

IN THE COURT OF APPEALS OF IOWA

No. 0-400 / 09-1660

Filed July 14, 2010

**IN THE MATTER OF THE TRUST UNDER
THE LAST WILL AND TESTAMENT OF
MARY E. WEITZEL**

**MARY ANN STRICKER, MICHAEL H.
STRICKER, and KENT D. STRICKER,**
Beneficiaries-Appellants.

Appeal from the Iowa District Court for Mitchell County, Bryan H. McKinley, Judge.

Beneficiaries appeal from a district court order denying their objection to an annual report and denying their application to remove the trustee.

AFFIRMED.

Roger L. Sutton of Sutton Law Office, Charles City, for appellants.

Scott D. Brown of Brown, Kinsey, Funkhauser & Lander, P.L.C., Mason City, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

This is the second appeal by the Strickers concerning the administration of the Mary E. Weitzel Trust.¹ Mary Ann Stricker, Michael Stricker, and Kent Stricker, the beneficiaries of a trust created by Mary Weitzel, now appeal from a district court order denying their objection to the “Third Annual Report (2008)” and denying their application to remove the trustee, First Citizens Trust Company. We affirm the judgment of the district court.

I. Background Facts and Proceedings.

In 1994, Mary Weitzel executed a will providing that in the event her husband, Adam, predeceased her, all her assets were to be placed in “The Mary E. Weitzel Trust.” A local bank was named as trustee for Mary Ann Stricker, the Weitzels’ daughter. After Mary Ann’s death, the assets were to pass to the Weitzels’ grandsons, Michael Stricker and Kent Stricker.

The relevant provisions of Mary’s will creating the trust for Mary Ann provided:

1. My trustee shall, from time to time, pay to my said daughter or to her guardian, or apply for her benefit the income of this trust. My trustee in the exercise of its discretion, as it deems necessary or advisable, may pay sums from the principal to provide for her proper care, support, and maintenance.

2. Upon the death of my said daughter, my trustee shall distribute the remainder of the trust, as then constituted, to my grandsons, Kent David Stricker and Michael Harold Stricker, share and share alike.

3. No title in the trust created in this Article or in any property at any time becoming a part of any such trust, or in the income therefrom shall vest in the beneficiary and neither the principal nor the income of any such trust estate shall be liable to

¹ In *In re Trust of Weitzel*, No. 09-0447 (Iowa Ct. App. Dec. 17, 2009), this court affirmed the district court’s award of trustee compensation and the denial of the Strickers’ petition to terminate the trust.

be reached in any manner by the creditors of said beneficiary, and the beneficiary shall have no power to sell, assign, transfer, encumber, or in any other manner to anticipate or dispose of his interest therein.

4. It is my wish that my farm land not be sold.

Adam died in 1996, and Mary died in 2005. First Citizens Trust Company assumed its role as trustee in August 2006. The trust assets, which consisted of a 312-acre farm and house valued together at \$872,000, were conveyed to First Citizens in January 2007. Mary Ann and her husband, Harold Stricker, had lived in the house located on the farm for fifty-two years. With the consent of all the beneficiaries, the trustee transferred the house and approximately four acres to Harold and Mary Ann. It then rented the farmland to Stricker Farms, Ltd., which was owned by Mary Ann, Harold, and their sons, Michael and Kent, for \$26,250 per year.

First Citizens filed an annual report for 2007 in May 2008, requesting the court to approve fees for its services as trustee from the inception of the trust. It also requested fees for the services of the trustee's attorney, John Reuber. First Citizens' standard fee schedule and statements itemizing the services of the trustee and attorney were attached to the annual report. First Citizens requested compensation in the amount of \$2375.43. The Strickers filed a petition to terminate the trust and later filed an objection to the annual report, contesting, the fees sought by the trustee and the trustee's attorney.² Following a hearing, the district court entered a ruling determining the fees requested by First Citizens

² The Strickers withdrew their objection to the attorney fee request at the beginning of the January 28, 2009 hearing.

were reasonable. The court denied the petition to terminate the trust. On appeal, we affirmed.³

On May 14, 2009, First Citizens filed its third annual report covering the period from January 1, 2008, through December 31, 2008. The Strickers filed objections to the report contesting the fees sought by both the trustee and the trustee's attorneys. The Strickers also filed an application to remove First Citizens as trustee, requesting Michael and Kent Stricker be appointed co-trustees. Following a hearing, the district court denied the objections to the third annual report and approved the fees requested. The court also denied the application to remove the trustee.

