

96PR110 (10/29/99)

PROBATE COURT CITY AND COUNTY OF DENVER STATE OF COLORADO

Case No. 96PR110

IN THE MATTER OF

The Estate of JAMES FENNELL,
Deceased

ORDER ALLOWING REIMBURSEMENT OF FEES AND COSTS

THIS ORDER is the third and final part of the Court's ruling arising from a Motion for Supervised Administration and a Petition for Removal and Surcharge of Personal Representative and Trustee.

BACKGROUND

James Fennell died in January 1996 leaving a will and revocable trust. In addition to the estate planning documents they had signed, James Fennell and his wife had prepared for his death by identifying their nephew Michael Bessler ("Bessler") as a financial confidant. They named Bessler as agent under their powers of attorney, as successor trustee under their joint revocable living trust, and as personal representative and testamentary trustee of James Fennell's estate. For approximately 6 years before his death, James Fennell trained Bessler to assume the responsibilities of these positions. The testimony regarding Bessler's role in James and Marjorie Fennell's financial life was consistent and uncontradicted.

When James Fennell died in 1996, Bessler undertook the role of personal representative of the decedent's estate, trustee of the several trusts, and continuing confidant, advisor, and agent to the decedent's wife, Marjorie Fennell.

In connection with the probate proceeding, Bessler carried out the directions of the decedent's will, which provided in pertinent part:

E. UNSUPERVISED ADMINISTRATION: It is my intention that the probate of my estate be conducted as an administrative, not a judicial proceeding under the Colorado Probate Code. I therefore direct informal probate of my will, informal appointment of my personal representative, unsupervised administration of my estate, and informal closing of my estate by sworn statement of my personal representative, unless changed circumstances occur

which I could not have anticipated and which necessitate formal or supervised judicial proceedings for the protection of persons interested in my estate. [Last Will and Testament of James Fennell, dated November 15, 1990, at ARTICLE IX].

Bessler filed a pro se application for informal probate of the decedent's will in this Court, seeking unsupervised administration. The Court's file reveals that his Letters were issued by the Probate Registrar on January 24, 1996. Bessler timely served and filed the Information of Appointment required under C.R.S. § 15-12-705 (1999).

In the spring of 1998, and without any prior requests for limited court intervention or oversight, Petitioners, who are the wife and descendants of James Fennell, filed a Motion for Supervised Administration. Bessler opposed the Motion.

On July 9, 1998, before the Court had ruled on the Motion for Supervised Administration, Petitioners filed a Petition to Remove and Surcharge the Personal Representative and Trustee. Petitioners were frustrated with Bessler's resistance to their effort to subject the estate to supervision and to secure his voluntary resignation.

Bessler also opposed the Petition for his removal and surcharge. The Court ordered the parties to mediate; unfortunately Mrs. Fennell declined to participate, and the mediation was unsuccessful.

A trial on all pending matters (except for the instant issue of the fiduciary's reimbursement of his litigation costs) was held during the course of three sessions beginning January 17, 1999 and concluding June 4, 1999. The Court issued the first part of this three-part Order on July 9, 1999.

In its Order dated July 9, 1999, the Court denied the Motion for Supervised Administration. Under the decedent's will, the standard of proof for ordering supervised administration was high. After a comprehensive trial reflecting the exhaustive discovery that had occurred in this case, the Court concluded that supervised administration was not necessary because circumstances had not changed and the Court's supervision was not required "for the protection of persons interested in the decedent's estate."

The Court concluded that Bessler's administration of the James Fennell estate and the several trusts should proceed as directed by the decedent's will, "as an administrative, not a judicial proceeding . . ." The Court further concluded that Bessler properly resisted the Motion for Supervised Administration.

In its July 9th Order, the Court also denied the Petition for Removal and Surcharge of the Personal Representative. The Court found that Bessler had been selected and directed by the decedent to serve in these fiduciary roles. The Court also found that Bessler had discharged his offices as personal representative, trustee and agent properly, timely, and temperately. His fees and the fees of professional advisors who assisted in the administration of the estate were found to be reasonable and necessary and were approved.

