I* at ¶7. The trial court modified, affirmed, and adopted the Special Master's report by a judgment entry filed June 8, 2006. The appeal resulting in our opinion in *Conway I* ensued, with the Trust and remaining trustees claiming error in the trial court's decision to reinstate Neil J. Conway III as a trustee. Id. at ¶10. We affirmed the trial court. Id. at ¶28-31.

{¶4} On April 10, 2007, appellants moved to show cause. On or about May 1, 2007, the trial court conducted a hearing after which the parties entered a settlement, which the trial court memorialized in a judgment entry filed May 23, 2007. All of the existing trustees resigned, and the trial court appointed Attorney I. James Hackenberg as successor trustee.

{¶5} Appellants retained Attorneys Stephen M. Bales and Joseph W. Kampman, and their firm, Ziegler, Metzger & Miller LLC, to represent them regarding the Trust. A declaratory judgment action against the successor trustee, the former trustees, and all other beneficiaries of the Trust was filed, as were motions to compel and for attorney fees. The successor trustee moved the trial court to appoint counsel on his behalf, which was granted. As a result, the trial court appointed Attorneys George B.P. Haskell and George Cruikshank to represent the successor trustee. The trial court further appointed Attorney Paul Miller to represent the interests of any unknown or unborn beneficiaries of the trust. Attorney Dorothea J. Kingsbury continued to represent the interests of the other former trustees, as well as those of their children as beneficiaries of the Trust.

{¶6} Pursuant to R.C. 5801.10, the parties began negotiating a Private Settlement Agreement ("PSA") to which the parties eventually agreed. By a judgment entry filed December 18, 2008, the trial court adopted the PSA, which, in addition to settling existing disputes, simplified and clarified operation of the Trust for the future.

{¶7} The attorneys for all the parties moved the trial court for fees, to be paid from the Trust. The trial court granted the motions of the successor trustee's attorneys, and those of Mr. Miller. However, by a judgment entry filed December 30, 2008, it

denied the motions of Attorneys Kampman and Kingsbury. Appellants moved the trial court to reconsider its decision, but the motion was overruled via judgment entered on January 14, 2009. Appellants timely noticed this appeal, assigning three errors. Their first assignment of error contends:

{¶8} "The trial court erred in denying the Plaintiffs/Appellants' Application [Motion] for Attorney Fees to be paid from the Trust where the payment of attorney fees is specifically provided for in the language of the Trust and the trial court's December 18, 2008 Judgment Entry, notwithstanding the payment of attorney fees by the original Trustees, Successor Trustee and the trial court from the Trust, and the trial court's granting of other Motions For Attorney Fees."

{¶9} We review a trial court's decision to grant or deny attorney fees for abuse of discretion. *Norfolk S. Ry. Co. v. Toledo Edison Co.*, 6th Dist. No. L-06-1268, 2008-Ohio-1572, at ¶60. An abuse of discretion is no mere error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Rather, the phrase connotes an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. Id. "Abuse of discretion" is a term of art, describing a judgment neither comporting with the record, nor reason. *Amon v. Keagy*, 11th Dist. No. 2008-T-0033, 2009-Ohio-3794, at ¶18.

{¶10} By their first assignment of error, appellants argue that provisions of the Trust itself, and the PSA, command the payment of their attorney fees. First, they cite to Article III of the Trust's bylaws, entitled "Services and Expenses," which provides at Section A, "Wages and Fees for Service," for the payment of legal fees for attorneys hired by the trustees. As the successor trustee correctly points out, Mr. Kampman was

never hired by the trust in any fashion: he sued it on his clients' behalf. Consequently, this provision of the bylaws is of no comfort to appellants.

{¶11} Second, appellants cite to the PSA itself. Section 8(g)(ii) provides, in pertinent part:

{¶12} "All past or present costs, expenses and reasonable attorney fees incurred by the parties to the pending Trust litigation shall be borne and paid for by the parties themselves except that each party has the right *to petition* the Court for an award of fair, reasonable and necessary attorney fees to be paid for by the Trust related to or arising out of the Motion to Compel filed March 10, 2008 and/or the Declaratory Judgment filed March 21, 2008 *** and/or the negotiation, preparation, and execution of this Private Settlement Agreement." (Emphasis added.)

{¶13} Appellants argue this provision justifies payment of Mr. Kampman's fees, as he was principally involved in drafting the PSA.