The Strickers appeal. They assert the district court erred in determining the fees charged by the trustee and trustee's attorneys were fair and reasonable. They further assert the court erred in failing to remove the trustee.

II. Scope of Review.

This case was tried by the probate court in equity. See Iowa Code § 633.33 (2009); *In re Barkema Trust*, 690 N.W.2d 50, 53 (Iowa 2004) (noting a hearing on objections to a fiduciary's final report is an equitable proceeding); *Bass v. Bass*, 196 N.W.2d 433, 435 (Iowa 1972) (stating a hearing on allowance of fiduciaries' compensation for services rendered in administration of an estate "stands in equity"). Thus, this court's scope of review is de novo. Iowa R. App. P. 6.907 (2009).

³ *In re Trust of Weitzel*, No. 09-0447 (Iowa Ct. App. Dec. 17, 2009).

III. Discussion.

A. Trustee Compensation.

Iowa Code section 633A.4109 (2009) governs compensation for trustees, although “considerable discretion is left to [the] trial court in the allowance or nonallowance” of such fees. *Bass*, 196 N.W.2d at 435; see also *In re Woltersdorf*, 255 Iowa 914, 916, 124 N.W.2d 510, 511 (1963) (“The matter of fees for executors and trustees rests within the sound discretion of the trial court.”); Restatement (Third) of Trusts § 38 cmt. c(1), at 150 (2003) (stating trial courts have discretion in determining a trustee’s reasonable compensation). That statute provides that where, as here, “the terms of the trust do not specify the trustee’s compensation, a trustee or cotrustee is entitled to compensation that is reasonable under the circumstances.” Iowa Code § 633A.4109(1). The district court determined the fees requested by First Citizens were reasonable. We agree.

Gregory Nicholas testified on behalf of First Citizens. Before becoming president and CEO of First Citizens, Nicholas was engaged in the private practice of law. A fairly substantial portion of his twenty-five-year practice was devoted to the administration of estates and trusts. He explained the standard annual fee charged by First Citizens for administering trusts involving farms such as this one was one-tenth of one percent of the value of the farm plus five percent of the income to the trust. The fee schedule was approved by the trust company’s board. The fees charged by other trust companies for like-type services was a factor taken into consideration by First Citizens in setting its fees. Nicholas testified that standard rate resulted in First Citizens’ requested fee of

\$2156.05 for its services in 2008. Nicholas testified that although he devoted more time to the trust in 2008 as a result of the beneficiaries' objections made to the 2007 annual report and their appeal, the trust company made no claim for trustee's fees over and above its standard fee. He testified the fee request was similar to the request made in the 2007 report. He believed the trustee fees requested in the 2008 report were fair and reasonable.

The district court found:

As to the fees charged by First Citizens Trust Company, Greg Nicholas testified that he is the president and CEO of First Citizens Trust Company, has been an attorney since 1980, and was engaged in private practice from 1983 through 2005, with primary emphasis in estates and trusts. Mr. Nicholas testified that he is familiar with the fee structure for trusts and their fees are consistent and reasonable with other fiduciaries in North Iowa. He further testified that his fees are based upon a fee schedule, which was outlined to the beneficiary at the inception of the trust, which is based upon the aggregate of five percent of income, as well as one-tenth of one percent of market value. No additional charge was requested for defending the trust in a legal action commenced by the beneficiaries.

Mr. Nicholas also testified that in the case of the Stricker farm, the rent is cash rent in the amount of \$100/acre, which is below market value, and is an accommodation by First Citizens in working with the beneficiaries, Michael and Kent Stricker, the tenants to the lease.

The Court, based upon the testimony of Greg Nicholas, finds that the fees of First Citizens Trust Company, again, to be fair and reasonable and they are approved.

The Strickers argue the compensation awarded to the trustee is unreasonable because it is based on a fixed fee schedule and "the Trust Company did not itemize its hours or activities." As we held previously, this argument lacks merit for several reasons.