REQUEST FOR REIMBURSEMENT

In its management order attendant to the trial, the Court reserved Bessler's request for reimbursement of his litigation costs in connection with his defense of the supervision, removal and surcharge actions. In the second part of this case, the Court addressed the

legal basis for his request in its Order Denying Partial Summary Judgment, dated September 29, 1999.

In that Order, the Court held that a fiduciary may be reimbursed for his reasonable and necessary attorneys' fees and costs for mounting a successful resistance to actions for supervision, removal and surcharge. The Court rejected Petitioners' argument that a fiduciary's defense of a removal and surcharge action can never constitute a benefit to the estate or trust. The Court expressly held that a benefit accrues to the estate or trust when the fiduciary increases the size or value of the estate, but also when he successfully defends the confidence placed in him by the decedent to properly administer the estate and trust. The Court hereby incorporates all of its analysis, citations of authority and conclusions of law contained in the Court's ruling dated September 29, 1999 as if set out in full herein.

A hearing was held on October 1, 1999 to set the amount of the reimbursement. This Order addresses that issue.

As with all matters that come before a probate court in connection with the administration of a decedent's estate and trusts, the Court's first resort has been to the testamentary document(s). Here the Court looks primarily to the Last Will and Testament of James Fennell. The Will provides, at Article IX.D.:

Any fiduciary under my will shall be entitled to reasonable compensation commensurate with the services actually performed and to reimbursement for expenses properly incurred. [emphasis added].

Next, the Court looks for guidance to the Colorado Probate Code:

15-12-720. Expenses in estate litigation. If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred. C.R.S. §15-12-720 (1999).

This section has been specifically applied in Colorado to permit reimbursement of litigation costs incurred by a personal representative who defends a removal and surcharge action. See *In the Matter of the Estate of Phipps*, 713 P.2d 412 (Colo. App. 1985). In *Phipps*, an heir/beneficiary sued for removal and surcharge. The Colorado Court of Appeals upheld the trial court's denial of the beneficiary/litigant's request for reimbursement from the estate of her litigation costs. However, the Court of Appeals reversed the trial court's denial of estate-paid attorney fees to the personal representative, stating,

The court's conclusion that §15-12-720 C.R.S., does not apply to this case is erroneous. That section is limited only by the requirements that the personal representative must have defended the proceeding in good faith and that the expenses incurred must have been necessary and reasonable to the administration of the estate. Thus, it has not been determined whether the personal representatives here have met the good faith requirements of the statute.

Id. at 414-415, citing with approval *Tuckerman v. Currier*, 54 Colo. 25, 129 P. 210 (1912):

[E]xecutors to a will are justified in incurring necessary and legitimate expenses in the defense of their appointments, 'as well as to in good faith defend their course of procedure when attacked while in office.'

Colorado joins other jurisdictions who consistently follow the rule set down in the oft-cited case of *Jessup v. Smith*, 119 N.E. 403 (N.Y.1918), wherein J. Cardoza said of the trustee:

He owed a duty to the estate to stand his ground against unjust attack. He resisted an attempt to wrest the administration of the trust from one selected by the testator and to place it in strange hands. . . . Plainly, such services, if paid for by the trustee personally, would justify reimbursement on his accounting before the surrogate.

Id. at 404. In *Rapp v. Rapp*, 562 N.W.2d 359 (Neb. 1997), the Supreme Court of Nebraska recently reiterated the rule:

[g]enerally, if the fiduciary's defense of his acts is fully successful, he is ordinarily entitled to recover the reasonable costs necessarily incurred in preparing his final account and in successfully defending it against objections.

Id. at 345. See also *In Re Trust of Freeman*, 75 N.W.2d 906 (Minn. 1956) and *Cooper v. Brodie*, 480 S.E.2d 101 (Va. 1997).

Following the governing documents and the applicable law the Court has considered all of the required factors: Were the expenses for which reimbursement is sought incurred in good faith (i.e., "properly incurred"), and were they both necessary and reasonable in amount?

