

**IN THE COURT OF APPEALS OF IOWA**

No. 3-556 / 12-1946

Filed July 10, 2013

**RICHARD NEAL SCHEUERMANN and  
JEFFREY RAY GUMM, TRUSTEES OF  
THE GUMM FAMILY TRUST,**  
Plaintiff-Appellants,

**vs.**

**DAVID M. GUMM, TRUSTEE and DAVID  
M. GUMM, INDIVIDUALLY,**  
Defendant-Appellees.

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Appeal from the Iowa District Court for Dallas County, Richard B. Clogg,  
Judge.

Co-Trustees appeal the district court's award of attorney fees to a third  
trustee. **AFFIRMED AS MODIFIED.**

Thomas P. Murphy of Hopkins & Huebner, P.C., Adel, for appellant.

John P. Dollar and Steven C. Despotovich of Wilson, Deege, Dollar,  
Despotovich & Riemenschneider, West Des Moines, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

**VOGEL, P.J.**

Richard Scheuermann and Jeffrey Gumm, as co-trustees of the Gumm Family Trust, appeal the district court's ruling awarding attorney fees to their fellow trustee, David Gumm, to be paid from the trust. They assert David's application for fees was untimely as David failed to request attorney fees at the trial and waited forty-seven days after the court's ruling on the posttrial motions to file his application. They further claim *res judicata* bars David's relitigation of attorney fees. Because there is no statutory deadline for the filing of attorney fee applications, we conclude David's application was not untimely. However, we modify the district court's ruling as we find the district court did abuse its discretion in awarding attorney fees to David that were incurred in a separate action. We therefore modify the district court's ruling to remove the attorney fees associated with that separate action.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

This appeal arises from a dispute involving the Gumm Family Trust. In February, 2011, David, as one of three co-trustees, filed suit in Greene County against his co-trustees, Richard and Jeffrey, alleging various claims against them. This Greene County petition was dismissed on summary judgment on January 25, 2012, and the court assessed costs against David but did not address attorney fees.

In September of 2011 while the Greene County case was still pending, Richard and Jeffrey filed a declaratory judgment action in Dallas County. They sought a legal determination with respect to various aspects of the trust, as well as removal of David as the third co-trustee. David, both individually and in his

capacity as co-trustee, filed an answer generally denying the allegations in the petition and seeking attorney fees. He also filed a counterclaim alleging the same complaints against Richard and Jeffrey that were alleged in the Greene County case.

The district court granted partial summary judgment in the Dallas County case, ruling the trustees could sell the property of the trust by majority action and dismissing the counterclaims made by David based on the preclusive effect of the Greene County case. The case proceeded to trial on the issue of David's removal as a trustee and on Richard and Jeffrey's request to have David's farm lease terminated.

On April 4, 2012, the court issued a ruling in favor of David finding he could continue to farm the land under the terms of the trust, and refusing to remove David as a trustee since the trust had not been damaged or endangered by David's actions. The court assessed costs to Richard and Jeffrey, but made no mention of attorney fees. Richard and Jeffrey then filed a motion to amend or enlarge regarding the substance of the court's ruling, which David resisted. On April 27, 2012, the court denied the motion.

Forty-seven days after the court's ruling on the motion to amend or enlarge, David submitted an application for reimbursement of attorney fees covering both the Greene County and Dallas County actions. Richard and Jeffrey filed a written resistance to the application asserting David's actions in both the Greene County and Dallas County actions have not benefited the trust, and thus, he should not be entitled to attorney fees under Iowa Code section

633A.4507 (2011).<sup>1</sup> A hearing was held, though it was unreported.<sup>2</sup> On August 7, 2012, the district court granted David's application for fees.

In its opinion, the court first noted Richard and Jeffrey's attorney fees of approximately \$40,000 for the Greene County and Dallas County actions had been paid by the trust. The court then reasoned that David's defense of the Dallas County action and the litigation in Greene County benefitted the trust, such that the trust should pay the attorney fees associated with both proceedings. Therefore, the court ordered the trust to pay David's attorney fees in the sum of \$26,836.62.

