

Law Office of Curtis E. Shirley

RE: Berry v. Key Trust Co. of Ohio, et al., Cause No. 431079

I write to express my opinion concerning the legal fees and expenses of Richard L. Berry, the plaintiff in this case. Based upon my detailed review, the plaintiff's fees and expenses are appropriate, fair, reasonable, understandable, and in line with his desires, expectations and instructions.

In rendering my opinion I have read all of the pleadings, papers and orders filed with the Clerk of the Court (approximately 175) since the complaint on February 26, 2001 through and including the "Notice of Objection to Plaintiff's Attorneys' Fees and Request for Hearing" filed on July 22, 2002. I have reviewed the redacted billing statements for activity from January 1, 2002 through May 31, 2002.

I have reviewed but not read word for word the depositions and other discovery that is not part of the Court's record. I reviewed them to determine the extent of the defendants' objections, whether the questions had an objective of obtaining admissible evidence or resolving the disputes, and whether a reasonable attorney would have conducted the discovery to prepare for trial and eliminate any possibility of surprise. I have read all of the correspondence between the plaintiffs' attorneys and the defendants' attorneys, mostly for the purpose of reviewing how the parties have dealt with the issues and settlement.

The only information I reviewed outside of the record in this case were the Martindale—Hubbell listings for the plaintiff's attorneys.

The issues in this case are several. The plaintiff is the grantor and the beneficiary of an irrevocable trust agreement signed on February 25, 1991 which I understand at the time the complaint was filed had a value of approximately one hundred million dollars (\$100,000,000). As to the 1991 irrevocable trust, the plaintiff sued the defendants individually and as trustees for breach of trust and breach of fiduciary duty, for preparing the documents at issue in this case at the behest of another, for malpractice by providing negligent advice, false advice, threats, insufficient advice on issues concerning the documents and on the tax consequences, and to remove the trustees. Concerning the trust document itself, the plaintiff filed a complaint to rescind the 1991 trust on the grounds that it was signed under undue influence, and because of fraudulent inducement, duress and mistake. The plaintiff also seeks to terminate the trust.

In addition to the 1991 trust, the plaintiff sued the defendants for breach of trust and breach of fiduciary duty concerning distributions from trusts signed in 1978, 1980, and

1981, for unjust enrichment, and for full and complete accountings. The defendants have responded with general denials and filed several counterclaims and motions.

During the litigation the defendants have disputed virtually every possible fact and point of law. There have been no admissions or stipulations, other than joint motions to the Court on administrative matters. Additional issues raised by the defendants have included whether the plaintiff was or is incapacitated, whether his children are beneficiaries, whether a guardian ad litem needs to be appointed for them, whether the plaintiff has the ability to disclaim his childrens' interests in the trust, whether a settlement agreement had been reached, whether either party is entitled to payment of fees during the course of these proceedings, whether such fees are reasonable, and whether attorneys fees and expenses qualify under the language of the trust.

The ABA Model Rules of Professional Responsibility state that "The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, ..." EC 2-17. "The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained." EC 2-18.

Ohio Disciplinary Rule 2-106 follows word for word the language of the ABA Model Rule of Professional Conduct 1.5 concerning the factors to be considered. The only distinction between them is that the ABA rule states that "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee", while the Ohio Disciplinary Rule criticizes "an illegal or clearly excessive fee." The specific issue is thus whether "after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." Ohio D.R. 2-106(B).

In making that determination the Ohio Disciplinary Rule includes several factors: (1) the time spent by the attorneys involved; (2) what the attorneys spent their time doing; (3) the novelty of the issues involved; (4) the difficulty of the issues involved; (5) the skill level required to perform the legal service properly; (6) the likelihood that representing the plaintiff in this case would preclude his attorneys from accepting other clients; (7) the fees customarily charged in the locality for similar legal services; (8) the amount in controversy; (9) the client's reasonable requests concerning how he wishes his attorneys to proceed; (10) time limitations imposed by the client or by the circumstances of the case; (11) the nature and length of the attorney client relationship; (12) the experience, reputation, and ability of the attorneys; (13) whether the fee is fixed or contingent; (14) whether all of the plaintiff's attorneys have assumed responsibility for the representation; (15) whether all of the plaintiff's attorneys have assumed separate roles and the division of fees is proportionate to the work involved; and (16) the results obtained.

