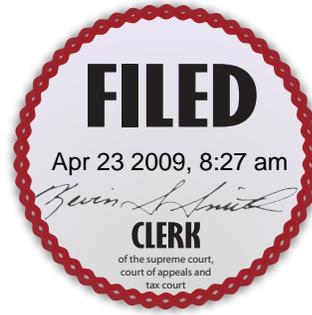


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE SUPERVISED)
ESTATE OF GEORGE A. CURTS, Deceased.)

_____)
CHRISTINE RUBY, Successor Personal)
Representative,)

Appellant,)

vs.)

JAMES F. SCARPONE, Individually, and as)
Former Personal Representative, and)
SCARPONE & CO., P.C., Claimant.)

Appellees.)

No. 71A03-0804-CV-188

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable Peter J. Nemeth, Judge
Cause No. 71J01-0703-ES-102

April 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

George A. Curts (“Curts”) died testate, leaving his daughter Christine N. Ruby (“Ruby”) as his sole beneficiary. James F. Scarpone (“Scarpone”) served as the initial personal representative, but was removed at Ruby’s request. The trial court awarded him a total of \$50,000 for his attorney fees and for his services as personal representative. Ruby, who succeeded Scarpone as personal representative, filed a motion to correct error, arguing, inter alia, that the award was too great. She now appeals from the denial of her motion to correct error. We affirm.¹

Issue

Ruby raises a number of issues on appeal, which we consolidate as whether the trial court abused its discretion in denying her motion to correct error.

¹ James Scarpone filed two Appellee’s Briefs. Together, they are fifty-four pages, almost double the limit. Ind. Appellate Rule 44(D). Barnes & Thornburg filed a brief for Scarpone as the personal representative. S. Eric Marshall and William Landgraf filed a brief for Scarpone as an Estate claimant. In substance, however, each brief addressed both of Scarpone’s roles; that of an Estate claimant and the personal representative. Accordingly, Scarpone’s briefs greatly exceeded the limit.

Facts and Procedural History

Scarpone, a certified professional accountant but not an attorney, began advising Curts on tax, investment, and other financial matters in the late 1990s. In addition to providing accounting services, Scarpone helped Curts complete five transactions, including purchases of three IRAs and the investment of \$2000 in a growth fund. After Curts sold his business, Scarpone also assisted Curts in purchasing a \$60,000 annuity in June 2005. By March 2007, the annuity was valued at almost \$76,000. In June 2006, Curts went back into business.

Curts died on March 9, 2007, when Ruby, his only child, was twenty-four. Except for a few specific gifts, Curts' Will provided that the remaining assets of his Estate would fund a trust for Ruby's benefit. She was to receive the trust corpus in three equal installments at ages thirty-five, forty-five, and fifty-five. The Will nominated Scarpone as the personal representative and the trustee.

With legal assistance from Greta Roemer Lewis of Barnes & Thornburg ("B&T"), Scarpone petitioned for probate of the Will and to be appointed personal representative ("PR"). Scarpone was so appointed, and the Will was admitted to probate. Because the Estate was, in Scarpone's words, solvent but "significantly illiquid," he quickly sold the annuity referenced above. Appendix at 141. Two months later, Scarpone filed a claim of \$4560, on behalf of Scarpone & Co., P.C., against the Estate "for professional services rendered as certified public accountants for tax preparation" in 2005 and 2006. *Id.* at 144. In addition to tax issues, one bill included "consultation and professional assistance regarding estate planning and will preparation matter." *Id.* at 146-47 (emphasis added).

Three months after Curts' death, Scarpone filed an inventory showing the Estate's net value as greater than \$430,000. The Estate included: a business; the annuity; two mortgaged residences; a vacant lot; a 1998 motor home with an existing loan of \$22,864; a 2002 Ford Explorer; and five accounts totaling \$37,059.² The largest asset of the Estate was the ongoing retail business, Curts Enterprises, LLC d/b/a Temptations and Teasers ("Temptations and Teasers"). A loan on its inventory was \$4994 greater than the value of the inventory itself. The mortgage on the commercial real estate was \$88,274. Scarpone valued the commercial real estate at \$350,000, which appeared to also include his assessment of the value of the business. The business therefore comprised almost half of the Estate's total assets.

