

**IN THE COURT OF COMMON PLEAS  
PROBATE DIVISION  
CLARK COUNTY, OHIO**

Robert E. Harley, Trustee	:	CASE NO. 20094007
Plaintiff		
-vs-	:	JUDGE RICHARD P. CAREY
Suzanne Johnson Dortch, et al.		
Defendants	:	DECISION RE: PLAINTIFF'S MOTION FOR SANCTIONS

This matter is before this Court to consider a Motion for Sanctions pursuant to R.C. 2323.51 and Civil Rule 11 filed by Plaintiff and Counterclaim Defendant, Robert E. Harley (hereinafter "Mr. Harley"). In his Motion, Mr. Harley seeks the imposition of sanctions upon Attorney Ann Frayne, counsel for Defendant and Counterclaimant, Suzanne Dortch. The crux of Mr. Harley's Motion concerns Frayne's persistent and flawed interpretation of a spendthrift clause of a trust, regularly promulgated by Attorney Frayne as part of her client's claim, defense, or other position taken in connection with a complaint for declaratory action previously pending in this Court.

Some background. Mr. Harley serves as the Trustee of an Inter Vivos Trust created by Carolyn T. Johnson on October 13, 1998. She originally named her children, Suzanne Johnson Dortch (Frayne's client) and Scott Johnson, as the beneficiaries of any income produced by the Trust. However, she amended this Trust in 2001. As amended, the Trust named Scott Johnson's son, James, as the primary beneficiary, providing funding for his post high school education from the Trust's income and principal. Afterward, any income would be distributed to Suzanne Johnson Dortch and Scott

Johnson. The Conservatory of Music in Cincinnati, Ohio was named as the Trust Remainder Beneficiary. Specifically, as amended, the relevant provision provides as follows, to-wit:

“If my husband does not survive me, the Trustee shall distribute the trust income and so much principal as is necessary to provide an education beyond high school for her grandson, James Johnson, now of Sullivan, Missouri; otherwise the income shall be distributed equally to my children, Suzanne Johnson Dortch and Scott Johnson, or to the survivor of them. After the last to die of my children, the Trust shall terminate and my Trustee shall distribute all the income and principal to the Conservatory of Music in Cincinnati, Ohio, who shall hold the assets in its Endowment Fund and use the income therefrom for the purpose of provisions scholarships for worthy students.”

As amended, then Suzanne Dortch and Scott Johnson were relegated to equal distributions of income --- but only after said educational needs were addressed.

Carolyn Johnson passed away on July 24, 2004. On March 10, 2009 Suzanne Dortch, without authorization of the Trustee, assigned her right, title and interest to the Trust to a third person. Accordingly, Article 7 of the Trust --- designated “Provisions Against Alienation” --- was triggered. Article 7 reads in relevant part as follows, to-wit:

“If, for any reason, without the prior written consent of, or an act authorized by, the Trustee, any such beneficiary attempts to assign, alienate, pledge, or encumber his or her interest hereunder or any such interest would, but for this provision, best or be enjoyed by any other person or any firm, corporation or other entity, then the rights and interests of such beneficiary herein shall cease and terminate, but thereafter the Trustee shall pay to or for the benefit of such beneficiary or any other person dependent upon such beneficiary so much of the net income and/or principal from such beneficiary’s trust as the Trustee, in their absolute discretion, shall deem proper for each such beneficiary’s health, support, maintenance, and education.” (emphasis added)

On June 16, 2009, and as Trustee of the Carolyn T. Johnson Trust, Mr. Harley filed a Complaint for Declaratory Judgment asking the Court to find first that said Section

7 of the Trust was valid and applicable in this case; second, that as a result the Trustee had the right to declare Defendant Suzanne Johnson Dortch's income interest in the Trust to cease and terminate; third, that the Trustee then had absolute discretion with respect to any future income distributions to Defendant Dortch; and fourth, that Section 7 assigned Defendant Dortch no "increased rights or entitlements to the principal" of the Trust. The filing of this Complaint led to a flurry of filings by Attorney Frayne on behalf of Defendant Dortch and in the form of an Answer, Counterclaim, Crossclaim, Third Party Complaint, Memorandum Contra Plaintiff's Motion for Summary Judgment, Memorandum Contra Plaintiff's Motion for Judgment on the Pleadings, and a written response to a filing by Defendant University of Cincinnati College - Conservatory of Music. In these filings, Attorney Frayne consistently and repeatedly asserted her interpretation that the implementation of said spendthrift clause enhanced the legal position of Defendant Dortch such that she could rightfully claim both interest income and principal from said trust, tempered only by the Trustee's consideration of Defendant Dortch's health, support, maintenance, and educational needs. Moreover, not only did Attorney Frayne employ this interpretation to seek judgment on the action for declaratory judgment, she also sought damages for conspiracy on behalf of Trustee Harley and Defendant University of Cincinnati College - Conservatory of Music.