In addition to the ethical considerations above, Courts also look to: (17) the facts and circumstances of the individual case; (18) work done in exploring other possible causes of action or theories, whether or not successful; (19) any extraordinary services

performed; (20) the risk that any malpractice committed by an attorney would exceed the limits of any malpractice policy; (21) whether there is unnecessary duplication of work; (22) a lodestar method, whereby the Court multiplies the number of hours reasonably expended by a reasonable hourly rate and then may enhance this lodestar amount by a multiplier to arrive at a fee determination; (23) the amount spent for preparing and defending fee petitions; (24) whether the action, defense or continuation of any matter is frivolous, unreasonable, groundless, or involves bad faith; (25) the percentage of the amount sought in fees compared to the net amount at issue; (26) who is filing the petition for fees compared to who owns the money that will pay those fees; (27) whether the fees were incurred on the plaintiff's initiative or because of the tactics of the opposition; (28) how much the opposition has incurred in attorney fees and expenses; (29) whether the lack of payment of the attorney fees might cause one or more of his attorneys to withdraw and the beneficiary have to pay additional or extraordinary sums to employ other counsel; (30) the ability of the attorneys to repay any fees or expenses ultimately found to have been unreasonable; (31) how the cash flow implications of paying the fees will effect the parties' bargaining position during settlement and its effect on the possible duration and further expense of the case; (32) in accounting for legal services, the extent to which the plaintiff's attorneys can disclose the amounts involved and the nature of the legal services without providing any defendant with information that would provide an advantage.

Trust litigation by its very nature involves several additional factors that the Court should consider: (33) the trust terms; (34) the fiduciary obligation of a trustee to act in the best interests of the beneficiaries; (35) whether the trustee has breached its duties in any manner; (36) whether any trustee or investment advisor or anyone else receiving compensation from the trust has any conflict of interest; (37) whether the fees and expenses would be the same if a different, independent trustee were in place; (38) the purposes of the trust; (39) the particular statutes of the trust code at issue; (40) the benefits rendered to the beneficiaries; (41) how the ultimate outcome of the litigation will otherwise effect the beneficiaries, their families, or their heirs; (42) the interest of the beneficiary in the trust, such as whether he has a vested or contingent interest in either principal or income; (43) whether any other person has superior standing to hold the trustees accountable; (44) whether the fees can be paid from income or whether the principal must be used; (45) any tax benefit that could occur by paying the fees now rather than at the conclusion of the case; and (46) no matter the Court's ruling on the reasonableness of the fee, whether the client believes the fee to be reasonable and proper.

I will address these in turn.

1. As to the time spent by the attorneys involved, the redacted billing records show the number of hours worked. Courts routinely rely on the attorneys' affidavits to support this number. There is no information that even hints that the attorneys have misrepresented anything to the plaintiff, the trustees, or the Court.

2. The papers filed with the Court, the discovery and the correspondence between the parties show what the attorneys have spent their time doing, irrespective of the redacted billing statements. I would not have needed to review the redacted billing

statements to reach my opinion. The Court file alone shows that extensive work has been done, and the amount of research needed. On occasion there has been billing by several attorneys for attending the same deposition or hearing. But in a case of this magnitude that is to be expected. Cases that involve significant amounts in controversy do not involve a single attorney on each side of the aisle.

3. The issues in this case do not appear novel, but they have been vigorously advocated by the defendants. I have not seen either side argue that a statute is unconstitutional, that an appellate decision needs to be overturned, or that the facts are so unusual so as to require a sophisticated application by the Court.

4. The issues in this case do not appear difficult, but again the defendants have challenged every issue raised by the plaintiff and raised many additional issues on their own. Except where a settlor signs an irrevocable trust to qualify as a charitable remainder trust, or to establish an estate planning vehicle for annual exclusion gifts (such as a life insurance trust), cases are rare where a settlor signs and funds a trust and then the trustees fight to prevent the settlor from getting his money back. State courts routinely rescind such documents or alter the trust terms to suit the wishes of the settlor. Trustees usually seek Court involvement so as to protect themselves from any possible lawsuit for breach of trust, not because they want to argue that the trust must survive, that they must remain in place, or that they know what is best for the settlor.