Ruby's first two attorneys withdrew soon thereafter, and Veronica Jarnagin appeared for Ruby. On July 16, 2007, Ruby petitioned for Scarpone's removal as PR due to conflicts of interest, the unauthorized practice of law, and other allegations. Eight days later, B&T's Robert G. Devetski filed his appearance "for the Estate." App. at 15. A third B&T attorney, Kate E. Mueller, appeared in September 2007 "for James F. Scarpone, Personal Representative." Id. at 14. From mid-July through mid-October, including a status hearing in September and another in October, the parties communicated regarding whether and upon what conditions Scarpone would resign as PR, the Estate's release of claims against Scarpone, discovery, Scarpone's disclaiming his interest in a bank account held jointly by him and the decedent, and other matters. In a document filed with the trial court, Ruby asserted that "Scarpone should be subject to

² Amounts are approximated for simplicity.

the ordinary statutory and common law duties imposed on any resigning fiduciary.” Id. at 175.

On October 22, 2007, the trial court conducted a hearing on Ruby’s petition to remove Scarpone, at which he was represented by Lewis and Mueller of B&T. Regarding Scarpone’s alleged conflicts of interest, Mueller argued,

We do not believe that Mr. Scarpone has done anything that would even approach malfeasance and the allegations and accusations that’s [sic] been hurled at him by Ms. Ruby, who is the beneficiary of the Estate, are without merit. Notwithstanding that, given the contentiousness created by those allegations, he has decided that it is in his best interests despite his desire to see it through for his friend who has now passed, that he resign as Personal Representative. And we have represented that to the Court that Mr. Scarpone is willing to resign as Personal Representative. We have turned over the information that was requested by the other side and have turned over a proposed release. If the only remaining issue is the terms of that release, I would say that that doesn’t comport with the discussions we’ve had which have only continued to delay that which seems to be a joint goal at this point, which is to get Mr. Scarpone removed as Personal Representative so that he is no longer subject to the continued accusations by Ms. Ruby’s counsel. And, furthermore, that the Estate at issue no longer continues to have its assets dissipated by needless and frivolous litigation.

Transcript I at 7-8. Asked whether Scarpone had submitted a written resignation to the trial court, Mueller responded negatively “because he wanted – he wants to have a release.” Id. at 12. The conversation continued as follows:

Court: I don’t care about that release, you are still going to have to make an accounting to me. So why are we wasting our time here?

Mueller: That’s all true. But if Mr. Scarpone resigns, you know, his concern is that at least before submitting to the resignation that he be paid his fee as personal representative and that his firm [Mueller’s firm, B&T] be paid fees for representing him in the administration of the estate.

Id. at 15. Mueller later reiterated that Scarpone had offered to resign “conditioned upon payment of his fees and the release.” Id. at 18. B&T’s Lewis did not intervene during this argument.

After this argument, the trial court heard additional evidence. Ruby called Joanne Havenhill (“Havenhill”), Curts’ friend and healthcare representative.³ One day, Havenhill drove Curts to a doctor’s appointment, during which immediate surgery was recommended to address a “ballooned” aneurysm. Id. at 23. Curts delayed his surgery to finalize his estate plan with Scarpone. Havenhill testified as follows regarding Curts’ communications with Scarpone:

A: I was present when he had called Mr. Scarpone several times to make sure is the will done, is the will done? I got to get this in order. I have got to have the surgery. I’ve got to get this taken care of.

Q: Okay. So he is pressing Mr. Scarpone to help him get a will?

A: Very expeditiously. He wanted it finished and complete.

Q: Okay. Do you know if he got that finished?

A: To my knowledge, he did. I mean, when I went with him in the middle of April [2006] to the office, and I waited in the car, as he asked me to do, he came out of there and said that it was all done and had a brown sealed envelope.

Id. at 23-24. As Havenhill’s testimony continued, the trial court asked,

Court: Mr. Scarpone is on here as a claimant and he’s got a conflict of interest. Is there any reason why this Court does not have an obligation to remove him?

³ Havenhill was named in the Will as a conditional beneficiary. As the condition was not met, however, she had no financial interest in the Estate.

Mueller: I don't think there's an obligation to remove him, there's been . . .

Court: How can I let a claimant serve as a personal rep when he's on both sides of the issue, that's an inherent conflict of interest.

Mueller: Well, if that's the case, he's had the claim for –

Jarnigan: May 29th [2007].

Lewis: The statute allows for personal representatives to file claims against the Estate. There is a statute that is directly on point, I'll pull it.

Court: In terms of – doesn't there need to be someone else representing the Estate, at that point? I mean, how can the personal –

Lewis: If that claim gets litigated, yes.

