IN THE COURT OF APPEALS OF IOWA

No. 1-120 / 10-1019
Filed April 27, 2011

IN THE MATTER OF THE ESTATE OF CHARLES JANSSEN, Deceased.

JEAN ANDERSON,
Claimant-Appellee,

vs.

KRISTI MILLER-CHELOHA**,**
Executor,
and SUSAN MILLER JANSSEN,
Executor-Appellant.

Appeal from the Iowa District Court for Grundy County, Bruce B. Zager, Judge.

The appellant appeals a district court order granting attorney fees to the former attorney for the estate and dismissing her replevin action. **AFFIRMED AS MODIFIED.**

Matthew J. Reilly of Eells & Tronvold Law Offices, P.L.C., Cedar Rapids, for appellant.

Brooke Trent of Randall & Nelson, P.L.C., Waterloo, for appellee.

Timothy M. Sweet of Beard & Sweet, P.L.C., Reinbeck, pro se.

Considered by Vogel, P.J., Doyle, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

I. Background Facts & Proceedings

Charles Janssen was the son of Hilda and Claus Janssen.[1] Charles rented farmland from Hilda. He made several improvements, including placing grain bins on the property. Hilda passed away on February 18, 2006. Jean Anderson, Charles's sister, was named executor of Hilda's estate. Hilda's estate filed suit against Charles, claiming he had owed a debt to Hilda. Charles hired attorney Timothy Sweet to defend him in the suit. Sweet also represented Charles in several counterclaims against Hilda's estate.

Charles passed away on May 22, 2007. His will was admitted to probate. His wife, Susan Miller Janssen, and her sister, Kristi Miller Cheloha, were named as executors. Sweet was designated as the attorney for the estate. Susan and Kristi filed an application seeking to have Sweet represent the estate in the lawsuit filed by Hilda's estate at the rate of $165 per hour, and the probate court approved the application. For representing Charles's estate in this litigation, the probate court approved payments to Sweet of $8715.73 on December 17, 2007, $7741.00 on August 4, 2008, and $24,009.35 on January 21, 2009.

On December 26, 2007, Jean, as the subsequent owner of the farm that had been leased to Charles, filed a claim against Charles's estate claiming she had terminated the farm lease effective March 1, 2007, and the estate owed her holdover rent and attorney fees. The executors denied the claim.

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[1] The other children of Hilda and Claus were William Janssen, Robert Janssen, Jean Anderson, and Donald Janssen. Donald predeceased his parents, and he was survived by two children. Additionally, Claus had passed away before the events involved in this appeal.

The executors of Charles's estate decided to pursue an action to reopen the estate of John Janssen. John was Charles's uncle, and Charles was one of the beneficiaries of John's estate. John died on June 15, 2005, and Charles's brother, William Janssen, had been the executor of the estate. Charles's estate alleged improprieties by the executor; William Janssen Jr., John's attorney in fact; and Don Kliebenstein, John's attorney and the attorney for the estate.[2] Susan and Kristi filed an application seeking to have Sweet represent the estate in the lawsuit involving John's estate at the rate of $165 per hour. That application was approved by the probate court. The probate court approved payment to Sweet of $6530.75 on March 10, 2008, $15,267.38 on August 4, 2008, and $49,075.82 on January 26, 2009, for his work in representing Charles's estate in the litigation involving John's estate.

Sweet filed a petition to withdraw as counsel for Charles's estate. The probate court granted his request on June 29, 2009, except for matters in a settlement of the reopening of John's estate. Sweet sought $5575.49 in ordinary attorney fees for his work on Charles's estate. He also sought $1677.35 for fees and costs for his work for Charles's estate in connection with the litigation involving Hilda's estate. Additionally, Sweet requested to be paid $10,371.71 for fees and costs associated with his work for Charles's estate in the litigation involving John's estate.

