

IN THE IOWA DISTRICT COURT FOR DUBUQUE COUNTY

**IN THE MATTER OF
THE RESIDUAL TRUST B UNDER
THE LAST WILL AND TESTAMENT OF
MARTHA WILLENBORG,
Deceased.**

No. TRPR 027914

**IN THE MATTER OF THE ESTATE OF
ELMER V. WILLENBORG,
Deceased.**

No. ESPR 044243

**RULING ON POST-JUDGMENT ISSUES,
INCLUDING SANCTIONS AMOUNT**

On July 21, 2016 the court considered post-judgment motions prompted by the court's May 31st Order on Post-Ruling Motions. While an appeal of the court's April 13th Declaratory Ruling had been filed, the court deemed the motions to be submitted on the pleading and trial records, and presented without request for oral argument within the limited and ongoing jurisdiction of the district court under Iowa Rule of Appellate Procedure 6.103 (2). Before the drafting of the ruling on post-verdict motions was complete, however, the appellants—the Willenborg Beneficiaries—filed a Motion for Limited Remand on July 27th. The court halted its drafting to await a Supreme Court determination on the various procedural issues posed. On September 16th the Iowa Supreme Court issued its Order confirming the district court's jurisdiction to resolve pending issues.

Pending before the district court presently, are:

- Intervenor Joan L. Recker's June 13th Certified Claim for Attorneys' Fees and Expenses (as resisted in part by the Beneficiaries);
- The Beneficiaries' June 14th Motion to Amend and Enlarge [the May 31st Order for sanctions] (as resisted by O'Connor & Thomas, P.C. and by the Intervenor); and
- O'Connor & Thomas' June 17th Motion for Sanctions incorporated within its Resistance to [the Beneficiaries'] Second Motion to Amend and Enlarge.

A ruling now enters to confirm the court's analysis and decisions about these matters.

THE COURT RULES AS FOLLOWS.

1. Beneficiaries' [Second] Motion to Amend and Enlarge

- A. The Beneficiaries' [Second] Motion to Amend and Enlarge, directed to the court's May 31st Order that grants the Intervenor sanctions against the Beneficiaries, is denied.
- B. O'Connor & Thomas' Motion for Sanctions against the Beneficiaries for filing a successive, post-judgment Motion to Enlarge and Amend, is denied.

2. Determination of Sanctions

In its May 31, 2016 Order on Post-Ruling Motions, the court found Intervenor Joan Recker to be entitled to recover reasonable expenses, including attorney fees, as part of a sanction for the Beneficiaries' filing and pursuit of litigation claims in violation of Iowa Rule of Civil Procedure 1.413 and/or Iowa Code Section 619.19.

A. Nature of Sanctions

In reconciling a claim for sanctions under Rule 1.413 and/or Section 619.19, with the American Rule whereby a losing litigant does not normally pay a victor's attorney fees, the court acknowledges that the primary purpose of sanctions is seen as "deterrence, not compensation." *Rowedder v. Anderson*, 814 N.W.2d 585, 589 (Iowa 2012) (citations omitted). A subsidiary goal is to compensate the victim of plaintiffs' conduct that runs afoul of Rule 1.413 and/or Section 619.19. *Id.* at 592.

B. Factors Considered in Determining Sanctions Amount

It is incumbent upon the trial court to fairly quantify sanctions, not only employing the contextual considerations articulated by the American Bar Association¹ in these matters, but also specifically addressing:

- 1) The reasonableness of [Recker's] claimed attorney's fees and expenses;
- 2) The minimum sanction necessary to deter the unlawful conduct found here;
- 3) The [Beneficiaries'] abilities to pay; and
- 4) Factors related to the severity of the violation.

Id. (internal quotations and citations omitted).

¹ The ABA Section of Litigation has published guidance for courts in determining sanctions in its *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, reprinted in 121 F.R.D. 101, 125-26 (1988). *Rowedder*, 814 N.W.2d 585, 590 (citing in footnote 2, the ABA considerations as well as their application in *Barnhill v. Iowa Dist. Ct.*, 765 N.W.2d 267, 276-77 (Iowa 2009)).