Court: Well, if this isn't being litigated, I don't know what is.

Id. at 31-32. There ensued a discussion of Indiana Code Section 29-1-14-17, referenced by Lewis, which establishes a specific procedure for claims against an estate by a PR. Ruby's counsel alleged that Scarpone had multiple conflicts of interest beyond his claim for \$4560 in pre-death accounting services, including co-owning an account with Curts, improperly managing Estate assets, including realty, personalty, and money, and not sharing information with Ruby, the Estate beneficiary, despite discovery requests.

As the hearing continued, Ruby then called Scarpone to testify. On direct examination, she elicited his testimony regarding his company's claim for \$4560 in pre-death accounting services. Jarnigan, Ruby's attorney, stated that her client was opposed to the trial court's approval of the claim. The trial court removed Scarpone as the PR, appointed Ruby as the successor PR, and approved Scarpone's claim against the Estate

for \$4560.

Scarpone submitted his final accounting of the Estate's finances, and requested payment of his PR fees and B&T's fees, attaching checking account summaries and billing sheets from himself, his company, and B&T. Scarpone sought payment for all tasks related to the Estate at his standard CPA rate, regardless of the nature of the task. The billing sheets made clear that he charged the Estate for time spent litigating, including discovery and negotiations related to a release from liability.

For accounting and tax services performed on behalf of Curts' company in 2007, Scarpone's company charged \$9835. For his time on PR tasks, Scarpone demanded \$30,784; B&T demanded \$36,864.

During the January 17, 2008 evidentiary hearing on Scarpone's submission and fee requests, he testified that he did not charge the Estate for some tasks such as mowing the grass, doing other yard work, and some of his time spent working with the police on alleged break-ins. With respect to the day-to-day running of Temptations and Teasers, Scarpone testified as follows:

I established a track record for the business, a business that had only been in existence for nine months at the time of his death. I established a track record. I established credibility. I brought some normalcy to the business when the business was exceptionally fragile when I took over as personal representative, exceptionally fragile. I brought normalcy. I brought the people that I needed. I couldn't be at the business every day. I kept those people to where they were – they trusted me. They worked with me. I excited them about the business, and I established a track record with them. I brought credibility with the bank. The bank could have called all of these loans. And I brought credibility to attempting to take an ugly situation and make it better.

Transcript II at 74-75. Later, Scarpone added, "I worked on this Estate every day. I

visited the business every time I would see a client in South Bend and come back to my office. I stopped and visited the business daily.” Id. at 79.

After argument regarding the fees, the trial court awarded Scarpone \$50,000; \$25,000 for his services as PR and the same amount for B&T’s attorney fees. It denied Ruby’s motion for attorney fees based upon Scarpone’s allegedly frivolous refusal to resign.

The next day, the trial court issued its written “Order Approving Initial Personal Representative’s Petition on Final Account, Request for Personal Representative’s Fees and Attorney’s Fees, Petition for Discharge” (“Order”). App. at 19. In addition to the decisions referenced above, the trial court approved Scarpone’s final account and provided that “James F. Scarpone is now released and discharged from any further duties, responsibilities, or liabilities related to the Estate of George A. Curts.” Id. The trial court “expressly determine[d] that there is no just reason for delay and hereby directs the entry of judgment.”⁴ Id. at 20.

Ruby filed a motion to correct error, challenging: (1) the award of the \$4560 claim; (2) the denial of additional discovery regarding the fees; (3) the award of \$25,000 for the PR fees; (4) the award of \$25,000 for B&T’s fees; and (5) the denial of Ruby’s request for attorney fees in light of Scarpone’s allegedly frivolous litigation. S. Eric Marshall (“Marshall”) and William R. Landgraf (“Landgraf”) filed appearances for Scarpone “in his individual capacity.” App. at 8.

On March 17, 2008, the trial court conducted a hearing on Ruby’s motion.

⁴ Administration of the Estate was still pending when this appeal was taken.

Mueller denied that B&T had a conflict of interest and stated that,

[B&T's] engagement has been limited to representation of Mr. Scarpone in his capacity as personal representative of the Estate. The mere fact that Mr. Landgraf has just now appeared pro hac vice for purposes of further confirming or re-enforcing that to the Court, the fact remains that the representation, and she's alleging a conflict of interest . . . she cannot prove and offer this Court no evidence.

...