Section 633A.4109 does not require trustees to submit an itemized statement in order to receive compensation. *Cf.* Iowa Code § 633.200

(authorizing compensation for other fiduciaries and their attorneys “for such services as they shall render as shown by an itemized claim or report made and filed setting forth what such services consist of”). In *Woltersdorf*, our supreme court approved a trustee fee in the absence of an itemized statement, reasoning, “[w]hile no itemized statement was made as to each day by day work done in connection with the trust, it appears that whatever was necessary was done.” *Woltersdorf*, 255 Iowa at 916, 124 N.W.2d at 511 (finding no abuse of discretion in trustee fee of \$1000 for trust estate valued at \$15,000). The same can be said here.

We find no abuse of discretion in the court’s decision. In so concluding, we have considered the factors set forth in the Restatement (Third) of Trusts in determining whether the compensation requested by a trustee is reasonable. See Restatement (Third) of Trusts § 38 cmt. c(1), at 150 (stating factors that may be considered include local custom, trustee’s skill and experience, time devoted to trust duties, amount and character of trust property, degree of difficulty, responsibility, and risk assumed in administering the trust, including making discretionary distributions, nature and costs of services rendered by others, and quality of the trustee’s performance).

For the first time on appeal, Strickers assert the method of computing the trustee fees violates due process protections under the United States and Iowa Constitutions. This issue was not presented to nor decided by the district court. Therefore error was not preserved on the constitutional issue. See *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008) (“Issues not raised before the district

court, including constitutional issues, cannot be raised for the first time on appeal.”).

B. Attorney Fees.

In addition to objecting to the trustee’s fees, the Strickers objected to the fees of attorneys John Reuber and Scott Brown. They argue Brown appeared without court approval, without a designation of attorney, and without any advice to the court as to the reasonableness of his fees.

Reuber originally represented the estate of Mary Weitzel, and later represented First Citizens after it was appointed trustee in August 2006. Reuber prepared the first two annual reports for the trust. After the Strickers filed their petition to terminate the trust in July 2008, attorney Scott Brown was hired by First Citizens to defend the action. Reuber continued to work with First Citizens on trust matters and also assisted Brown with the defense to the petition to terminate. At the January 28, 2009 hearing, Reuber appeared on the behalf of the trustee as to the second annual (2007) report. His representation of the trustee ceased as of the date of the hearing. He did not represent the trust concerning the Strickers’ petition to terminate, but he did testify as a witness on behalf of the trustee.

Reuber’s statement in the amount of \$1057 for his professional services in representing the trustee, covering the period July 24, 2008, to January 28, 2009, was submitted with the third annual (2008) report. Strickers objected. The district court approved the fee, finding:

During cross-examination, Mr. Reuber further testified that since he had drafted the trust agreement, it was anticipated he would be called as a witness. During and up until the time of the

hearing in January 2009, he provided answers to questions and litigation support, as well as working on the annual report for the year 2008.

The court finds, in review of Mr. Reuber's testimony, as well as his time and services rendered, that his fees are fair and reasonable. Mr. Reuber was not only preparing the annual report but was also assisting Scott Brown on the issue of termination, which came to the forefront by the beneficiaries filing the petition, and hearing on the issue which was held in January 2009.

On appeal, the Strickers argue the trust should not have been responsible for Reuber's time spent for witness preparation and testifying. A review of Reuber's statement indicates that of the ten hours billed, two hours were devoted to witness preparation and testimony, resulting in a charge of \$200 for those activities. Upon our review of the record, we find no abuse of discretion in the district court's decision.

Attorney Scott Brown, who now represents the trustee, submitted a statement for services in the amount of \$260 for preparation of the third (2008) annual report. Strickers objected. The district court found the fees to be reasonable. Upon our review of the record, we agree.

First Citizens hired attorney Scott Brown to defend Strickers' petition to terminate the trust. Brown submitted a statement for services in the amount of \$2690.80 concerning that action. Strickers objected. The district court found: "As to the fees of Scott Brown, Greg Nicholas testified that they needed independent counsel upon the filing of the petition, and the Court finds the fees for Mr. Brown are reasonable and therefore approved." On appeal the sum and substance of Strickers' argument is:

[The] billings from attorneys to defend the payment of bank fees or the charging of the trustee are contrary to the best interest of the beneficiary and appears to be a conflicting situation. Mary Ann

questioned the bank's authority to charge fees that were not contracted and is being punished by the trust bank for her challenge to that trust bank's authority. The resistance to the objection for fees was made by the trust bank and they should pay their own attorneys. It is not the responsibility of the beneficiary to pay both sides.