Bessler opposed Petitioners' Motion for Supervised Administration based upon his belief that an order of supervised administration was contrary to the decedent's intent. His conclusion resulted from the tutelage of the decedent and the express provisions of the decedent's will. The Court concluded that the facts presented at trial failed to support the Motion for Supervised Administration. The Court FINDS that Bessler's actions in defending the decedent's intent as expressed in the will were taken in good faith and the expenses associated with his resistance were properly incurred.

James Fennell made no provision for the removal of the personal representative or trustee by Petitioners. Unlike a case where family members such as Petitioners are assigned broad powers to remove fiduciaries and identify successors, here the responsibility fell entirely on the Court to determine if there was cause for the removal of the personal representative or the trustee. Finding that no cause for removal existed in this case, the Court denied the Petition. Having acquitted Bessler from any wrongdoing in connection with the administration of the estate and trusts, the Court FINDS that his decision to defend himself was justified and the expenses incurred to mount the defense were properly incurred.

The Court rejects Petitioners' argument that Bessler acted exclusively in his self interest when he sought to enforce the decedent's intent as expressed in the will and trust. In their Pre-Hearing Brief Re: Attorney's Fees and Costs, filed September 7, 1999, Petitioners rail about Bessler thusly: "This litigation was waged against the Petitioners for selfish, vengeful, and entirely personal reasons." In fact, until Petitioners filed their Motion for Supervised Administration and Petition for Removal and Surcharge of Personal Representative and

Trustee, there were no judicial proceedings of any kind in this estate; it had been handled by the Registrar entirely as an administrative proceeding.

Petitioners have argued similarly that Bessler acted exclusively in his self interest in resisting the removal and surcharge petition. The Court similarly rejects this analysis. As noted, the Petition to Remove and Surcharge the Personal Representative and Trustee was filed before the Court had heard the merits of the Motion for Supervised Administration. After all of the allegations against the personal representative and trustee were presented at trial, the Court concluded that both the Motion for Supervised Administration and the Petition for Removal and Surcharge were without merit and denied them both. Although Petitioners have the absolute right to ask the Court to review the estate and trust administration on their behalf, their allegations that Bessler's defense of his actions constituted an aggressive act are disingenuous.

The argument that a fiduciary who defends himself against removal or surcharge acts in his individual interests has been advanced frequently and rejected consistently. The Court of Special Appeals of Maryland, in *Saulsbury v. Denton National Bank*, 335 A.2d 199 (Md. App. 1997), observed

It is the position of the appellants, however, that where the defendant-trustee is not directly preserving the assets of the trust but is rather fighting a legal battle to preserve his own status as trustee, he is acting not on behalf of the trust but on behalf of himself. Notwithstanding a certain surface logic in the proposition, the authorities are clear that a successful defense by a trustee against an effort to remove him as trustee is a defense on behalf of the trust estate itself (citing *Bogert, Trusts and Trustees* sec. 525(2d Edition, 1960).

In summary, having considered the extensive record in this case and the substantial legal authority, the Court CONCLUDES that Bessler acted properly in defending the proceedings; he acted in good faith; the expenses incurred were necessary to mount a successful defense; and, having been exonerated of the charges, he is entitled to reimbursement of his costs.

AMOUNT OF REIMBURSEMENT

The Court has reviewed the amount of the reimbursement sought to determine whether the fees and costs were necessary and reasonable in amount. Bessler seeks reimbursement of the following costs:

1. Attorney Fees and Costs Bessler asks for reimbursement of attorney fees of \$110,403.05 and costs of \$6,349.05 to the law firm of Cox Padmore Skolnik & Shakarchy. In regard to this part of Bessler's request the Court makes the following findings:

This was vigorous litigation. It was appropriate and necessary for Bessler to retain litigation counsel. Theresa Moore ("Moore") specializes in litigation. She testified that she has had experience litigating probate matters.