5. Although the issues in this case do not appear novel or difficult, the skill level required of the attorneys in this case is substantial. Every attorney brings some expert knowledge of the Probate Code, Trust Code, Evidence Code, Trial Rules, Colorado and Ohio state income tax, Colorado and Ohio state inheritance, gift and estate tax, federal income tax, federal estate and gift tax, or how to try a case. Trust litigation is one of the most difficult areas of the law, especially because of the lack of reported case decisions.

6. I have no doubt from a review of the time involved in this case that the plaintiff's attorneys have been precluded from accepting other clients and other employment. This not only has an adverse impact on the attorneys' current business, but adversely affects the future business they will need to rebuild once this case is resolved. For this reason alone the plaintiff's attorney fees and expenses are reasonable.

7. As to the fees customarily charged in the locality for similar legal services, the Court should consider the fees customarily charged in trust litigation cases involving one hundred million dollars. Attorneys who specialize in trust litigation and will represent a plaintiff are few. In Indiana there are only ten (10) attorneys available out of 15,000. I believe the proportion is similar in Ohio. \$500 an hour per attorney is very reasonable.

8. Because the amount in controversy involves approximately one hundred million dollars, this is a phenomenally important factor. No attorney can afford to make a mistake. Every possible argument and motion has been and will be made.

9. The plaintiff's testimony at his deposition and his signed affidavits confirm that he has an understanding and appreciation of how his attorneys have proceeded in this case, and that they have complied fully with his wishes.

10. The plaintiff does not have control of his own money. He is understandably eager to have this case resolved. Every day that goes by is another day that he cannot choose how to invest his own funds, and another day that the defendants want to continue charging a trustee fee.

11. The nature and length of the relationship between the plaintiff and his attorneys is significant. One hundred million dollars is a lot of money. It is presumably the plaintiff's single greatest asset, which he has entrusted to his attorneys. He is entitled to and should be able to pay for his choice of the best attorneys.

12. The plaintiff has hired experienced, nationally recognized and able attorneys.

13. The fee in this case is hourly. That means the Court should make every effort to make certain that the attorneys are paid in a timely fashion. If the attorneys were not to be paid regularly, on this point it would be similar to a contingent fee. In evaluating whether a fixed fee amount is appropriate, the Court may consider how that amount compares to a variety of contingency fees. One perspective to consider is that the difference between the \$2,000,000 that has been billed thus far and the tens of millions that the attorneys might receive if the case involved a contingency arrangement is the plaintiff's ability to have these fees paid now.

14. All of the plaintiff's attorneys have responsibility for and have actively participated in representing him.

15. The plaintiff's attorneys have assumed separate roles and their fees result directly from the work each has provided. It also appears to be a collaborative effort.

16. As to the results obtained, the plaintiffs have been tremendously successful. The full range of causes of action and claims raised by the plaintiffs are progressing toward trial in early December.

17. The facts and circumstances of this case support the request for attorney fees. This is, in essence, many lawsuits under one caption. The defendants are named for separate and distinct reasons. If the plaintiff's attorneys had any intention to generate unreasonable fees, they could have filed some cases in state court and some in federal court based on diversity jurisdiction. Even when the plaintiff filed all of the cases in state court they could have involved separate counties. By filing all of the allegations in a single state court proceeding the plaintiff's attorneys chose the most efficient, and therefore least expensive, route.

18. The documents show that the plaintiff's attorneys have devoted their efforts to prosecution of the causes of action and theories set forth in the pleadings. They have not strayed from the issues raised in the amended complaint.

19. The plaintiff's attorneys have performed extraordinary services in their attention to the range of work required to prosecute this case properly and effectively.

20. It is impossible for the attorneys to insure against the risks implicated by this case. The risk that any malpractice committed by an attorney would exceed the limits of any malpractice policy is a serious consideration. Sole practitioners can routinely obtain malpractice coverage with limits of \$2,000,000. Law firms may obtain \$5,000,000 per occurrence. With one hundred million dollars at stake in this lawsuit, none of the plaintiff's attorneys can afford to make a mistake.

21. My review of the documents confirms there has been cooperation, communication, coordination and collaboration among the plaintiff's attorneys, but not unnecessary duplication of work. The time sheets show duplication of work, but I believe it to be necessary in this case. The stakes are high and the issues are numerous. Most cases involving substantial estate and trust litigation involve multiple law firms and multiple lawyers. It is not unusual for over a dozen firms to be involved on one side of a case.