The Iowa Trust Code imposes a duty upon a trustee to "administer the trust according to the terms of the trust" and according to the Trust Code. Iowa Code § 633A.4201. "A trustee may only incur costs that are reasonable in relation to the trust property, purposes, and other circumstances of the trust." *Id.* § 633A.4204. In performing all actions necessary to accomplish the proper management of the trust, a trustee has the power to, without authorization by the court, to employ attorneys "to advise or assist the trustee in the performance of administrative duties." *Id.* §§ 633A.4402(26), 633A.4401(1)(b), 633.699. A trustee may "defend an action, claim, or proceeding in order to protect trust property." *Id.* § 633A.4402(30). "The trustee can properly incur expenses for reasonable counsel fees and other costs in bringing, defending, or settling litigation as appropriate to proper administration or performance of the trustee's duties." Restatement (Third) of Trusts § 88 cmt. c, at 258 (2007). "The right of indemnification applies even though the trustee is unsuccessful in the action, so long as the trustee's conduct was not imprudent or otherwise in violation of a fiduciary duty." *Id.* Likewise, a "trustee's entitlement to indemnification for attorney fees turns on whether its defense of the litigation is for personal protection against claims of malfeasance or for expenses properly incurred to defend the management of the trust." *In re Trust of Killian*, 459 N.W.2d 497, 503 (Iowa 1990). With these principles in mind, we conclude the district court did not

abuse its discretion in approving the attorney fees First Citizens incurred in defending Strickers' petition to terminate the trust.

C. Removal of Trustee.

Finally, the Strickers assert the court abused its discretion in failing to remove the trustee. Iowa Code section 633A.4107 governs the removal of a trustee.⁴ Section 633A.4107(2) provides:

The court may remove a trustee, or order other appropriate relief if any of the following occurs:

- a. If the trustee has committed a material breach of the trust.
- b. If the trustee is unfit to administer the trust.
- c. If hostility or lack of cooperation among cotrustees impairs the administration of the trust.
- d. If the trustee's investment performance is consistently and substantially substandard.
- e. If the trustee's compensation is excessive under the circumstances.
- f. If the trustee merges with another institution or the location or place of administration of the trust changes.
- g. For other good cause shown.

Having already found that trustee's compensation is not excessive under the circumstances, the only ground that could apply here is subsection g, the "catch-all" for removal of the trustee if good cause is shown. The burden to prove conduct sufficient for removal of the trustee is upon the person seeking removal. *See generally In re Estate of Atwood*, 577 N.W.2d 60, 63 (Iowa Ct. App. 1998) (appealing removal of the executor in equity case).

The Strickers argue removal was proper because the trustee unreasonably withheld income from Mary Ann and failed to act in Mary Ann's best interests, and because of the hostility between the trustee and the

⁴ Although not couched as a petition under section 633A.6202(2)(j), we will treat it as such.

beneficiaries. Upon our de novo review, we agree with the district court that the Strickers failed to establish or prove any of the grounds for removal under Iowa Code section 633A.4107(2).

Here, there was no evidence that the trustee unreasonably withheld income from Mary Ann. The trustee paid the property taxes and insurance for the farm, the asset of the trust. The trustee then gave Mary Ann distributions of the income, after taxes, as dictated by the trust. Additionally, the evidence presented did not establish that the trustee had not acted in the trust's best interests. Clearly, Mary's underlying intent in creating the trust was preserving the farm land for the residual beneficiaries, not providing income to Mary Ann. The evidence presented simply did not establish that the trustee had failed to preserve the asset. Although the Strickers alleged hostility between them and the trustee, we find that the minimal friction between Mary Ann and the trustee did not interfere with the proper administration of the trust. See *Schildberg v. Schildberg*, 461 N.W.2d 186, 193 (Iowa 1990). Mary Ann herself testified that her relationship with the Bank was not good, but also not bad, stating "[i]t's in the middle." Finally, as stated above, we have concluded the fees charged by the trustee were not excessive in this case. Having so concluded, we cannot say that merely having to pay fees establishes good cause for removal of the trustee. Accordingly, we affirm the judgment of the district court.

AFFIRMED.