

IN THE COURT OF APPEALS OF IOWA

No. 1-088 / 10-0952
Filed March 7, 2011

**IN THE MATTER OF THE ESTATE OF
DOROTHY G. POTTER, Deceased,**

**JUDY H. POTTER and
MICHAEL E. POTTER,**
Executors-Appellants,

vs.

**BANKERS TRUST COMPANY and
RICHARD C. WENZEL,**
Appellees.

Appeal from the Iowa District Court for Linn County, Robert E. Sosalla,
Judge.

The executors of Dorothy G. Potter's estate appeal from a probate court order approving the payment of fees to the former co-executor and to the former attorney for the estate. **AFFIRMED.**

Janette S. Voss of Remley, Willems, McQuillen & Voss, L.L.P., Anamosa, for appellants.

Paul P. Morf and Jason M. Steffens of Simmons, Perrine, Moyer & Bergman, P.L.C., Cedar Rapids, for appellee Bankers Trust Company.

Frank J. Nidey of Nidey, Wenzel, Erdahl, Tindal & Fisher, P.L.C., Cedar Rapids, for appellee Richard C. Wenzel.

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

TABOR, J.

This appeal challenges a probate court order approving the payment of fees to the former co-executor and to the former attorney for the estate of Dorothy G. Potter. Judy Potter, the decedent's daughter and remaining co-executor of the estate, contends the court "overlooked the misdoings of the former fiduciaries" in awarding the fees. Finding no abuse of discretion in the probate court's award of fees, we affirm.

I. Background Facts and Proceedings

Dorothy Potter died on April 24, 2009. She had been preceded in death by her husband, Stanley. The Potters were survived by three adult children: Penny, Michael, and Judy. Only Judy lived in Iowa.

Bankers Trust Company, N.A. (Bankers Trust) acted as co-executor for Stanley Potter's estate, to the dissatisfaction of co-executor Dorothy, who did not believe that she was adequately consulted on estate decisions. When Dorothy wanted to change her own will shortly before her death, she was unable to get help from either Bankers Trust officer Randy Petsche or Richard Wenzel,¹ the attorney for the co-executors of Stanley's estate.

At the time of her death, Dorothy held a certificate of deposit with Bankers Trust. On May 7, 2009, before the probate court issued letters of appointment, Bankers Trust cashed in the certificate and opened an "estate" account. Bankers Trust also made several payments from the estate account before having legal authority to do so.

¹ His attorney notified the appellate courts that Mr. Wenzel died on September 26, 2010.

On May 27, 2009, the court appointed Dorothy's daughter Judy and Bankers Trust as co-executors of the estate. That same day, the co-executors designated attorney Wenzel to assist in the administration of Dorothy's estate. Over the ensuing months, Judy clashed with Bankers Trust over several tasks involved with administering her mother's estate, including the filing of insurance policy claim forms, paying off credit card date-of-death balances, and the organization of Dorothy's personal property.

On September 4, 2009, Judy filed applications to remove Bankers Trust as co-executor and to remove Wenzel as attorney for the estate. She attached an affidavit asserting that the working relationship among her, the co-executor, and the attorney had "broken down to the point of no return." Judy's brother, Michael Potter, concurred in the requests to have these fiduciaries removed. On December 16, 2009, Wenzel moved to withdraw as counsel for Dorothy's estate.

On February 18, 2010, the probate court granted Judy's application to remove Bankers Trust as co-executor. The court determined that Bankers Trust was "unsuitable" to serve as executor within the meaning of Iowa Code section 633.63 (2009) and "failed to properly manage the estate" when considering the duties imposed by section 633.35. The court further determined that "unwarranted hostility" between the executor and the beneficiaries supported removal. The removal order directed Bankers Trust to file any application for fees in connection with the services it rendered to the estate within seven days.

On February 24, 2010, Bankers Trust applied for payment of \$7872.50 in co-executor fees. That same day, Wenzel filed his application seeking \$6793.33

in attorney fees for his work on the Potter estate from May 27, 2009, until September 4, 2009. Judy resisted the applications for fees filed by both Bankers Trust and Wenzel, arguing that the court should disallow their requests because their services “did not benefit the Estate and did not benefit the beneficiaries of the Estate.”