22. Any lodestar method would result in a request for even higher attorneys fees and expenses.

23. The plaintiff's attorneys should not have to prepare and defend fee application at all. This is an hourly arrangement between the plaintiff and his attorneys using his own money, which the defendant trustees have tried to block as a tactical maneuver. The amount of time spent preparing and defending fee petitions has been more than usual. I believe that the defendants have increased the time involved by asking the Court to revisit the issue.

24. There is no evidence that the plaintiff has raised any action, defense or continued any matter that is frivolous, unreasonable, groundless, or involves bad faith.

25. The percentage of the amount sought in fees compared to the net amount at issue argues in favor of approving the requested fees. The Court can certainly understand that the plaintiff is being prudent in believing that \$2,000,000 in fees to date is worth every penny in a one hundred million dollar controversy if the fees bring the parties closer to a resolution, either through a settlement or by a judgment.

26. No matter how the Court might rule on the ultimate issues in this case, it is beyond dispute that it is the plaintiff's one hundred million dollars in one form or the other. The defendants will never be more than mere trustees of these funds. The plaintiff is not requesting that the defendants pay the attorney fees out of their own pockets; at least not yet. Because these fees ultimately diminish the value of the property to the plaintiff or his family, he has every reason to be prudent in assessing the amount to be paid.

27. There is no evidence that any of the plaintiff's attorneys have filed motions or made arguments to increase their time. The defendants have filed numerous counterclaims and motions. The defendants have also filed motions concerning the appointment of a guardian ad litem, whether the Court should disqualify the plaintiff's attorneys, and discovery disputes. The plaintiff should receive compensation for attorney fees incurred in responding to what the defendants have raised, irrespective of the merits.

28. I do not have any information concerning the amount of the defendants' attorney fees and expenses.

29. There is no evidence that one or more of the plaintiff's attorneys might withdraw if his or her fees are not paid, but the Court should make certain that they are treated fairly so as not to cause the plaintiff any concern over this, or to cause him to start over with new attorneys.

30. This is not a fee application case where the Court must approve attorney fees and expenses pursuant to any statute. Thus, this factor does not apply.

31. The time sheets of the plaintiff's attorneys show that they are spending large portions of any working day on this case. The cash flow implications of that decision are staggering for them and the plaintiff. If the defendants can have their fees paid while at the same time diminish the plaintiff's, they gain a substantial advantage by increasing the amount of work required in the case, delaying the ultimate resolution—either before trial or by appeal—and turning a deaf ear to any settlement discussions. Resolution of this case should be everyone's objective, and the best way to accomplish that is to order the trustees to provide the plaintiff access to his money in order to pay his reasonable attorneys fees. The Court should note that whether or not the plaintiff's attorneys get paid does not cost the defendants a dime.

32. I have reviewed no evidence as to what the defendants' attorneys have been paid nor what they have composed to support such fees. The plaintiff's attorneys have provided redacted billing statements that I find sufficient. Obviously the plaintiff has reviewed the full text. I recognize that if there was a problem with any part of the invoices, the plaintiff is in a position to complain directly to his lawyers.

33. The trust states that it was "established by the Grantor for his own exclusive benefit", Art. I, par.A, that the trustees shall distribute funds to the plaintiff for "support, health and education ... [and] to continue the standard of living to which he is accustomed". Art. I, par. B(2). Payment of the plaintiff's attorney fees and expenses fall within this language. The trustees do not need to make any inquiries to determine that the plaintiff paying two million dollars in attorney fees will lower his standard of living.

34. The trustee has a fiduciary obligation to act in the best interests of the beneficiaries. In the same manner that the defendants filed a counterclaim involving a declaratory judgment, they should also have filed a neutral petition for instructions asking

to pay the plaintiff's reasonable attorney fees. There is no evidence that the plaintiff is asking for payment from the trust while he is suffering from any kind of disability that the defendants have raised in this case. The plaintiff's attorneys have performed services that they believed to have been necessary. In addition to the amount being reasonable, I believe it is reasonable for the trust to be the source of the funds.

35. In this case the plaintiff has alleged that the trustees have breached their duties concerning a one hundred million dollar trust. Perhaps this explains why on the fee issue the defendants do not appear neutral but hostile. The Court should consider the defendants' arguments not in their capacity as trustees but also as adverse parties trying to gain an advantage.

