

IN THE COURT OF APPEALS OF IOWA

No. 6-838 / 06-0497
Filed December 13, 2006

IN THE MATTER OF THE ESTATE OF IRENE INA JOHNSON

JAN ARKFELD and LANA BRUNING,
Plaintiffs-Appellants,

vs.

DONALD D. JOHNSON,
Individually and as Executor of the
Estate of IRENE INA JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Montgomery County, James Heckerman, Judge.

Plaintiffs appeal an order fixing fees in a probate estate. **AFFIRMED.**

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellants.

Mark D. Swanson of Swanson Law Firm, Red Oak, for appellee.

Considered by Sackett, C.J., and Eisenhauer, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

ROBINSON, S.J.**I. Background Facts & Proceedings**

This case involves the estate of Irene Johnson, who died on June 8, 2004, at the age of eighty-four. Irene had three children, Donald Johnson, Jan Arkfeld, and Lana Bruning. After Irene's death, Donald submitted to probate a will dated August 21, 2001. Donald was appointed executor for the estate. The will provided Jan and Lana would each receive a bequest of \$5000, and the remainder would go to Donald. The probate inventory shows Irene's estate is worth about \$3.78 million.

Jan and Lana filed a petition to set aside the 2001 will, alleging it was the result of undue influence by Donald. Plaintiffs seek to have Irene's previous will dated November 7, 2000, admitted to probate. Under the 2000 will each child would receive one-third of the estate.

With the will contest pending, the executor, Donald, and the estate's attorney, Mark Swanson, requested ordinary fees under Iowa Code sections 633.197 and 633.198 (2003). Jan and Lana objected, asking that the request for fees be held in abeyance until after the trial of the will contest. A hearing on the application for fees, which was not reported, was held in February 2006.

The district court awarded the executor a fee of \$67,685.07, with one-half of that amount, \$33,842.53, payable at that time and the remainder to be paid when the estate received final approval of tax issues from the Internal Revenue Service (IRS). An identical award of fees was made to the estate's attorney. The court stated, "Litigation continues in a will contest and the objecting parties

remain free to object to attorney or executor requests for extraordinary fees at such time that application is made therefore.” Jan and Lana appeal the fee awards.

II. Standard of Review

A hearing on an allowance of fees in a probate case is in equity, and our review is de novo. See Iowa Code § 633.33; *In re Estate of Heller*, 401 N.W.2d 602, 608 (Iowa Ct. App. 1986). In equity cases, especially when considering the credibility of witnesses, we give weight to the fact findings of the district court, but are not bound by them. Iowa R. App. P. 6.14(6)(g); *In re Estate of Bruene*, 350 N.W.2d 209, 217 (Iowa Ct. App. 1984).

III. Merits

On appeal, Jan and Lana contend the district court should not have awarded executor and attorney fees while the will contest is still pending. They assert that if they are successful in the will contest, Donald’s fees as executor may be reduced under section 633.162, which provides, “In fixing the fees of any fiduciary, the court shall take into consideration any violation of this Code by the fiduciary, and may diminish the fee of such fiduciary to the extent the court may determine to be proper.” See *In re Guardianship of Liggett*, 327 N.W.2d 779, 781 (Iowa Ct. App. 1982) (noting a court may diminish the amount of fees if an executor violates the probate code).

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). We have stated, “It is customary, as followed in this case, for the

attorney and executor fees to be set by the court on application by the executor prior to the final report, usually following the submission of the probate inventory.” *Estate of Randeris v. Randeris*, 523 N.W.2d 600, 606 (Iowa Ct. App. 1994). Furthermore, “It is equally common for the maximum ordinary fee allowed by statute to be requested and approved by the court” *Id.* A court may later review and adjust a fee allowance at the hearing on the final report. *Id.* at 607.

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. *In re Estate of Simon*, 288 N.W.2d 549, 552 (Iowa 1980). The court may also consider the size of the estate. *Bolton*, 403 N.W.2d at 43.

We find the probate court did not abuse its discretion under the facts of this case. The file in this case shows the estate was fairly large, and the executor and attorney had many important issues to address, including tax returns and ongoing management of the estate. We conclude the executor and attorney were entitled to an award of ordinary fees under sections 633.197 and 633.198. As discussed above, such fees are often awarded before the final report in a probate case. *Randeris*, 523 N.W.2d at 606. If a diminishment of fees

is made under section 633.162 based on violations of the probate code, this adjustment can be made at the time of the hearing on the final probate report. *See id.* at 607. Any fees later determined to be inopportune and not appropriate could be recouped from Donald's share of the estate. The will contestants are secure if their suit is ultimately successful.

We affirm the decision of the district court.

AFFIRMED.