
Brown Trust

Attorney fee — Agreement to arbitrate — Jurisdiction

The Orphans' Court Division has jurisdiction to resolve dispute between fiduciary and attorney whether or not parties signed agreement containing arbitration clause. (Hunter — Attorney and Client 2).

In the Orphans' Court Division of the Court of Common Pleas of Montgomery County. Trust estate of Lessie Mae Brown, settlor. Preliminary objections of respondent attorneys. No. 09-3893.

Jennifer D. Gayle, for petitioner Hubert J. Brown.

John J. Koresko V, for respondents.

MEMORANDUM OPINION BY OTT, J., FEB. 22, 2011:

On November 25, 2009, the petitioner, Hubert L. Brown, trustee of the trust under deed executed by the settlor, Lessie Mae

Brown, under date of October 1, 1993, filed a petition for turnover of assets. The citation was directed to John J. Koresko, V, Esquire, and the Koresko Law Firm, P.C., former counsel for the trustee. The petition alleges that the Koresko Law Firm received the proceeds from the sale of real estate held by the trust in the amount of \$215,887.24, and remitted only \$180,000 to the trust. The petition seeks the turnover of the balance, plus interest, to the trustee.

The respondents removed the matter to the United States District Court for the Eastern District of Pennsylvania. By Order dated April 1, 2010, that Court remanded the matter to us. Respondents then filed with the Third Circuit of the United States Court of Appeals an appeal that was rejected. After the record was returned to this Court, the respondents filed preliminary objections to the petition in the nature of motions to dismiss alleging a prior pending action, failure to name necessary and indispensable parties, the existence of a mandatory arbitration clause, improper venue, failure to state alter ego claim against respondent Koresko individually, the matter was vexatious, the existence of adequate remedy in another forum, failure to state a claim for recovery of counsel fees and costs, failure to state a claim for recovery of interest, and failure to plead that the agreement containing the arbitration clause was unconscionable or one of adhesion.

These preliminary objections are either improper or without merit and will not be discussed at length, except for those that implicate a claim of lack of subject matter jurisdiction. Specifically, the respondents contend that this is a dispute over the counsel fees earned by them, a dispute which must be submitted to binding arbitration as per the parties' agreement and over which this Court has no jurisdiction. The provision for arbitration upon which the respondents rely is found in the Legal Services Agreement sent by the Koresko Law Firm to the petitioner in January of 2009, setting forth the particulars of the firm's representation of petitioner as trustee. The document requested a retainer of \$5,000, and contained a dispute resolution clause that provided, in pertinent part:

The parties consent to exclusive personal jurisdiction in any state or federal court or forum for arbitration or dispute resolution located in the Eastern District of Pennsylvania where an action is commenced . . . This forum selection provision is a material part of Attorney's inducement to enter into representation. Attorney shall have the exclusive discretion to elect a form of binding arbitration or alternative dispute resolution in lieu of any proceeding in any court of law involving the terms of this agreement.

The petitioner contends the agreement is not valid for a variety of reasons, including the facts that he did not remit a retainer and did not sign the document. We need not determine whether or not the parties entered into an agreement because it is clear such an agreement could not be binding.

There appears to be very little law on the enforceability of an agreement to arbitrate a dispute over counsel fees in Orphans' Court matters. In *Spillane Trust*, 11 FIDUC. REP. 2d 109 (Chest. 1991), the Chester County Orphans' Court directed payment of counsel fees as determined by an arbitrator, without any independent inquiry into their reasonableness, where the parties — including the beneficiary — were in agreement about the arbitration process. The respondents have cited us to *Johnson Estate*, 403 Pa. 476, 171 A.2d 518 (1961), for the proposition that “arbitration agreements have been enforced in the context of probate proceedings in Pennsylvania. . . .” In reality, that case stands only for the proposition that a declaratory judgment proceeding may be appropriate in Orphans' Court to determine the meaning of a clause in a will. There was no question of arbitration in the *Johnson* matter. Counsel for the petitioner has cited us to numerous cases where courts reduced counsel fees that were calculated in accordance with written agreements between fiduciaries and attorneys. In *Thompson's Estate*, 426 Pa. 270, 232 A.2d 625 (1967), the trustee paid his counsel a set fee as per their agreement. The Office of the Attorney General, as *parens patriae* for charities, objected to the amount paid on behalf of charitable beneficiaries. The Orphans' Court determined it was not bound by the agreement and directed the trustee to recover the excess paid to counsel. On appeal, the Supreme Court affirmed and stated:

Appellant-trustee is acting under the misapprehension that a trustee, acting under a will for unnamed charities to be selected by him, can bind not only the charities but the court as well by entering into a contract for counsel fees on a contingent basis. A trustee is an officer of the court and, as we have previously observed, all of his acts of omission or commission are subject to the scrutiny and control of the orphans' court.