36. There is no evidence that the plaintiff or any of his attorneys has a conflict of interest in requesting the fees. There is evidence that the defendants have a conflict of interest in raising their objections.

37. In my opinion the attorneys fees requested by the plaintiff would be paid if an independent trustee were in place. I have never heard of a single trust case where the Court has signed an order in favor of a beneficiary (in this case approving a method of paying the plaintiff's attorneys fees) and the trustee nonetheless moved the Court to reconsider its ruling. This was not the act of a trustee raising an issue for the Court to decide, this was personal and hostile.

38. The plaintiff signed the trust in this case. It was his money that funded it. The purpose of the trust was to benefit him. The Court should approve the attorneys fees as reasonable by placing itself in the same position as if the plaintiff would have the ability to pay these from his own personal bank account. That is how the plaintiff views the trust property, and that argues in favor of respecting the plaintiff's decision that the attorney fees are reasonable.

39. The Ohio Trust Code and case law permits the attorneys fees to be paid out of the trust. There is no rule that would cause the Court to diminish the amount or delay the timing of payment to the plaintiff's attorneys.

40. Obviously payment of the plaintiff's attorney fees benefits the beneficiary of the trust.

41. The ultimate outcome of this litigation will effect the plaintiff and his family in ways we can only imagine. The plaintiff is acting properly by not wanting his one hundred million dollars in the hands of others who are hostile, either as current defendants or as possible future trustees.

42. The plaintiff is the beneficiary of the trust. The defendants have raised the issue as to whether the trust permits others to have an interest, including questions about his power of appointment. But there is no dispute that only the plaintiff has received any trust property to date, and the trustees have never petitioned to distribute trust property to

anyone else. For the reasons as stated in factor 38, this argues in favor of respecting the plaintiff's decision that the attorney fees are reasonable.

43. The plaintiff has filed the lawsuit to hold the defendants accountable, as trustees and individually. There has been no serious challenge raised in response to his having proper standing. The plaintiff is the best person to hold the trustees accountable and appears to be the only person with standing to do so. For the reasons as stated in factor 38, this argues in favor of respecting the plaintiff's decision that the attorney fees are reasonable.

44. In most fee disputes any amount not paid to an attorney in fees is kept by the client in full because he or she was paying the attorney fees with after tax dollars. In the trust context this is not the case. The trust has a lot of money. Because it generates substantial income, anything not paid as a reasonable attorney fee will be taxed at the top income tax rate. Because attorney fees in trust cases are paid with before tax dollars, any mistake in paying one dollar too much costs the trust about sixty cents. This factor shows that a \$2,000,000.00 benefit to the plaintiff by paying his attorney fees diminishes the trust by only \$1,200,000.00. Rather than look to the amount of attorneys fees, the trustees should be highlighting to the Court how the precise amount of any decision would impact the trust, which is a much lower figure.

45. As to the timing of payment, the Court is well advised to order the trustees to release the funds so that the plaintiff can pay his reasonable attorney fees as soon as possible. Such fees and expenses diminish the tax obligations of the trust. By having the trust pay the fees directly, this also eliminates a possible tax problem as to whether the attorneys fees are deductible (by the trust or the plaintiff), and whether the plaintiff will have problems with the rules concerning alternative minimum tax. See Kenseth v. Comm'r of Internal Rev., 259 F.3d 881 (7th Cir. 2001).

46. In this case the plaintiff believes the attorneys fee to be reasonable and proper. For the reasons as stated in factor 38, this argues in favor of respecting the plaintiff's decision that the attorney fees should be paid. That the plaintiff will be responsible for the attorneys fees no matter what the Court's ruling weighs heavily in favor of approving the request.

Based upon the documents listed above, the issues and information involved in this case, the standard of review employed, and for all of the above reasons, in my opinion "a lawyer of ordinary prudence would [not] be left with a definite and firm conviction that the fees and expenses are in excess of a reasonable fee". Neither Mr. Eldred, Mr. Hannafan, Mr. Miller, nor Ms. Starkey have violated Ohio Disciplinary Rule 2-106(B). In my opinion the plaintiff has received effective, excellent representation for fair and reasonable fees and expenses. He is wise and correct to request that the trust pay them immediately.

Yours very truly,

Curtis E. Shirley