{¶14} Appellants' argument implies Mr. Kampman was the primary engineer of the PSA. However, the record does not clearly disclose the extent of his participation. While Mr. Kampman's fee bill revealed he worked on the PSA, the bills submitted by other attorneys disclose the same. Regardless, the language of Section 8(g)(ii) does not establish a right to attorney fees for work done in relation to the trust litigation but merely a right to petition. Simply because the PSA authorizes the award of attorney fees does not imply a trial court is required by the PSA to grant such fees upon the proper filing of a petition. The issue of whether attorney fees should be awarded is committed to the discretion of the trial court and, as a result, appellants' argument is without merit.

{¶15} The first assignment of error is overruled.

{¶16} Appellants' second assigned error provides:

{¶17} "The trial court erred in denying the Plaintiffs/Appellants' Motion For Payment of Attorney Fees from the Trust because the procedural history and facts of the case indicate that the attorney fees were fair and reasonable."

{¶18} Appellants' second assignment of error argues the trial court abused its discretion because, pursuant to common law principles, attorney fees may be recoverable from a trust fund when the underlying litigation benefits the trust or the party seeking fees was reasonably justified in bringing the suit. See *Lloyd v. Campbell* (1946), 120 Ohio App. 441, 452 (in order for a party to be awarded attorney fees under such circumstances, "the litigation must be beneficial to the trust estate or the party must be reasonably justified in bringing it.") See, also, *In re Estate of Hughes* (1946), 78 Ohio App. 143, generally.

{¶19} Initially, we point out that appellants failed to raise this argument before the trial court. It is axiomatic that a litigant's failure to raise an issue in the trial court waives the litigant's right to raise that issue on appeal. *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 220. To allow appellants to waive an argument by not allowing the trial court to pass upon the point and then revive it on appeal frustrates the orderly administration of justice. As the Ohio Supreme Court stated in *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 171:

{¶20} "*** The legitimate state interest in orderly procedure through the judicial system is well recognized as founded on the desire to avoid unnecessary delay and to

discourage [parties] from making erroneous records which would allow them an option to take advantage of favorable verdicts or to avoid unfavorable ones. ***"

{¶21} Here, counsel filed a motion and brief in support of his application and, in so doing, merely cited to the enabling provision of the PSA. Counsel could have drawn the trial court's attention to the argument upon which he now relies at the time he filed his application, but failed to do so. Even where the matter at issue is an application for attorney fees, "[l]itigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process." *Easterday v. Gumm* (Nov. 15, 1996), 8th Dist. No. 96 CA 2179, 1996 Ohio App. LEXIS 5198, *29-*30. (Holding the failure to raise a sub-issue relating to the amount of attorney fees awarded in a motion in opposition to the award unequivocally waived the argument on appeal.) Appellants' counsel applied for attorney fees *and* filed a brief in support of his application. He had the opportunity to assert his common law basis for an award of fees below, but failed to do so. By failing to raise his common law argument to guide the trial court's discretion in its determination of whether his fees were "fair, reasonable and necessary," counsel waived the argument for the same purpose on appeal.

{¶22} However, assuming arguendo, appellants properly preserved the argument, their position would still fail. In appellants' brief, counsel for appellants asserts he is entitled to attorney fees because the underlying litigation was beneficial to the trust and/or appellants were reasonably justified in bringing it. In support, appellants provide their own assessment of the necessity of the litigation and also underscore counsel's contributions to the drafting of the PSA. Despite appellants' subjective assessments, there are no materials of evidential quality to support their assertions.

Even assuming counsel was the principal drafter of the PSA, the document which effectively resolved the parties' apparent legal dispute(s), we cannot conclude, without more, that the court abused its discretion in failing to grant counsel's request for fees. Without affidavits, testimony, or even record pleadings providing some insight into the reasons for which suit was commenced, appellants' points have the legal value of mere unsworn self-justifications.

{¶23} Courts have stated that "'[t]he administration of trusts is generally regarded as an exclusive subject of equity jurisdiction, with the accompanying large need of judicial discretion in the disposition of individual cases. [Thus,] [a]ppellate courts *tend toward leaving unaltered any order respecting costs or fees passed upon by the trial court*.'" (Emphasis added.) *In re Heltzel, Trust 2.* (Oct. 21, 1994), 11th Dist. No. 93-T-4965, 1994 Ohio App. LEXIS 4735, *3, quoting *Lloyd*, supra, at 451.