On May 4, 2010, the probate court held a hearing on the fee matter, taking testimony from attorney Wenzel, Judy Potter, and Petsche, the senior vice president at Bankers Trust. The court issued an order on May 5, 2010, awarding Bankers Trust fees in the amount of \$5818.50 for its services as co-executor of the Potter estate; the court disallowed \$2054.00 from Banker Trust’s original claim. The probate court also awarded Wenzel \$6793.33 in attorney fees, the entire amount he requested. Judy appeals from the probate court’s ruling.

II. Standard of Review and Legal Basis for Fee Award

We review de novo appeals from orders on the allowance of fees in a probate case, Iowa Code § 633.33, giving weight to the probate court’s findings of fact, especially when the court is assessing witness credibility. *In re Estate of Simon*, 288 N.W.2d 549, 551 (Iowa 1980). But we are not bound by the factual findings. *Id.*

The probate court has considerable discretion in allowing fees for the executor and attorney of an estate. *In re Estate of Rutter*, 633 N.W.2d 740, 751 (Iowa 2001). Unless the court’s decision on compensation for probate services is induced by legal error, we will reverse only for an abuse of discretion. *In re Estate of Brady*, 308 N.W.2d 68, 74 (Iowa 1981).

Iowa Code sections 633.197 and 633.198, which permit the award of ordinary fees to an estate's executor and attorney, are founded on the theory of quantum meruit. *In re Estate of Bolton*, 403 N.W.2d 40, 43 (Iowa Ct. App. 1987). The executor and attorney for an estate are entitled to the reasonable value of their ordinary services. *Id.* In considering a reasonable fee, the probate court considers the time necessarily spent on estate matters, the nature and extent of the service, the amount involved, the difficulty of handling and the importance of the issues, responsibility assumed, and results obtained. *Simon*, 288 N.W.2d at 552. Under section 633.162, a probate court may diminish the amount of fees if an executor violates the probate code. *In re Guardianship of Liggett*, 327 N.W.2d 779, 781 (Iowa Ct. App. 1982).

III. Analysis

A. Preservation of Error

On appeal, Judy contends this is “clearly a case that requires the imposition of Iowa Code Section 633.162 to deny Bankers Trust and Wenzel any compensation for the services each provided to the Dorothy Potter Estate.”

Section 633.162—which is entitled “Penalty”—provides:

In fixing the fees of any fiduciary, the court shall take into consideration any violation of this probate code by the fiduciary, and may diminish the fee of such fiduciary to the extent the court may determine to be proper.

Judy faults the probate court for not indicating in its order awarding fees that it considered the “violations of Bankers Trust and Wenzel when determining each former fiduciary’s fee.”

In response, Bankers Trust and Wenzel both contend that Judy failed to preserve error on her section 633.162 argument by not urging the probate court to apply that code section when deciding whether to diminish the fiduciaries' requested fees. They point out that her objection to their fee applications was limited to asking the probate court to disallow all fees "that did not benefit the Estate and that did not benefit the beneficiaries of the Estate." At the May 4, 2010 hearing, Judy's attorney made the following closing argument:

There's been a hearing that has removed Bankers Trust as the executor. It's clear that based upon the Court's findings of fact, that are no longer in question or appealed, that they did not meet their duties as the executor of that estate. . . . [T]he fees that have been requested absolutely did not advance the interests of the estate. Instead it delayed the estate, cost it more money.

Bankers Trust asserts that Judy's general argument that her co-executor did not advance the interests of the estate is distinct from the statutory argument being raised on appeal. Bankers Trust also highlights Judy's failure to ask the probate court to amend or enlarge its fee order to address section 633.162.

Bankers Trust and Wenzel express valid frustration with the evolution of Judy's legal argument from the trial court to appeal. But our error preservation rules are not designed to be hypertechnical. *Griffin Pipe Prod. Co., v. Bd. of Review*, 789 N.W.2d 769, 772 (Iowa 2010). A party is required to alert the district court to an issue at the time when corrective action can be taken. *Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006). But a party's failure to cite a specific code section in support of an objection is not dispositive of whether the issue has been preserved for appeal. See *Schneider v. State*, 789 N.W.2d 138, 147 (Iowa 2010). Certainly it would have been helpful to the probate court if Judy

had provided it with the same legal authorities in support of her position that she has brought to the attention of this court on appeal. But we do not decide whether error is preserved based “on the thoroughness of counsel’s research and briefing so long as the nature of the error has been timely brought to the attention of the district court.” *Summy*, 708 N.W.2d at 338.