On August 17, 2012, in response to this order, Richard and Jeffrey filed a motion to amend or enlarge pursuant to Iowa Rule of Civil Procedure 1.904(2), in which they disputed the district court's characterization of the Greene County proceedings as benefitting the trust, as well as the calculation of attorney fees. They further claimed that, because David did not file a rule 1.904(2) motion to amend or enlarge requesting attorney fees after the court's ruling on the merits, he failed to preserve the issue and could not later request fees be awarded. They further asserted the issue of attorney fees in the Greene County action was barred by res judicata. The court summarily denied Richard and Jeffrey's motion to amend or enlarge on September 24, 2012. Richard and Jeffrey appeal.

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<sup>1</sup> Iowa Code section 633A.4507 states: "In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."

<sup>2</sup> Richard and Jeffrey, as appellants, did not submit a statement of the evidence or proceedings from this hearing to this court under Iowa Court Rule 6.806.

## II. PRESERVATION OF ERROR.

David first asserts on appeal that Richard and Jeffery failed to preserve error on appeal because their initial written resistance to his application for attorney fees did not include the procedural arguments of untimeliness and res judicata. He also claims that Richard and Jeffrey failed to file the notice of appeal in time because their rule 1.904(2) motion was improper. David claims the rule 1.904(2) motion raised the issue of timeliness and res judicata for the first time, and as a result, it was not a proper motion to amend or enlarge. Because the motion was not proper in David's opinion, it did not toll the time for filing the notice of appeal.

We find Richard and Jeffrey properly preserved error on their claim and their notice of appeal was timely filed. While the initial written resistance to David's application for fees did not include the procedural claims Richard and Jeffrey now make on appeal, the court held an unreported hearing on the application. We do not have a transcript from the hearing, but we do have a transcript from the hearing on the motion to enlarge or amend the court's order. In that hearing, David opposed the motion to enlarge or amend by stating that all of the arguments Richard and Jeffrey were making, including the procedural arguments, were made at the prior unreported hearing on the application.<sup>3</sup> While we cannot confirm in the record these arguments were in fact presented to the

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<sup>3</sup> David's attorney stated in response to opposing counsel's argument, "I didn't hear anything today that I didn't think we heard back when the court considered the issue of fees to begin with . . . . All of these arguments have been thoroughly aired previously." He went on to say later in the hearing, "Where was this argument when we were doing the hearing on the fees? I believe I heard it then. It's the same argument recycled, in effect."

district court at the initial unreported hearing on the application for fees, we take David's attorney at his word that all of the arguments made at the motion to enlarge or amend "had been thoroughly aired previously." It is disingenuous for David to assert the contrary now on appeal. The district court was clearly presented with the arguments and ruled on them. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (finding an issue must be raised before and decided by the district court before we will decide them on appeal).

In addition, because the arguments had been made in the initial proceeding and had not been addressed by the court in its ruling granting David's fee application, it was proper for Richard and Jeffrey to seek a ruling on their challenges in a 1.904(2) motion. See *Baur v. Baur Farms, Inc.*, \_\_\_ N.W.2d \_\_\_, \_\_\_ 2013 WL 2710449, at \*4 (Iowa 2013) (holding a rule 1.904(2) motion that seeks to "obtain a ruling on an issue that the court may have overlooked, or to request the district court enlarge or amend its findings when it fails to comply with rule 1.904(1)" is proper and will toll the time for appeal).

### **III. SCOPE AND STANDARD OF REVIEW.**

Normally actions involving the administration of a trust are heard in probate court in equity, and thus, our review is de novo. See Iowa Code §§ 633.33, 633A.6101; *In re Trust No. T-1 of Trimble*, 826 N.W.2d 474, 482 (Iowa 2013). However, the sole issue on appeal is the court's award of David's attorney fees to be paid from the trust. The appellate review afforded to attorney fee applications involving estate actions is two-fold. See *In re Estate v. Bockwoldt*, 814 N.W.2d 215, 221–22 (Iowa 2012). "Though our review on an action for the allowance of attorney's fees is de novo, we review a district court's

decision that services were extraordinary under section 633.199 for abuse of discretion.” *Id.* at 222 (holding the court would review whether attorney fees in the application were in fact necessary and extraordinary services for abuse of discretion but then review de novo the question of whether sufficient documentation of the fees was provided to justify the award made).