Petitioners argue that Moore's rate of \$185 is unreasonably high in light of her experience and qualifications. They recommend that the Court reduce her rate to \$140 to \$150 on that basis. Based upon the testimony presented, the hourly rate charged by the firm for Moore's time reflects her experience and tenure and is reasonably consistent with the hourly rates of

other attorneys with similar experience practicing in the Denver metropolitan area. Neither cross examination of Moore nor the Court's observation during the extensive trial time, revealed any deficiency in her experience or qualifications justifying a reduction in her hourly rate.

In representing Bessler, the firm utilized paralegals and others in the firm whose hourly rates were higher or lower than Moore's. Her testimony concerning the reasons for using other personnel in the firm was persuasive, i.e., that the firm utilized the same criteria in representing Bessler as are used in other cases.

The costs charged by the firm included postage, fax, on-line legal research, delivery, long distance and similar costs that were individually itemized for this client. The testimony satisfied the Court that the firm used the same criteria in charging this client that are used by the firm in regard to other clients. Bessler knew the terms of the engagement when he hired this firm. He incurred these costs in good faith.

Finally, the Court finds that the aggregate amount of fees and costs is reasonable. The size of the Court's file is evidence of the production of both Petitioners' counsel and Bessler's counsel. The surcharge claims against Bessler were strenuously advanced and in the aggregate were in excess of the compensation approved for his services as personal representative and trustee. His counsel justifiably responded in his defense. The Court is satisfied that a defense was necessary, that Bessler's counsel represented him appropriately, and that throughout the litigation, responded appropriately to Petitioners' claims and allegations.

The testimony established to the Court's satisfaction that Moore and the paralegal kept reasonably contemporaneous and complete time records sufficient to support the fees charged. The billing reports that they produced were entered as exhibits and have been scrutinized by Petitioners' counsel and by the Court.

The Court recognizes that by allowing Petitioners to bring all of their claims and complaints about Bessler's performance to the attention of the Court, some of which were made in pleadings filed after the first five days of the trial, the Court increased the responsibility of counsel on both sides. Overall, the Court concluded that it was more efficient for them and for the Court to consider all possible claims and defenses, rather than holding a second trial. Nevertheless, this additional burden is being taken into account by the Court in evaluating the aggregate amount of the fee.

Finally, the Court must consider that Bessler prevailed on all of the defenses asserted. While not determinative, this factor must be taken into account by the Court in evaluating the reasonableness of the costs he incurred to achieve the result.

The Court has considered all of these factual findings and all of the factors set out in C.R.S. § 15-12-721(2)(1999) "as guides in determining the reasonableness of a fee." The Court FINDS that the aggregate amount of attorney fees and the costs charged by Padmore, Skolnik & Shakarchy were necessary to the defense and were reasonable.

Petitioners argue that the Court cannot approve the portion of Bessler's request for reimbursement that reflects attorneys' fees and costs in connection with this bifurcated portion of the trial to consider reimbursement of his litigation costs. Assuming that all of the post trial work done by counsel (see Exhibit A to Bessler's Second Supplement and

Amendment to Affidavit Regarding Attorneys Fees and Costs, filed September 24, 1999) relates to this aspect of the case, the total amount of fees and costs at issue is \$12,190.55.

Petitioners argue that no Colorado attorney or fiduciary is entitled to fees for time spent collecting a fee, citing *In Re Estate of Painter*, 628 P.2d 124 (Colo. App. 1980), reh'g denied, Feb. 19, 1981, cert. denied, May 4, 1981 (referred to herein as "Painter II"); *In Re Estate of Painter*, 671 P.2d 1331 (Colo. App. 1983) (referred to herein as "Painter III"); and *Kolouch v. First Sec. Bank of Idaho*, 911 P.2d 779 (Id. App. 1996), reh'g denied, review denied. The Court finds these opinions not controlling in this case.

There is no rule laid down in the Painter decisions that a fiduciary must finance out of his own pocket the costs associated with a claim for reimbursement of expenses. Review of Painter and Kolouch is useful, however, to the extent that it reveals confusion about what is being considered here. This is not a fiduciary compensation case. It is not a claim for "fiduciary fees" and it is not a claim against the estate filed by an attorney who seeks payment of a fee for services.