C. Reasonableness of Fees and Expenses Claimed

Douglas M. Henry's attorney-fee itemization for Recker—31 pages long and chronicling the date, purpose, amount of service provided, and charge applied by various attorneys and paralegal staff within his office—shows conscientious attention to the significant factual and legal issues pressed upon Recker's interests by the Beneficiaries in their exercise of lawsuits. From the outset of records submitted, attorney Henry's professionalism and fair billing practices are apparent.

The attorneys working on the file charge hourly between \$190 for partner work and \$140 for associate-level service—all reasonable and modest within the range of rates transacted by the Iowa litigation bar for similar service involving complex issues. Office statements also document routine professional discounting for "TIME REDUCED," "DON'T BILL," or "WRITE OFF," including as one example, of over \$1,000 written off in one monthly bill, alone. Actual expenses are posted in typical amounts seen in the modern practice of law.

Units of time that are attributed to legal-service tasks within Henry's office are reasonable, reflecting the exercise of efficiency and discretion in work undertaken and the billable time posted for it. More-expensive partner time is economized through use of associate-attorney service; and, paralegal involvement is featured for appropriate jobs at fair rates between \$85 and \$110 per hour, with the higher end applied to specific trial preparation and assistance.

The \$71,511.81 in reasonable charges attorney Henry claims for representation of Recker during this litigation, began accruing in the fall of 2012. Approximately \$18,426.37 was generated while Recker was on the lawsuit sidelines, as the Beneficiaries initially targeted Trustee American Trust & Savings Bank, and later expanded their focus to charge malpractice against the O'Connor & Thomas law firm. Recker took but biding steps initially to monitor the suit because it involved her long-standing Agreement Concerning Real Estate (ACRE) and it was delaying the closing on her purchase of the Willenborg farm. Eventually she filed Petition[s] for Specific Performance to protect her contractual right to fulfilment of the ACRE.

On December 9, 2013, after the lawsuit had been on file for over one year, the Beneficiaries lodged affirmative defenses against Recker, seeking to defeat her ACRE rights. From the point of that engagement, Recker sustained over \$52,895.44 in legal charges (up to the June 13, 2016 Certified Claim for Attorneys' Fees and Expenses). Another \$190 of service was unrelated to defense, but was implicated by the lawsuit due to new rental issues that had to be addressed in February of 2016.

While the Beneficiaries ask the court to retrospectively scrutinize the attention Recker's counsel gave to aspects of litigation that were directed at the O'Connor & Thomas law firm, interests of fairness do not warrant such a parsing. Once the

Beneficiaries set in motion pleadings that sought to deprive Recker of the benefit of the ACRE bargain, it was reasonable for her to be consistently attentive to the litigation, including all of its consolidated and intertwined parts.

The Beneficiaries also urge the court to excise from the full toll of Recker's litigation expense, that part caused by the 11-month trial delay and a concomitant re-preparation for trial—all caused by the trial-morning hospitalization of the Trustee's defense attorney, and his ultimate withdrawal. This unavoidable casualty in the trial schedule, together with the extra expense it entailed for Recker and all parties, should not be omitted from the Beneficiaries' responsibility. If anything, the trial delay presented additional opportunity for the Beneficiaries to withdraw from their collusive litigation scheme.

It is appropriate on this record to acknowledge at least \$50,000 of Recker's reasonable legal fees to have been inflicted upon her by the Beneficiaries' violation of Rule 1.413 and/or Section 619.19 as they tried to torpedo the ACRE.