This Court, in granting Mr. Harley's Motion for Summary Judgment and Judgment on the Pleadings, specifically found Attorney Frayne's legal interpretation of the implementation of the spendthrift provision to be without merit. The remaining theory --- that Mr. Harley had breached his duty of good faith in the execution of his

duties as Trustee herein --- was disposed of when the Court granted his Motion for Directed Verdict during trial.

What is before the Court now is the ramification of Attorney Frayne's steadfast misinterpretation of the application of the spendthrift provision of the Carolyn T. Johnson Trust as it was amended. At its very heart, the issue is whether Attorney Frayne's position that Defendant Dortch had a "right to distribution" from Trustee Harley, in light of this Court subsequently ruling that she did not enjoy such a right, tantamount to frivolous conduct for which Attorney Frayne may now be sanctioned. To this end, it is appropriate to first review the General Assembly's interpretation of "frivolous conduct".

RC 2323.51 provides the definition of "frivolous conduct." "Conduct" is defined as "the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action", or the taking of any other action in connection with a civil action. (A)(1)(a). It becomes "frivolous" if any of the following may fairly describe it, to wit:

"(i) it obviously serves merely to harass or maliciously injure another party to the civil action...or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

(ii) it is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.

(iii) the conduct consists of allegations or other factual contentions that have no evidentiary support, or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(iv) the conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief." (A)(2)

As to the first consideration, the Court notes that a certain mental culpability is required to be present before conduct might be concluded to be frivolous. This consideration employs the terminology “to harass”, “maliciously injure” and “improper purpose”. This Court is not inclined to believe that Attorney Frayne’s conduct betrays such a culpable inclination --- buttressed in part by the observation that Attorney Frayne did not institute the litigation in this matter.

Rather, the Court is inclined to believe that it is the second and third consideration, or a blend thereof, which may mostly likely be implicated by Attorney Frayne’s conduct in this case. That is to say that the focus of this Court is whether Attorney Frayne’s assertion of her interpretation of the implementation of the spendthrift provision was warranted under law based on the factual language of the Trust.

Interpretations of trust documents, of course, are necessarily issues of law. This having been said, it is likewise true that the interpretation is in no small part held hostage by the language employed by the scrivener. Attorney Frayne asserted that the spendthrift provision enhanced her client’s position to claim a right to distribution of income and principal from the Trust. As previously stated, this Court found otherwise. The question at hand: was Attorney Frayne’s assertion so devoid of proper legal reasoning under the law, and based on the trust language, that it should be deemed “frivolous” by this Court.

To this end, the statute most closely aligns to Civ. R. 11, wherein an attorney, upon signing a pleading or motion, certifies that to the best of that attorney’s knowledge, information and belief “there is good ground to support” the legal position advanced. On the one hand, the language of the spendthrift provision, once implicated, affords the Trustee “absolute discretion.” On the other hand, the language directs that the Trustee

“shall pay to or for the benefit of such beneficiary ... the net income and/or principal.”  
(emphasis added) To an extent, the legal interpretation depends on whether one reads the language to direct the Trustee to pay Dortch but only what he deemed necessary for her health, support, maintenance, and education; or, as the Court determined, to permit the Trustee to either pay Dortch or to decide not to pay Dortch anything --- no matter what the circumstances of her health, support, maintenance, and education. Mr. Harley’s counsel contends that the meaning of the trust provision was “clear and unambiguous”, and Frayne, it is said, should be punished for advancing an interpretation to the contrary. On the other hand, would it not then have been more appropriate for Defendant Dortch to have filed the Declaratory Judgment action.

After due consideration, this Court chooses to afford Attorney Frayne the benefit of the doubt with respect to her legal interpretation generally advanced in this case. While it was without merit, it was not completely devoid of grounds as per Civ. R. 11; nor was it completely “frivolous” as per R.C. 2323.51. Likewise, had Frayne’s position been supportable, then a case might be made --- in view of Dortch’s plight of bad health --- that Mr. Harley had unfairly assessed her needs.

This deference, however, cannot save Attorney Frayne from her written assertion that Mr. Harley participated in a “conspiracy.” At no time during the case, or now during the Court’s review, can this Court find any basis in law or in fact for this assertion. The Court finds this assertion to constitute frivolous conduct under R.C. 2323.51 and without good grounds to support it under Civ. R. 11, and to that end may be sanctioned by this Court.

Accordingly, the matter is assigned for hearing on **Wednesday, February 16, 2011 at 2:00 o'clock p.m.** on the issue of damages for Attorney Frayne's frivolous conduct.

IT IS SO ORDERED.

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RICHARD P. CAREY, JUDGE

cc: Thomas R. Kraemer, Esq.  
Jason D. Winter, Esq.