We believe the same two-fold review is applicable when the probate court evaluates a claim for attorney fees under section 633A.4507. *See Trimble*, 826 N.W.2d at 490–94 (stating the district court abused its discretion in holding a party personally responsible for fees and costs incurred in the litigation but reviewing the evidence submitted in support of the fees de novo). We will therefore review the district court’s decision that the trust should pay David’s attorney fees for abuse of discretion, but review the sufficiency of evidence to support the amount awarded de novo. *Id.* at 493–94; *see also Bockwoldt*, 814 N.W.2d at 222.

#### **IV. APPLICATION FOR ATTORNEY FEES.**

**A. Timeliness of Application.** On appeal, Richard and Jeffrey assert the district court should not have awarded David attorney fees because his application for attorney fees was untimely. They specifically assert the application should have been addressed at trial, and if not at trial, then it should have been filed within the time for filing posttrial motions under Iowa Rule of Civil

Procedure 1.1007.<sup>4</sup> Richard and Jeffrey assert the district court's jurisdiction over the case ended after it issued its order on the posttrial motions. They therefore claim the district court had no power to consider the application for fees filed forty-seven days later.

“Ordinarily the authority of the district court to decide substantive issues in a particular case terminates when a final judgment is entered and postjudgment motions have been resolved.” *Franzen v. Deere & Co.*, 409 N.W.2d 672, 674 (Iowa 1987) (holding the court did not have jurisdiction to consider a party's application for sanctions, under now rule 1.413(1)—frivolous pleadings, that was filed thirty-three days after the supreme court affirmed the final judgment of the district court, and the district court also “did not have authority to exercise its inherent power to tax attorney fees as costs.”). However, an application for attorney fees is not a normal postjudgment motion like a motion to enlarge or amend under rule 1.904(2), nor is the deadline for applications for attorney fees bound by the deadline for rule 1.904(2) motions. *City of Hampton v. Iowa Civil Rights Comm'n*, 554 N.W.2d 532, 537 (Iowa 1996). Attorney fees are separate and distinct from the underlying controversy, and it has been held that the district court retains jurisdiction to consider an application for attorney fees even after an appeal is filed. *Iowa State Bank & Trust Co. v. Michel*, 683 N.W.2d 95, 110 (Iowa

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<sup>4</sup> Iowa Rule of Civil Procedure 1.1007 provides, in part:

Motions under rules 1.1003 [judgment notwithstanding the verdict] and 1.1004 [New Trial] and bills of exception under rule 1.1001 must be filed within fifteen days after filing of the verdict, report or decision with the clerk or discharge of a jury which failed to return a verdict, unless the court, for good cause shown and not ex parte, grants an additional time not to exceed 30 days.

This fifteen day time period also applies to motions to enlarge or amend the district court's ruling under rule 1.904(2). See Iowa R. Civ. P. 1.904(2) (“On motion joined with or filed within the time allowed for a motion for a new trial . . .”).



2004); *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990); *Ayala v. Center Line, Inc.*, 415 N.W.2d 603, 605 (Iowa 1987); *Maday v. Elview–Stewart Sys. Co.*, 324 N.W.2d 467, 470 (Iowa 1982).

While the Federal Rules of Civil Procedure specifically provide a deadline for filing applications for attorney fees, see Fed. R. Civ. P. 54(d)(2)(B)(i) (requiring attorney fee applications to be filed within fourteen days after the entry of the judgment), there is no such requirement under the Iowa Rules of Civil Procedure. When the rules fail to provide a deadline for filing motions after the entry of judgment, our supreme court stated it becomes a task for the court to determine whether the timing of the motion “offend[s] against the requirement that such motions must be filed expeditiously without undue delay.” See *Hearity v. Bd. of Supervisors*, 437 N.W.2d 907, 908 (Iowa 1989) (considering the deadline for filing a motion for sanctions and concluding the motion was timely as it was filed within the period of time to appeal the case). In making this determination, we also consider the prejudice the parties suffered as a result of the delay. See *State ex rel. Weede v. Bechtel*, 56 N.W.2d 173, 197 (Iowa 1952) (considering the lack of prejudice to the parties in finding an application for attorney fees filed five years after the district court’s final judgment and eight months after the case became final on appeal was timely).