D. Amount Necessary to Deter

The Beneficiaries sought to defeat Recker's ACRE rights, as one theory of recouping the appreciation in the value of the Willenborg farm since the ACRE was executed. They eyed their prize through the lens of believing the land was worth over \$1.5 million, which would net them a boot of more than \$1.1 million² if they could just get rid of the Recker's right to purchase the land for \$355,000 under ACRE terms. The intensity of the Beneficiaries' effort is evident in the trial record. Not only did the Beneficiaries conspire at the outset to wield a lawsuit that questioned the genesis of the ACRE and sought monetary damages from American Trust and O'Connor & Thomas, but they then attacked Recker, whose only involvement was as a party to the ACRE. The Beneficiaries' pursued their plan for over three years before trial was reached, and now the matter is on appeal in its fourth year.

There is no evidence that the Beneficiaries collectively, or individually, took steps to withdraw from their litigation pack, or from an apparent testimonial pact. Even Carl, who might be argued to be less culpable than the rest due to his lack of personal knowledge of his grandfather Elmer Willenborg, his attenuation from historical facts being litigated, and his recruitment to merely to round-out the Beneficiaries class—had responsibility to exercise lawful, adult-level judgment in signing on. Clearly, he had a duty to investigate the merits of his claim, to pay attention to facts revealed in litigation discovery, and to assess the falsity of his aunts' and uncle's narratives. Yet, Carl took no action to right the litigation that was wrongful from its inception, and he took no steps at any time to withdraw from it.

² Recker's ACRE option to purchase the farm assured her the long-ago, negotiated price of \$355,000. It was the benefit of that bargain that the Beneficiaries hoped their consolidated attack on the contract could subvert.

To deter the bad-faith conduct of the Beneficiaries as exposed in this record, where individuals conspired to collect a windfall of over \$1.1 million,³ it is appropriate to require a \$50,000 sanction. Among the five Beneficiaries, such a sanction prorates to \$10,000 each—constituting but five percent of the scheme’s goal of yielding over \$200,000 in individual spoils to Mary, Joyce, Ann, and Carl as trust and estate beneficiaries. For Tom, \$10,000 of sanction would still not exceed 10 percent of his likely take of the hoped-for boon to Martha’s trust assets.

Since Recker sustained financial burden from the Beneficiaries’ reckless use of litigation as a weapon in this case, she should be accorded reasonable compensation to allay \$50,000 of her defense costs.

E. Beneficiaries’ Ability to Pay Sanctions

The Beneficiaries’ current financial circumstances have not been committed to the trial record. Yet, all five—Mary, Joyce, Ann, Carl, and Tom—are college-educated, and not shown to be under physical or mental disability. Moreover, they comprise the class that stands to receive residual assets from the Martha Willenborg Trust and the Elmer V. Willenborg Estate, respectively.

All five of the Beneficiaries populate the group of distributees of Martha’s Trust which reflects total assets of \$205,677.52 in the 11th Annual Report of Trustee submitted for 2016. In Elmer’s Estate, factoring its one-half interest in the farmland with its option-activated sale value under the ACRE, the gross probate assets will approximate \$279,006. However, only four of the litigating Beneficiaries—Mary, Joyce, Ann, and Carl—are beneficially entitled to distribution since Elmer eliminated Tom’s will-beneficiary berth upon discovering his son’s embezzlements from the family’s assets.

Given the relative entitlements to probate assets alone, the Beneficiaries have the reasonable ability to pay a sanction totaling \$50,000. It is reasonable and fair to require payment directly from the administrations.

F. Severity of Violation and Contextual Considerations

The conduct of the Beneficiaries triggering imposition of sanctions under Rule 1.413 and/or Section 619.19 is severe. All findings of fact and conclusions of law regarding the Beneficiaries’ breach of good-faith litigation which are set forth in the court’s April 13, 2016 Declaratory Ruling and its May 31, 2016 Order on Post-Ruling Motions are incorporated by this reference as if fully set forth in this Ruling. Further, that record documents facts and analysis that inform the court’s rulings in

³ Naturally, there would be administration expenses to be paid for Martha’s Trust, and Elmer’s Estate, and depending on the disposition of the farmland, there might also be expense associated with that.

all aspects of this filing.