She's tried to, you know, by smoke and mirrors assert that there is some conflict of interest that just hasn't ever existed.

Transcript III at 22-23.

The trial court denied Ruby's motion to correct error. She now appeals.

Discussion and Decision

A. Standard of Review

Ruby argues that the trial court abused its discretion in denying her motion to correct error. A trial court must take corrective action "if it determines that prejudicial or harmful error has been committed." Ind. Trial Rule 59(J). We review a ruling on a motion to correct error for an abuse of discretion. Paragon Family Rest. v. Bartolini, 799 N.E.2d 1048, 1055 (Ind. 2003).

The award of attorney fees in an estate administration is within the sound discretion of the trial court. Estate of Daniels ex rel. Mercer v. Bryan, 856 N.E.2d 763, 766 (Ind. Ct. App. 2006). We must affirm the trial court's decision absent an abuse of that discretion. Id.

B. Pre-Death Claim of Personal Representative

First, Ruby argues that the trial court, sua sponte and without advance notice,

heard evidence regarding a claim Scarpone made for services he performed for Curts prior to his death. This, she asserts, violated Indiana Code Sections 29-1-14-10 and -17(a), pertaining to disputed claims and claims made by PRs for services performed prior to the decedent's death. She further complains that she was not given adequate opportunity to conduct discovery regarding the claim.⁵

Scarpone, a certified public accountant, filed a \$4560 claim for "will preparation" and preparation of corporate income tax returns pre-dating Curts' death. App. at 147. Without citing the record, Ruby states in her Appellant's Brief that she objected to the presentation of evidence regarding this claim during a hearing on October 22, 2007. "[T]he trial court sua sponte raised and, over [Ruby's] objection, granted Scarpone's claim at the hearing set for the petition to remove Scarpone." Appellant's Brief at 42. In fact, Ruby called Scarpone and, on direct examination, asked him questions regarding the \$4560 claim. The trial court inquired,

Court: I don't know if we are trying the claim here or not but I would like to see it. There are so many claims that we probably should be getting rid of these as economically as possible.

Counsel: Uh-huh.

Court: Are you opposed to the Court granting this claim?

Counsel: Yes.

Court: Why?

⁵ Scarpone argues that Ruby waived her argument regarding this claim by not appealing it within thirty days. Although an order for the payment of money is appealable as of right, pursuant to Indiana Appellate Rule 14(A)(1), "there is no requirement that an interlocutory appeal be taken." Georgos v. Jackson, 790 N.E.2d 448, 452 (Ind. 2003). A party "may elect to wait until the end of litigation to raise the issue on appeal from a final judgment." Id. Thus, the argument was not waived.

Counsel: Because he is asking to be paid for services that he denies.
We are not done showing what he has denied.

Court: Well, you better show me some evidence that he denied it,
because I haven't heard any yet.

Tr. I at 86-87. Ruby's attorney then resumed taking Scarpone's testimony. Toward the conclusion of the hearing, the trial court asked for Ruby's argument regarding the \$4560 claim. Neither then nor after the trial court announced that it was approving the claim did Ruby object. Thus, she objected to payment of the claim, but never objected to presenting evidence regarding the claim during the October 22, 2007 hearing. Having elicited Scarpone's testimony on this subject, she cannot be heard on appeal to challenge the lack of notice that the matter would be tried. Invited error cannot be reviewed by this Court. Olcott Int'l & Co. v. Micro Data Base Systems, Inc., 793 N.E.2d 1063, 1077 (Ind. Ct. App. 2003), trans. denied.

C. Initial Personal Representative's Fees

Ruby challenges the trial court's award of \$25,000 in PR fees to Scarpone by asserting, among other things, that he mismanaged Estate assets, committed the unauthorized practice of law by drafting Curts' Will, and had a conflict of interest in serving as the initial PR. She also asserts that his fees were excessive for the tasks performed. The PR "shall be allowed such compensation for his services as the court shall deem just and reasonable." Ind. Code § 29-1-10-13. He may receive additional compensation "for other services not required of a personal representative." Id.

"[A] personal representative of an estate is regarded as a trustee appointed by law

for the benefit of and the protection of creditors and distributees of that estate.” In re Bender, 844 N.E.2d 170, 178 (Ind. Ct. App. 2006), trans. denied. A beneficiary may sue a personal representative for a breach of his fiduciary duty. Keybank Nat’l Ass’n v. Shipley, 846 N.E.2d 290, 299 (Ind. Ct. App. 2006), trans. denied. There is no dispute that Scarpone’s \$4560 claim invoked a specific statute that addresses estate claims by PRs. Thus, the General Assembly clearly identified the conflict of interest inherent in Scarpone’s situation.