By receiving compensation, the fiduciary's economic situation is improved; reimbursement merely makes the fiduciary whole. Both the decedent's will and trust distinguish between "compensation for services" and "reimbursement of costs." The Court has held in its Order dated September 29, 1999 and in this Order that, having successfully defended a petition to change the estate administration from what was directed by the decedent and having successfully resisted a petition to remove and surcharge him, Bessler benefited the estate and is entitled to "reimbursement of costs" from the estate. He is entitled to be made whole.

For the foregoing reasons, the Court ORDERS that Bessler's request for reimbursement of his attorney fees and costs is GRANTED.

Bessler has requested that the Court approve reimbursement of his attorneys' fees and costs associated with his response to the appeal that Petitioners have commenced seeking to set aside the Court's findings and conclusions of July 9, 1999. Authority for an award of fees and costs on appeal to the party who prevailed at trial is cited in *Gwin v. Chesrown Chevrolet, Inc.* 931 P.2d 466 (Colo. App. 1996) and *Levy-Wegrzyn v. Ediger*, 899 P.2d 203 (Colo. App. 1994).

An award of attorney fees must be based, not only on authority to make such an award, but also on a Court's specific findings in each individual case that the applicable standards have been met. The Court cannot properly act in advance; the request is DENIED.

2. Litigation Expenses. Bessler also seeks reimbursement from the estate and trusts for expenses paid for preparation of trial materials and presentation of the defense. These expenses comprise:

A. fees and costs of \$18,804.65 for Matthew Zieringer's services in support of the defense effort. Zieringer did not participate as counsel in the trial but acted as an advisor to Moore and was called by both Petitioners and Bessler as a witness.

B. accounting fees paid to Beverly Beattie for "litigation support fees and costs" in the amount of \$3,052.90; and

C. fees and costs in the amount of \$3,184.55 incurred for deposition and consulting expert fees and related litigation support (see Second Supplement and Amendment to Affidavit Regarding Attorneys Fees and Costs, filed by Bessler's counsel on September 24, 1999).

The Court has considered all of the applicable factors including necessity, reasonableness and good faith, and recognizing the extent of the litigation and the outcome, approves these costs as reimbursable expenses properly incurred by the personal representative and trustee.

The Court has considered Petitioners' objections to the costs of witnesses, expert and non-expert, based on statutory limits and finds their analysis inapplicable. Here the Court is called upon to evaluate Bessler's claim for reimbursement in terms of necessity and reasonableness. If he is obligated to pay these costs and if his reimbursable expenses meet the applicable tests, they should be allowed.

The Court recognizes that its Order declining to permit certain expert testimony was issued after Petitioners sought permission to call experts and after a reasonable litigation attorney would have investigated the use of opposing experts. The fees Bessler paid to experts were modest.

The other witnesses or deponents referred to include the attorney and the accountant who provided estate and trust administration services. Testimony of the professional advisors who assisted with the estate and trust administration was necessary to Bessler's defense and the amounts charged were reasonable. The Court notes that the accountant, for example, specifically excluded charges for trial time.

Based on an analysis of all applicable factors, the Court concludes that the litigation costs were necessary, incurred in good faith, and are reasonable in amount.

The Court therefore ORDERS that Bessler is entitled to reimbursement of the litigation costs he has paid or is obligated to pay.

3. Bessler's Compensation. In addition to the reimbursements sought, Bessler asks for compensation for his own time for participation in the defense of the case. The Court FINDS that, for the reasons previously discussed, the issue of compensation should not properly be considered as part of this reimbursement claim.

IT IS THEREFORE ORDERED that Bessler's attorneys' fees and costs and his litigation expenses are ALLOWED. The claims for attorney fees and costs on appeal and for compensation are DISMISSED without prejudice.

October 29, 1999

C. Jean Stewart
Judge, Probate Court