On January 25, 2010, Jean filed a motion for summary judgment in her claims against the executors of Charles's estate for holdover rent payments and

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[2] Kliebenstein died while that litigation was pending, and his estate was substituted as a party.

attorney fees.[3] Susan resisted the motion, and filed a petition for replevin against Jean, claiming Charles's estate was entitled to the return of certain grain bins which he had placed on the property. Jean filed a motion to dismiss the petition for replevin. On February 17, 2010, the probate court granted Jean's motion for summary judgment. Jean was awarded $13,015 in holdover rent and $10,722.72 in attorney fees.

A combined hearing was held on April 19, 2010, on Sweet's request for attorney fees and Jean's motion to dismiss the petition in replevin. The probate court granted Sweet's request for attorney fees in full, stating it was well aware of the contentious litigation involving Charles's estate, and finding the fees fair and reasonable. The court entered judgment for $5575.49 in ordinary attorney fees, $1677.35 for the litigation involving Hilda's estate, and $10,371.71 for the litigation involving John's estate. The court also dismissed the petition for replevin.

Susan filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), which was denied. Susan appealed the decision of the probate court granting Sweet's request for attorney fees and dismissing her petition for replevin.

II. Attorney Fees

A proceeding concerning the award of attorney fees in a probate action is in equity, and our review is de novo. Iowa Code § 633.33 (2009); *In re Estate of Petersen*, 570 N.W.2d 463, 465 (Iowa Ct. App. 1997). We give weight to the fact

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[3] In a separate action the district court had determined the farm lease had expired on March 1, 2007. Anderson claimed the executors of Charles's estate were barred by claim preclusion or issue preclusion from relitigating whether Charles and Susan had rightfully remained on the property after that date.

findings of the district court, especially considering the credibility of witnesses, bur are not bound by them. *In re Estate of Heller*, 401 N.W.2d 602, 608 (Iowa Ct. App. 1986).

A. We first address the issue of ordinary attorney fees. Under section 633.198, an attorney for an estate is entitled to a reasonable fee that is "not in excess of the schedule of fees herein provided for personal representatives." For ordinary services a personal representative may receive an amount up to six percent of the first one thousand dollars of an estate, four percent of the overplus between one and five thousand dollars, and two percent of all sums over five thousand dollars. Iowa Code § 633.197. These statutory percentages are only the ceiling on fees for ordinary services. *In re Estate of Bolton*, 403 N.W.2d 40, 43 (Iowa Ct. App. 1987).

In Iowa, ordinary attorney fees should be the reasonable value of the services rendered. *Id.* The court may consider factors such as the "competence and efficiency exercised in the estate, size of the estate, actual time devoted to the estate, nature and difficulty of the services performed, fee customarily charged for similar services, results obtained, and experience of the attorney or executor." *Estate of Randeris v. Randeris*, 523 N.W.2d 600, 607 (Iowa Ct. App. 1994). "To a considerable extent the compensation of an attorney rests in the discretion of the trial court but this must be a reasonable discretion." *In re Estate of Roggentien*, 445 N.W.2d 388, 389 (Iowa Ct. App. 1989).

Sweet is not seeking the maximum amount of ordinary attorney fees that could be awarded.[4] In the probate proceedings he sought $5575.49, and this amount was approved by the court. On appeal, he states that $2338.17 of this amount was actually attributable to the litigation involving John's estate and should be removed from his request for ordinary fees. He also states he mistakenly overcharged by ten dollars per hour for 15.90 hours of work, and states the ordinary fee award should be reduced by $159. We conclude the award for ordinary fees should be reduced to $3078.32.

Sweet completed nearly all of the ordinary work needed for the probate estate, including the income tax returns and clearing title to real estate that had been owned by Charles. He provided a detailed listing of the work completed for the estate. All that is required is the filing of the final report, obtaining approval, and closing the estate. We conclude the amount of $3078.32 is a reasonable amount for ordinary attorney fees in this case, determine Sweet is entitled to this amount, and modify the district court's order to reduce the amount from $5575.49 to $3078.32.