429 Pa. 281, 232 A.2d 630. In *Spinelli Estate*, 21 FIDUC. REP. 2d 298 (York 2000), the Court reduced the amount claimed by counsel where the fiduciary agreed to pay a straight percentage of the gross value of the estate. The Court stated:

[E]ven if an agreement was made to calculate the fees based on a percentage of

the estate, it would not be enforceable since attorney's fees in an estate are based on the reasonable value of the services rendered and subject to the approval of the Orphans' Court, See, *Lohm Estate*, 440 Pa. 268, 269 A.2d 451 (1970); *Barth Estate*, 170 Pa. Super. 163, 84 A.2d 256 (1951); *Jones Estate*, 163 Pa. Super. 129, 60 A.2d 366 (1948).

Spinelli at 300-01. Other cases where Courts approved fees lower than those contemplated in a fee agreement include *Wicker Estate*, 29 FIDUC. REP. 2d. 44 (Phila. 2007) and *Novotny Estate*, 24 FIDUC. REP. 2d 214 (Montg. 2004).

As these cases illustrate, fiduciaries have duties to and are answerable to the Orphans' Court, as well as to their beneficiaries, in ways that parties in civil, criminal and family cases do not. The broad authority of the Orphans' Court over fiduciaries is exemplified by its power to order, *sua sponte*, the filing of accounts by executors, administrators, guardians of incapacitated persons or minors, and trustees at any time. See §§3501.1, 5161, 5531, and 7781(b)(4) of the PEF Code, Furthermore, in Orphans' Court proceedings, the Court has a direct supervisory role over the propriety of counsel fees. The Court can raise the issue of the reasonableness of compensation *sua sponte* when the will or trust instrument is silent on the issue: *Estate of Sonovick*, 373 Pa. Super. 396, 541 A.2d 374 (1988). The Orphans' Court can also determine which parties must bear which costs. For example, if a beneficiary of a will or trust is determined to have brought litigation without a good faith basis or acted obstreperously in the course of a matter, the Court can assess some or all of the counsel fees incurred by the defending fiduciary against the beneficiary's distributive share. This expansive authority over fees is attributable, in part, to the nature of the fiduciary relationships over which the Orphans' Court has jurisdiction.

Counsel to fiduciaries in Orphans' Court matters share responsibilities to the beneficiaries. In *Pew Trust (No. 2)*, 16 FIDUC. REP. 2d 80 (Montg 1995), the esteemed late Honorable Alfred L. Taxis, Jr., of this Court analyzed the three-way relationship among counsel, fiduciary and beneficiaries in the context of a petition to disqualify trust counsel. He granted the petition after determining that a conflict of interest existed between the attorney's duty to the fiduciary and to the beneficiaries. He noted:

Model Rule 1.2 of the Professional Rules of Conduct . . . implies that where the client is the fiduciary, the fiduciary's lawyer may be charged with special obligations in dealing with a non-client beneficiary. Hence, [a law firm's] duties run not only to its client, but also to the non-client Trust beneficiaries.

Id. at 84. Judge Taxis also explained that these duties arise from the facts that:

the fiduciary estate has been created by the settlor for the exclusive benefit of the beneficiaries, the fiduciary and the lawyer for the fiduciary are compensated by the fiduciary estate, and the fiduciary traditionally stands in a superior position relative to the beneficiaries who, in turn, repose trust and confidence in the lawyer.

Id. at 85 (citations omitted).

In light of the foregoing discussion, it is clear that, even if the petitioner had agreed to and proceeded to arbitration and an award was entered, the Court could still determine the awarded sum unreasonable and order the trustee to recover money from counsel. See *Thompson's Estate*, supra. Thus, there can be no "binding" arbitration on the issue of fees and this Court can not be deprived of jurisdiction to hear the matter. Accordingly, we enter the following:

Order

And Now, this 22nd day of February, 2011, after argument on February 1, 2011, and consideration of briefs of counsel, the preliminary objections filed by respondents are Overruled. Accordingly, the respondents are directed to file an answer to the petition for turnover of assets within twenty (20) days from the date hereof.