Moreover, there was some evidence to suggest that Scarpone may have committed the unauthorized practice of law. “Confining the practice of law to licensed attorneys is designed to protect the public from the potentially severe consequences of following advice on legal matters from unqualified persons.” Charter One Mortgage Corp. v. Condra, 865 N.E.2d 602, 605 (Ind. 2007). Our Supreme Court has distinguished between filling in blanks on forms prepared by attorneys with simple data, especially in situations where the chance for legal error was low, versus giving advice about legal rights or the legal effects of the document he prepares. Id.; see also State ex rel. Ind. State Bar Ass’n v. Northouse, 848 N.E.2d 668, 672-73 (Ind. 2006). “Practicing and drafting a will and giving advice as to the contents and legal effect of a will constitute the practice of law.” Northouse, 848 N.E.2d at 673.

One of Scarpone’s bills included “consultation and professional assistance regarding estate planning and will preparation matter.” App. at 146-47 (emphasis added). Thus, Scarpone’s own words could support an inference that he committed the unauthorized practice of law. The testimony of Havenhill is additional support.

Furthermore, Curts did not want a simple Will. Given the ultimate timing of his death, he sought to establish a trust that would endure for approximately thirty-one years.⁶ The largest asset in his Estate was an adult-entertainment store – not an item easily liquidated or managed. Thus, the record contained some evidence that Scarpone may have committed the unauthorized practice of law.

The facts and the tension between Ruby and Scarpone made the conflict plain for all. As Scarpone himself testified,

[t]he reason for the release was that every words [sic] out of your mouth was that I intend and we intend to sue Mr. Scarpone and that was not made once, that was made at least a dozen times. . . . And that's why I requested the release was because when someone says to you over, over, over, and over again, we intend to sue you. . . . So that's why I requested a release that says we'll go our separate ways.

Tr. II at 82-83. Based upon his claim for pre-death accounting services, the possibility that he committed the unauthorized practice of law, and the explicit threat of a legal claim against Scarpone, his self-interest conflicted with his fiduciary duty to act on behalf of Ruby, the Estate's sole beneficiary, and Scarpone's fellow Estate creditors.

After Ruby filed her petition to remove Scarpone due to conflicts of interest, Scarpone's billing sheets included the following entries:

reviewing pleadings,

meeting with B&T to “review approach going forward and offer to resign as P/R,”

“receive and review e-mail from Bob Devetski re: terms and conditions of withdrawal as personal representative,”

⁶ Ruby was twenty-four when Curts died. The last distribution was to occur when she was fifty-five.

“Conference call with Attorney Lewis re: status of release,”

“Telephone conference w/ Attorney Lewis and Kate Mueller re: status of [PR] resignation,” and

“Attend Court hearing.”

App. at 208-10. There were several additional entries for discovery and other topics related to the litigious nature of the Estate administration.

The trial court awarded Scarpone \$25,000, rather than the \$30,784 he had sought. “[T]he court on appeal shall not set aside the findings or judgment unless clearly erroneous.” Ind. Trial Rule 52(A). “In the absence of special findings, we review a trial court decision as a general judgment and, without reweighing evidence or considering witness credibility, affirm if sustainable upon any theory consistent with the evidence.” Baxendale v. Raich, 878 N.E.2d 1252, 1257 (Ind. 2008) (quoting Perdue Farms, Inc. v. Pryor, 683 N.E.2d 239, 240 (Ind. 1997)).

For Scarpone’s services as PR, the trial court awarded him eighty-one percent of his requested fee. Essentially, it found that most of Scarpone’s time, but not all of it, benefitted the Estate. First, Ruby does not challenge Scarpone’s efforts from March 8, 2007 through July 24, 2007, the day B&T’s Devetski, a “probate litigator,” filed his appearance. App. at 226. Second, even after that date, Scarpone accounted for what would be the legitimate tasks of a PR, such as banking, accounting, insurance, real estate appraisals, individual tax returns (as opposed to the corporate tax submissions prepared by Curts’ company), some of his time spent addressing alleged property break-ins, and matters related to the transfer of PR duties from himself to Ruby. Third, Scarpone

testified that he did not charge for certain tasks such as yard work and some of the time he spent in responding to the alleged property break-ins. Accordingly, the trial court's award of \$25,000 to Scarpone was not clearly erroneous.⁷

Finally, Ruby argues that the trial court should have allowed her to conduct additional discovery regarding Scarpone's petition for fees. We review for an abuse of discretion a trial court's decision regarding discovery. Pioneer Lumber, Inc. v. Bartels, 673 N.E.2d 12, 15 (Ind. Ct. App. 1996), trans. denied. Given the fact-sensitive nature of discovery matters, the trial court's decision "is cloaked in a strong presumption of correctness on appeal." Id.