B. We turn next to the issue of extraordinary fees. Attorneys may present a fee claim in probate court in their own right. *See In re Estate of Martin*, 710 N.W.2d 536, 537 (Iowa 2006). "When fees for extraordinary services are claimed, the burden is on the claimant to show both the necessity and value of

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[4] Susan concedes that the size of Charles's estate was quite large. Sweet states the maximum ordinary attorney fee under sections 633.197 and 633.198 for the estate would be $33,119. Sweet is seeking substantially less than this amount.

the services . . . rendered." *Bass v. Bass*, 196 N.W.2d 433, 435 (Iowa 1972). Fees for extraordinary services are governed by section 633.199,[5] as follows:

> Such further allowances as are just and reasonable may be made by the court to personal representatives and their attorneys for actual necessary and extraordinary expenses or services. Necessary and extraordinary services shall be construed to also include services in connection with real estate, tax matters, and litigated matters.

There is no established definition for extraordinary services. *Estate of Randeris*, 523 N.W.2d at 606 n.1. Generally, however, extraordinary services are those which in character and amount are beyond those usually required. *In re Estate of Mabie*, 401 N.W.2d 29, 31 (Iowa 1987). "In making an allowance for extraordinary services, the critical issue concerns the reasonable value of the services performed, as well as the compensation allowed for the ordinary services." *Estate of Randeris*, 523 N.W.2d at 606 n.1. "In the end, the goal is to provide fair and reasonable compensation for all services performed." *Id.*

In regard to the Hilda estate litigation, Sweet has already been awarded $39,795.66 in extraordinary attorney fees. Susan has not objected to the

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[5] Section 633.199 was amended in 2007 to apply to estates of decedents dying on or after July 1, 2007. Charles passed away on May 22, 2007, and thus the amended version of section 633.199 does not apply in this case. We note that the factors in the amended version of 633.199 to use in determining the reasonable value of extraordinary services—(1) time necessarily spent by the attorney; (2) nature of the issues and extent of the services; (3) complexity and importance of the issues to the estate; (4) responsibilities assumed; (5) resolution; and (6) experience and expertise of the attorney—are essentially the same factors applied in some of our cases in determining the propriety of an award of fees for extraordinary services. *See, e.g.*, *In re Estate of Bruene*, 350 N.W.2d 209, 217 (Iowa Ct. App. 1984). We determine we may consider these same factors on the basis of case law, even though the amended version of section 633.199 is not itself applicable. Directly applicable, however, are the "necessity for such . . . services, the responsibilities assumed, the amount of extra time . . . involved," and "the importance of the matter[s] to the estate and . . . the results obtained." *See* Iowa Ct. R. 7.2(3); *see also Estate of Bolton*, 403 N.W.2d at 47.

reasonableness of this amount. She objected to Sweet's request for an additional $1454.75 for work representing Charles's estate in litigation against Hilda's estate, which would bring the total to $41,250.41. We note that this litigation was initiated by Hilda's estate prior to Charles's death, and that Sweet, who had represented Charles in the litigation, was asked by the executors to represent Charles's estate. The executors signed an application to retain Sweet at the rate of $165 per hour for purposes of the Hilda litigation, and the application was approved by the probate court. Susan does not dispute the number of hours Sweet has documented he spent on this litigation.