The application for attorney fees in this case was filed forty-seven days after the court ruled on the posttrial motions, and seventeen days after the deadline for filing a notice of appeal. We find the application for attorney fees filed by David was timely in this case. Richard and Jeffrey were not prejudiced

by this short delay, and there is no evidence the trust was adversely impacted by the delay. *See id.*

**B. Res Judicata.** Richard and Jeffrey also assert the doctrine of res judicata prohibits the award of attorney fees in this case. They claim David asked for attorney fees in his pleadings and tried the case without offering evidence or argument to support his claim; David therefore should be barred from seeking them in a postjudgment application. They also assert res judicata should prevent the district court in Dallas County from awarding fees incurred in the Greene County case, given the Greene County action was final and David failed to ask for fees during the proceeding.

“The doctrine of res judicata embraces the concepts of claim preclusion and issue preclusion.” *Spiker v. Spiker*, 708 N.W.2d 347, 353 (Iowa 2006) (citation omitted). Claim preclusion prevents a party from filing a second action seeking redress for the same wrong that could have been asserted in a prior valid and final decision. *Id.* A party is prevented not only from reasserting every claim or defense used in the first action, but also “any other admissible matter which could have been offered for that purpose.” *Id.* However, it only applies to bar the action if the party had a “full and fair opportunity’ to litigate the claim or issue in the first action.” *Id.* (citation omitted). Richard and Jeffrey assert claim preclusion prevents David from litigating his attorney fee application after the case became final. To establish claim preclusion, Richard and Jeffrey must prove “(1) ‘the parties in the first and second action were the same;’ (2) ‘the claim in the second suit could have been fully and fairly adjudicated in the prior case;’

and (3) ‘there was a final judgment on the merits in the first action.’” *Id.* (citation omitted).

Only one suit was filed in Dallas County. Therefore, Richard and Jeffrey’s contention that claim preclusion prevents the Dallas County court from awarding attorney fees incurred in the Dallas County lawsuit fails. The fundamental underpinning of *res judicata* is that there must be separate lawsuits filed. David did not file a second lawsuit seeking to recover the fees incurred in the Dallas County action. Rather, he filed an application in the same action forty-seven days after the court ruled on the posttrial motions. As stated above, the court retained jurisdiction to hear that application as a collateral matter to the final judgment. *See Michel*, 683 N.W.2d at 110.

However, we agree claim preclusion prevents David from recovering attorney fees from the Dallas County court when those fees were incurred in the Greene County case. The parties to the first and second action are identical, the request for attorney fees incurred in the Greene County case could have been fully and fairly adjudicated in Greene County, and the Greene County case was concluded full and final. *See Spiker*, 708 N.W.2d at 353. The underlying claims David asserted in the Greene County case were summarily dismissed by the Greene County court, which assessed the costs of the action to David. We find it was an abuse of discretion for the district court in Dallas County to have awarded attorney fees incurred by David in his prosecution of the Greene County case.

At the hearing to amend or enlarge the attorney fee application, David’s attorney asserted his fees for the Greene County case amounted to \$3818.00. Richard and Jeffrey do not challenge this amount. We therefore modify the

district court's ruling granting David attorney fees by removing \$3818.00 from the \$26,836.62 awarded. David is entitled to attorney fees in the amount of \$23,018.62 payable from the trust.<sup>5</sup>

**AFFIRMED AS MODIFIED.**

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<sup>5</sup> Richard and Jeffrey do not claim on appeal the district court erred in finding David's defense of their claims in Dallas County benefitted the trust, so we do not address that issue or the amount of fees awarded related to the Dallas County action.