Scarpone submitted a detailed, written request for fees. Ruby cross-examined him regarding his petition. On appeal, she fails to explain how the trial court abused its discretion, other than simply to assert that she desired additional discovery. The trial court did not abuse its discretion.

D. B&T's Fees

Similarly, Ruby argues that B&T's fees were improper and excessive. In so doing, she asserts that B&T's Devetski and Lewis violated Indiana Professional Conduct Rule 1.7 (Conflict of Interest: Current Clients). The PR's attorney may receive such compensation as the trial court deems to be just and reasonable. Ind. Code § 29-1-10-13. This determination is within the trial court's sound discretion. Estate of Daniels, 856 N.E.2d at 766. We review the trial court's decision for an abuse of that discretion. Id.

⁷ Ruby argues that the apportionment of PR and attorney fees should be "specifically determine[d]." Appellant's Brief at 29. However, she does not present argument regarding Indiana Trial Rule 52(A) or direct us to the record for evidence that she filed a written request for special findings. Accordingly, she has not established error.

We do not reweigh the evidence, and reverse only if the attorney fee determination was clearly against the logic and effect of the facts and circumstances before the probate court. Id.

Indiana Professional Conduct Rule 1.7 prohibits concurrent conflicts of interest.

The twenty-seventh comment to the rule advises,

In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

Ind. Professional Conduct Rule 1.7, comment 27 (emphasis added). A restatement by the American Law Institute suggests that an attorney owes a duty,

(4) to a nonclient when and to the extent that:

- (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
- (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
- (c) the nonclient is not reasonably able to protect its rights; and
- (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

RESTATEMENT OF THE LAW GOVERNING LAWYERS § 51(4) (2000).

One of Scarpone's two Appellee Briefs was filed by B&T's Devetski and Lewis. In it, they deny violating the Indiana Rules of Professional Conduct. First, they

emphasize that they advised Scarpone that they were limiting their “representation of him to his actions in his capacity as personal representative for the Estate” and that they expressly advised him that they “could not and would not represent him in any matters related to his actions in any other capacity, and ha[ve] carefully limited the scope of [their] representation ever since.” B&T Appellee’s Brief at 21 (emphasis added). Indeed, in their appellate filings, Devetski and Lewis appeared for “Scarpone, Former Personal Representative of the Estate,” while Landgraf and Marshall appeared for “Scarpone (personally), and the Claimant, Scarpone & Company, P.C.”

As referenced in footnote one, above, however, each Appellee Brief addressed both of Scarpone’s roles. B&T presented argument regarding Scarpone’s PR fees, as well as his request as an Estate claimant for \$4560 in pre-death accounting services. See B&T Appellee’s Br. at 12-13, 19-21. Thus, B&T’s assertions are internally inconsistent.

More troubling, even though the Appellant’s Brief presents argument regarding Indiana Professional Conduct Rule 1.7 and quotes it in its entirety, Devetski and Lewis fail to even cite the Rule. Ruby argues that,

[B&T] represented both sides of the removal litigation when it demanded the Estate’s release of Scarpone in his non-fiduciary roles while simultaneously representing him as fiduciary over the very same Estate. Those interests were conflicting and antagonistic.

Appellant’s Br. at 23. As noted above, a comment to the Rule suggests that, in estate administrations, an attorney “should make clear the lawyer’s relationship to the parties involved.” Prof. Cond. R. 1.7, comment twenty-seven. Devetski and Lewis respond by emphasizing the disclaimers they made to Scarpone. B&T Appellee’s Br. at 21-23. They

miss the point. The comment advises communication about the potential conflict to the parties, not just the client fiduciary.

The trial court did not determine whether B&T violated the Rules of Professional Conduct and, for purposes of this action, did not need to do so.⁸ Nonetheless, it is clear that, as with Scarpone's own fees, the trial court determined that most of the charges, but not all, benefitted the Estate. Of the \$36,864 Scarpone requested for his attorney fees, the trial court awarded \$25,000.