{¶24} As previously discussed, an abuse of discretion occurs when a court's actions are fundamentally arbitrary, unreasonable, or unconscionable. *Blakemore*, supra. Under these circumstances, counsel's bill and appellants' unsupported assurances relating to the import of the litigation to the trust (as well as counsel's participation in the same) are insufficient to demonstrate the trial court acted arbitrarily or unreasonably in denying the application.

{¶25} Appellants' second assignment of error is overruled.

{¶26} Appellants' third assignment of error asserts:

{¶27} "The trial court erred in denying Plaintiffs/Appellants' Motion For Payment of Attorney Fees from the Trust by a beneficiary of the Trust without at a minimum holding an evidentiary hearing to determine whether the fees are fair and reasonable."

{¶28} Under their final assignment of error, appellants contend the trial court abused its discretion in failing to hold an evidentiary hearing to determine the fairness and reasonableness of fees. We disagree.

{¶29} Initially, appellants moved the trial court for an evidentiary hearing on the reasonableness of counsel's attorney fees in a post-judgment motion for reconsideration. This court has held "*** that the filing of a motion for reconsideration from a final appealable order in the trial court is a nullity. *Pitts v. Ohio Dept. of Transp*. (1981), 67 Ohio St.2d 378, 381. See, also, *Keyerleber v. Keyerleber*, 11th Dist. No. 2007-A-0010, 2007-Ohio-3018, at ¶3." *Stewart v. Lowry*, 11th Dist. No. 2008-P-0068, 2008-Ohio-6414, at ¶3. Because the issue was raised in a motion not acknowledged by Ohio's procedural rules, it was not properly before the trial court.

{¶30} Even assuming the issue was properly raised, the trial court did not err when it ruled on counsel's application without a hearing. The Supreme Court of Ohio has held that a trial court is not required to hold an evidentiary hearing on an application for attorney fees. *State ex rel. Chapnick v. E. Cleveland City School Dist. Bd. of Educ.*, 93 Ohio St.3d 449, 452, 2001-Ohio-1585; see, also, *McPhillips v. United States Tennis Assn. Midwest*, 11th Dist. No. 2006-L-235, 2007-Ohio-3595, at ¶32, citing *Cregar v. Ohio Edison Co.* (Jan. 11, 1991), 11th Dist. No. 89-T-4316, 1991 Ohio App. LEXIS 78, *4. Because there is no legal mandate that a trial court hold an evidentiary hearing, we find no error.

{¶31} Appellants' final assignment of error is overruled.

{¶32} For the reasons discussed in this opinion, appellant's three assigned errors are without merit. It is therefore the judgment of this court that the judgment of the Lake County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

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{¶33} I would reverse and remand on the basis of the second assignment of error. I disagree that appellants were required to argue the issue of whether their attorney's application for fees was fair and reasonable, based on the case's history, before the trial court in order to preserve the issue for appeal. Applications for attorney fees are commonly submitted on motion, without briefing, and the PSA herein specifically contemplated that the various attorneys involved would petition the trial court for fees from the Trust. When appellants attempted to argue their position to the trial court via motion for reconsideration, the trial court simply denied them the opportunity.

{¶34} In addition to the case law cited by appellants in support of the motion for attorney fees, I note that R.C. 5810.04, entitled "Attorney's fees and costs," provides, in relevant part: "In a judicial proceeding involving the administration of a trust, ***, the court, as justice and equity may require, may award costs, expenses, and reasonable

attorney's fees to any party, ***, from the trust that is the subject of the controversy, ***[.]"

{¶35} In this case, the PSA provided for the resolution of the numerous disputes arising between the children of the trustors. It provides a simplified and clarified method for the successor trustee to administer the Trust's assets and provide the intended benefits to the beneficiaries. The record before this court contains bills of the attorneys involved in this case. Applications for attorney fees are commonly decided on the basis of such bills; and, from the record, it appears Attorney Kampman, working as appellants' attorney, was largely responsible for drafting the PSA. I further note that appellees do not dispute this point. As the PSA benefits the trust as a whole, and all the beneficiaries, I would find the trial court abused its discretion in not allowing Attorney Kampman a reasonable fee.

{¶36} I respectfully dissent.