We believe Judy adequately alerted the probate court to her contention that the officers of Bankers Trust “did not meet their duties as the executor of the estate” and should be denied any requested fees as a result. The probate court was capable of taking corrective action based on Judy’s objections to the fee requests raised at the hearing. In fact, the probate court acknowledged in its ruling that it had discretion to “make allowance” in the fee award where the services rendered by Bankers Trust were “improper.”

In contrast, we do not believe that Judy preserved error on her claim that attorney Wenzel’s fees should be diminished based on an alleged violation of the probate code. At the May 4, 2010 hearing, Judy’s counsel did not allege attorney Wenzel failed to meet his duties to the estate. According to the court’s May 5, 2010 order, Judy’s only challenge to Wenzel’s itemized fee statement was to an entry dated August 24, 2009. We will not consider Judy’s appellate claim that the probate court abused its discretion in failing to consider alleged “wrongdoings” by Wenzel when awarding fees.

B. Fees to Bankers Trust

Judy claims that by awarding fees to Bankers Trust, the probate court is rewarding the co-executor for its mishandling of her mother’s estate. She

contends that Bankers Trust violated probate code sections relating to the duties of fiduciaries and prohibitions against self dealing. See Iowa Code §§ 633.160, 633.155. She alleges these violations triggered the probate court's duty to consider section 633.162 in evaluating Bankers Trust's fee request. Bankers Trust counters that its "supposed mismanagement" of Dorothy's estate involved "minor matters without any identifiable damage to the estate." The former co-executor argues the probate court properly declined to use section 633.162 to deny or further discount Bankers Trust's fee request.

The probate court's February 18, 2010 finding that Bankers Trust "failed to properly manage the estate" did not preclude the co-executor from applying for fees for those services for which it was reasonably entitled to receive compensation under section 633.197. In fact, the court provided a specific deadline in the removal ruling for Bankers Trust to file a fee application. Bankers Trust timely filed an application for allowance of fees, itemizing the services provided. The probate court carefully considered the fee request and Judy's objections.

We find the probate court did not abuse its discretion in approving \$5818.50 of the \$7872.50 in fees requested by Bankers Trust. The court found Judy's own testimony demonstrated that Bankers Trust took actions to fulfill its responsibility as co-executor:

For example, it is necessary to determine the value of the estate's one-half interest in 20 acres of commercial property. Bankers Trust and Wenzel both took steps to obtain an assessed value of the property. They made arrangements for an appraiser to examine the property and estimate its value. . . . Other itemized matters include opening an estate account, obtaining an estate

identification number, reviewing receipts, submitting claims for medical services, issuing reimbursement checks to Judy, obtaining court authorization to employ family members for performing services for the estate, and attempting to prepare a complete report and inventory for the estate.

At the same time, the probate court exercised its discretion to disallow certain fees for services that did not contribute to the “neutral administration of the estate.” We are confident that in its review of Bankers Trust’s claims, the probate court understood that it could diminish the fee to the extent it determined to be proper for any violation of the probate code. See Iowa Code § 633.162. As it stands, the probate court’s fee determination was reasonable and should not be disturbed on appeal.

C. Fees to Attorney Wenzel

Judy does not advance a separate claim on appeal concerning the fees awarded attorney Wenzel. Instead she mentions him in passing in her argument concerning Bankers Trust’s mishandling of the estate. We do not believe this casual invocation of Wenzel’s name was sufficient to raise the issue for our consideration. See *Soo Line R.R. v. Iowa Dep’t of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994) (holding that random mention of an issue, without elaboration or supporting authority, is insufficient to raise issue for appellate court’s consideration).

Even if Judy’s claim regarding the attorney fees had been more fully briefed on appeal, she does not urge the same issue here that she raised in the trial court. See *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) (“Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing

a song to us that was not first sung in the trial court.”). In the trial court, Judy raised only one challenge to Wenzel’s fee claim. She objected to an entry dated August 24, 2009, which the attorney described as a meeting with Randy Petsche concerning Judy’s “credit card use.” The probate court accepted Wenzel’s explanation that this meeting was not related to Judy’s application to have the co-executor removed. Had Judy continued to urge this claim on appeal, we would defer to the court’s credibility finding on this matter. See *In re Estate of Heller*, 401 N.W.2d 602, 608 (Iowa Ct. App. 1986) (noting weight given to probate court’s credibility findings).

Even if we assume Judy had preserved error on her claim concerning attorney fees, we find no abuse of discretion in the probate court’s award to Wenzel.

AFFIRMED.