After Ruby sought Scarpone's removal due to conflicts of interest, B&T's billing sheets included the following entries, as well as others related to litigating whether, and under what conditions, Scarpone would be removed as PR:

- conferring with Lewis "regarding litigation of Estate,"
- discovery,
- preparation for and attendance at hearings,
- preparations, conferences, correspondence, and negotiations regarding "proposal" and "settlement offer,"
- "Began preparation of release,"
- "Prepared release and settlement agreement,"
- "E-mail to G. Lewis regarding release,"
- "Review Settlement Agreement and General Release,"
- "Obtain fee information needed for Agreement and Release,"

⁸ Ruby, a competent adult and indisputably the Estate's sole beneficiary, sought the appointment of a new PR. In response, rather than working toward an orderly and relatively inexpensive transition, B&T quickly enlisted the support of a probate litigator. Effectively, Ruby was forced to litigate for control of what was rightfully hers.

-conferred with Ruby's counsel regarding "resignation issues," and
- "drafted correspondence to Jim Scarpone regarding discovery and resignation."

App. at 217-27. The same billing sheets reflected tasks that benefitted the Estate, such as work performed prior to mid-July 2007 and certain later entries, including updating the list of Estate creditors, the status of the motor home and other tangible personal property, the alleged break-ins, a pending claim against the Estate for personal injury, an insurance claim, calculation of inheritance tax, inspecting the Estate's residential properties, work related to Scarpone's final accounting, and transition issues. Id.

We are not writing on a clean slate, therefore Ruby's request is an invitation to reweigh the evidence to determine the appropriate attorney fee, which we do not do. The trial court did not abuse its discretion in awarding \$25,000 to Scarpone for his attorney fees.

E. Ruby's Attorney Fees at Trial

Pursuant to Indiana Code Section 34-52-1-1(b), Ruby seeks reimbursement of \$9500 in attorney fees she incurred while Scarpone resisted resigning unless he received a release. She relies on the fact that Scarpone acknowledged that he was willing to resign, but would do so only upon receiving a release. This, she says, constituted frivolous litigation.

In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:

- (a) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;

- (b) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
- (c) litigated the action in bad faith.

Ind. Code § 34-52-1-1(b). We review for an abuse of discretion the trial court's decision to award attorney fees and the amount thereof. Lumbermens Mut. Cas. Co. v. Combs, 873 N.E.2d 692, 722 (Ind. Ct. App. 2007), trans. denied.

The trial court may remove the PR when, among other criteria, he becomes unsuitable, has mismanaged the estate, or has failed to perform any legal duty. Ind. Code § 29-1-10-6. A PR has no duty to resign upon a beneficiary's mere allegation that he is failing in his duties. As this Court observed in citing the removal statute, "[s]uch removal can be accomplished without resort to a covenant not to sue the personal representative." Inlow v. Henderson, Daily, Withrow & DeVoe, 787 N.E.2d 385, 396 (Ind. Ct. App. 2003), trans. denied. That is precisely what occurred here. Ruby sought Scarpone's removal, was granted the hearing to which she was thereby entitled, and received the requested relief when the trial court ordered her to replace Scarpone as PR. There was ample evidence in the record that Scarpone thought he was executing his duties in good faith and, indeed, clearly felt that he was performing well. As he testified, "[c]arry on if you think you can do a better job than I can." Tr. I at 83. The trial court did not abuse its discretion in denying Ruby's request for attorney fees incurred while seeking Scarpone's removal.

F. Scarpone's Attorney Fees on Appeal

In Scarpone's brief prepared by B&T, he argues that he is entitled to his attorney

fees in defending the appeal. We have discretion to assess damages, including appellate attorney fees, for frivolous or bad-faith actions. Ind. Appellate Rule 66(E). To avoid chilling the exercise of one's right to appeal under the Indiana Constitution, we limit our award of attorney fees to appeals "permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." Orr v. Turco Mfg. Co., 512 N.E.2d 151, 152 (Ind. 1987); see also IND. CONST. art. VII, § 6.

Under this standard, Scarpone has not established his entitlement to appellate attorney fees. His request is denied.

Conclusion

The trial court did not abuse its discretion in denying Ruby's motion to correct error.

Affirmed.

RILEY, J., and MATHIAS, J., concur.