At the executors' request or with their agreement, Sweet filed and pursued counterclaims against Hilda's estate. Prior to trial in the case, the district court granted summary judgment to Hilda's estate on several of the counterclaims raised by Charles's estate. The case continued, however, on claims of trespass and conversion of assets. Shortly before trial Hilda's estate dismissed its petition, thereby relinquishing its claims against Charles's estate for $60,000. In the litigation Charles's estate was awarded $18,000, plus some contested personal property. Thus, the estate benefitted by at least $78,000 due to Sweet's representation. The additional $1454.75 in fees requested by Sweet involve services for enforcing the trial court rulings and resisting an application for attorney fees by the executor of Hilda's estate.[6] The probate court took judicial notice of the numerous, lengthy trials the estate was involved in, and the

[6] The attorneys in Hilda's estate sought extraordinary legal fees of $138,544.50, but the district court reduced this amount to $36,000. *See In re Estate of Janssen*, No. 09-0904 (Iowa Ct. App. May 26, 2010).

substantial pleadings, and stated it was "well aware of the highly-contentious litigation involved in all aspects of the Charles Janssen Estate." The court concluded the request for extraordinary fees for the Hilda estate litigation was fair and reasonable. We find no abuse of discretion in the court's conclusion.

For the John Janssen estate litigation, Sweet has already been awarded $67,106.20 as attorney fees for extraordinary services, and Susan has not objected to this amount. Sweet requested an additional $10,111.50 for his services, which would make the total $77,217.70. The executors sought to retain Sweet at the rate of $165 per hour in their action to reopen the estate of John, and the application was approved by the district court. At the hearing on the request for ordinary fees and additional extraordinary fees, Sweet made a professional statement that he had warned the executors of the risks involved in reopening John's estate, but they determined to proceed with the action due to their belief that Charles had been entitled to a greater share of John's estate, and that there had been improprieties in the administration of John's estate.

There were several difficulties in the action because several key witnesses, John, Hilda, and Charles, were all deceased. Also, while the case was pending the attorney for John's estate, Kliebenstein, died. These circumstances required extensive discovery to uncover the facts involving the transactions involved, especially as they involved "confidential agreements" to withdraw objections to John's estate in exchange for compensation. The case also involved examination of financial records involving a bank account that had not been disclosed in the accounting of the estate.

A seven-day trial was held on the issues involved in John's estate, and multiple legal and factual issues were presented. A medical expert presented testimony concerning the mental capacities of John and Charles. A probate expert testified to the standard of care for an executor. The judge appointed an independent executor and directed the recovery of $301,000 from various parties. Of this amount $100,000 was to be recovered from Charles's estate. Charles's estate, however, would receive $43,000 as a beneficiary, leaving the total liability $57,000.

Sweet has requested $10,111.50 for his work after the trial. He filed a post-trial motion that brought an additional $50,000 into John's estate. Also, during the post-trial period, Sweet negotiated and reached an agreement to reduce the liability of Charles's estate to $20,000. These actions substantially benefitted Charles's estate. The probate court also took judicial notice of the proceedings in the litigation involving John's estate, and concluded Sweet's request for fees was fair and reasonable. We find no abuse of discretion in the court's determination. The case involved lengthy and complex litigation, made more difficult by the personalities of the family members involved.

We affirm the district court's grant of attorney fees to Sweet for extraordinary services in the amount of $1454.75 for the litigation involving Hilda's estate and $10,111.50 for the litigation involving John's estate.

III. Replevin Action

Susan filed a petition for replevin claiming that certain grain bins on Hilda's farmland had been purchased by Charles and should properly be included within

his estate. The farmland was currently owned by Jean. Jean responded by filing what was captioned as a "Pre-Answer Motion to Dismiss Petition for Replevin," claiming the replevin action should be dismissed because (1) the petition did not meet the requirements for a replevin action under chapter 643, (2) the grain bins were real property, not personal property, and (3) under the terms of the lease between Hilda and Charles improvements became the property of the landlord, unless there was a prior written agreement to the contrary. Susan sought a continuance, and asked that the matter be set for an evidentiary hearing. Jean initially resisted the request for an evidentiary hearing. There was already a hearing scheduled on the issue of attorney fees, and the probate court ordered that the motion to dismiss would be heard at the same time.[7]

The hearing was held on April 19, 2010. Jean provided a written summary of her arguments, which included seven grounds for dismissing the replevin action.[8] Susan testified, stating Charles had paid for the grain bins, and he paid the taxes and insurance on them. She indicated the grain bins were erected

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[7] Generally, a motion to dismiss is based on the contents of the pleadings. *Moyer v. City of Des Moines*, 505 N.W.2d 191, 193 (Iowa 1993). Where a motion to dismiss is based a failure to state a claim upon which relief may be granted, the court does not consider factual allegations outside the petition. *Geisler v. City Council of Cedar Falls*, 769 N.W.2d 162, 165 (Iowa 2009). In the present case, however, evidence was presented without objection by either party. Like the district court, we therefore will consider the evidence presented at the evidentiary hearing.