3. Justness of Award

In considering the justness of Recker's recovery of \$50,000 to defray some of her defense expenses, it cannot go unnoticed that Iowa law otherwise lends support to this measure of justice. While the claim before the court is framed under Iowa Rule of Civil Procedure 1.413 and/or Iowa Code Section 619.19, analysis under the common law for recovery of attorney fees is germane.

In Iowa the trial court has equitable jurisdiction and shoulders responsibility to determine, in appropriate cases, whether attorney fees should be awarded under the common law. *Hockenberg Equipment v. Hockenberg's Equipment & Supply Company of Des Moines, Inc.*, 510 N.W.2d 153, 159 (Iowa 1993).⁴ Typically, a party cannot recover attorney fees as damages without a statutory or written contractual provision that allows the award. *Id.* at 158. However, courts have "recognized a rare exception" that has been further defined by the Iowa Supreme Court to lie where litigant conduct rises to the level of "oppressive or conniving behavior." *Id.* at 158-60. The totality of the Beneficiaries' actions in this lawsuit, beginning with, and propelled by, their scheme to present coordinated, false accounts to undermine the lawful ACRE, attains a level emblematic of "harsh, tyrannical" motivations and an "intentional failure to discover or prevent the wrong." *Id.* at 159.

While the court in this Willenborg matter does not premise its sanctions ruling on a *Hockenberg* analysis, it is worthy to note that such a test is likewise supportive.

4. Judgment Entry

A. The Beneficiaries shall pay a \$50,000 sanction for their conduct that violated Iowa Rule of Civil Procedure 1.413 and/or Iowa Code Section 619.19.

B. The form of payment shall be as follows.

- 1) The judgment is the joint and several responsibility of all the Beneficiaries—Mary Zirul, Joyce Willenborg, Ann Holst, Carl J. Florian, and Thomas Willenborg, Sr.—and shall constitute a judgment against each, and shall be registered as a lien upon their beneficial shares in the Martha Willenborg Trust, TRPR027914 and in the Elmer V. Willenborg Estate, ESPR044243.
- 2) Payment of the judgment is due as of the date of this Ruling, and shall be made through the Dubuque County Clerk of Court.

⁴ Even though the *Hockenberg* case involved a punitive-damage issue, the Iowa Supreme Court's analysis of the doctrine of common-law attorney fees and a trial court's equitable responsibility to understand and adhere to that law, is relevant here. Granted, punitive damages were not at bar in the Willenborg trial, but the matter of sanctions is analogous, which makes a concise review of this law pertinent.

3) Interest on the judgment shall accrue from the date of this Ruling, until the judgment is paid, at the annual rate of 2.59 percent.

C. The \$50,000 sanctions judgment together with interest on it, shall be paid by the Dubuque County Clerk of Court to the credit of Joan L. Recker for compensation that defrays some of the attorney fees and expenses she incurred in defending the Beneficiaries' lawsuit.

JUDGMENT IS ENTERED ACCORDINGLY OCTOBER 16, 2016.

Directions for Service

Service of an electronic copy of this Order shall be made upon:

David J. Dutton, Cheryl L. Weber, Steven K. Daniels, attorneys for Willenborg
Trust/Estate beneficiaries/interested persons/executor
Gregory M. Lederer, attorney for American Trust and Savings Bank
Megan R. Dimitt, attorney for American Trust and Savings Bank
Robert V.P. Waterman and Andrea D. Mason, attorneys for O'Connor & Thomas, P.C.
Douglas M. Henry, attorney for Joan L. Recker
Carrie Nauman, court reporter
Dana Havertape, 1st District case coordinator



State of Iowa Courts

Type: OTHER ORDER

Case Number **Case Title**
TRPR027914 TRUST MARTHA WILLENBORG TRUST B

So Ordered

A handwritten signature in blue ink, appearing to read "Annette J. Scieszinski". The signature is fluid and cursive, written over a horizontal line.

Annette J. Scieszinski, District Court Judge,
Eighth Judicial District of Iowa