[8] The following grounds were discussed during the hearing on the motion to dismiss: (1) failure to follow the procedures for replevin under chapter 643; (2) failure to file the matter as a compulsory counterclaim to Jean's claim against Charles's estate; (3) res judicata because the issue had been raised in the litigation between Charles's estate and Hilda's estate; (4) a written resistance to the motion to dismiss was not filed within ten days; (5) the grain bins were fixtures, not personal property; (6) under the terms of the lease, improvements inured to the benefit of the landlord, unless there was a written agreement otherwise; and (7) the conveyance to Jean included all interest in the real estate, including the grain bins.

prior to the farm lease noted by Jean. Susan offered ten exhibits. They were admitted without objection. The exhibits included tax records, bills for the grain bins, and documentation of insurance. Susan was cross-examined.

The probate court granted the motion to dismiss on the grounds (1) the petition for replevin was time-barred, (2) it was subject to res judicata based on "various other proceedings that have been tried to the court," (3) the grain bins were part of the real estate and became fixtures, and (4) through the transfer of the real estate to Jean, the improvements were transferred to Jean. Susan filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), stating that a dryer was not attached to the grain bins and was not covered by the court's ruling. The court denied the motion.

Replevin is an action at law. *First Trust & Sav. Bank v. Guthridge*, 445 N.W.2d 401, 402 (Iowa Ct. App. 1989). The standard of review in a replevin action is for the correction of errors at law. *Prenger v. Baker*, 542 N.W.2d 805, 807 (Iowa 1995). "We will not disturb the trial court's findings of fact as long as they are supported by substantial evidence in the record." *Id.*

"Replevin is an action to recover specific personal property that has been wrongfully taken or wrongfully detained, with an incidental right to damages caused by reason of such detention." *Flickinger v. Mark IV Apartments Ass'n*, 315 N.W.2d 794, 797 (Iowa 1982). Personal property becomes a fixture of real property when: (1) it is actually annexed to the realty, or to something appurtenant thereto; (2) it is put to the same use as the realty with which it is connected; and (3) the party making the annexation intends to make a

permanent accession to the freehold. *Young v. Iowa Dep't of Transp.*, 490 N.W.2d 554, 556 (Iowa 1992) (quoting *Ford v. Venard*, 340 N.W.2d 270, 271 (Iowa 1983)). "A fixture is, by definition, real property because it is incorporated in or attached to the realty." 35A Am. Jur. 2d *Fixtures* § 3, at 840 (ed. 2001). Agricultural buildings, such as granaries, corn cribs, or hog houses, may be considered fixtures, even when they are built on removable skids. *See Cornell College v. Crain*, 211 Iowa 1343, 1344, 235 N.W. 731, 732 (1931).

We find no error in the district court's conclusion that the structures in question here had become fixtures and were part of the real estate. There was argument the grain bins could be removed, but "[t]here's a cost to that that's pretty extensive." As fixtures, the grain bins became part of the real estate. *See* 35A Am. Jur. 2d *Fixtures* § 3, at 840. Replevin actions, however, are limited to the recovery of personal property. *Flickinger*, 315 N.W.2d at 796. We conclude the probate court properly denied the petition for replevin.

We affirm, as modified, the decision of the district court of the issue of attorney fees, and affirm its ruling on the replevin action.

AFFIRMED AS MODIFIED.