

IN THE COURT OF APPEALS OF IOWA

No. 7-705 / 07-0131
Filed November 29, 2007

**IN THE MATTER OF THE ESTATE OF
ORVILLE M. NELSON, Deceased,**

**U.S. BANK, N.A., Executor of the Estate
of ORVILLE M. NELSON, Deceased,
Appellant.**

Appeal from the Iowa District Court for Allamakee County, Monica L. Ackley, Judge.

An executor appeals the district court's order denying his application for extraordinary fees. **AFFIRMED IN PART AND REVERSED IN PART; REMANDED WITH INSTRUCTIONS.**

James Goodman of O'Connor & Thomas, P.C., Dubuque, for appellant.

W. Richard White of Morrow & White Law Offices, Waukon, for appellee.

Heard by Vogel, P.J., and Mahan and Zimmer, JJ.

VOGEL, P.J.

U.S. Bank, through its attorney, James E. Goodman, Jr., as executor of the estate of Orville M. Nelson, appeals from the district court's order denying its request for executor's fees and extraordinary attorney fees in a probate proceeding. Because we agree with the executor, that the work undertaken by the attorney for the estate was approved by the district court and was necessary for the preservation of the assets of the estate, we reverse in part and affirm in part.

I. Background Facts & Proceedings

Orville M. Nelson died on September 20, 2001 and his will was admitted to probate on October 8, 2001. Nelson's estate was valued at over two million dollars, which included 1000 acres of farmland that Nelson operated with some assistance from his disabled brother, Arthur Nelson. Nelson's will provided that one-third of his property was to be equally divided among six of his siblings and two-thirds was to be held in trust for Arthur, to ensure he was well cared for as long as he lived. Upon Arthur's death, the trust was to be dissolved and the remaining assets divided among Orville's other six siblings. The will nominated attorney James D. Bristol to serve as executor of the estate and he subsequently designated himself as attorney for the executor. However, after a disagreement with Orville's siblings over the sale of some of the estate's assets, Bristol voluntarily withdrew from both roles. On March 18, 2002, the district court approved \$9009.45, the full amount of fees and expenses Bristol requested for his work prior to his withdrawal. The district court then appointed Arthur Nelson

and James Rathbun as successor executors and appointed attorney Robert J. Cowie as their attorney.

Five days prior to his appointment, Cowie filed an application for ordinary and extraordinary attorney's fees, requesting \$250,000. It appears he had worked with at least some of the beneficiaries as his application states in part:

The undersigned attorneys undertook to represent all the residuary beneficiaries of the above entitled estate concerning actions or inactions taken by the former attorney and executor for the estate, James Bristol. As compensation for such undertaking, the beneficiaries agreed with the attorneys to pay a one-third (1/3) contingent fee agreement on dollars to be saved by the beneficiaries in having Mr. Bristol withdraw as executor and attorney; not sell real estate in the estate which is required to be retained; and filing certain tax elections available for the estate if such real estate is retained in the Nelson family.

Attorney Cowie purported to attach a calculation of anticipated dollars to be saved, and to reduce the amount of fees should the savings not be achieved in full. No documentation was attached. On the same day, the district court, finding the fee to be "valid and reasonable" approved this request without notice to the beneficiaries or setting a hearing. Cowie later reached a family settlement agreement with Orville's siblings. The agreement provided that Arthur would notify the social security office that he was no longer disabled and would assume the operation of Orville's farm. This would allow the estate to take a Family Owned Business Deduction as well as use the Special Use Valuation, both aimed at reducing the estate's federal tax liability.¹ The settlement also terminated the trust created for Arthur and paid a lump sum to the other six siblings. Arthur was responsible for all estate taxes, inheritance taxes, and

¹ See IRC sections 2057 and 2032.

penalties. Additionally, Arthur assumed the responsibility to pay Cowie's attorney's fees. In August of 2002, Cowie was paid \$50,000 of his fees and Arthur executed a mortgage on the farmland for the remaining \$200,000.

On June 10, 2002, Kenneth Nelson, one of Orville's siblings, filed a motion for reconsideration of the \$250,000 fee authorized for Cowie. Although Cowie's motion for extraordinary attorney's fees claimed the beneficiaries agreed to his \$250,000 fee, Kenneth alleged not all of the beneficiaries had agreed, nor were they given notice of Cowie's request. Cowie's actions in regards to the estate were further scrutinized, resulting in a civil fraud and professional malpractice action being filed against Cowie by attorney Thomas L. Staak representing Arthur. Additionally, a petition to appoint a conservator for Arthur was filed.

In May of 2004, U.S. Bank was appointed as the next successor executor for the estate with attorney James Goodman appointed as the attorney for the executor. Goodman filed a motion to set aside the \$250,000 attorney's fee authorized to Cowie and requested the court's permission to participate in discovery in the fraud and malpractice case Arthur had filed against Cowie. The district court ordered that Orville's estate and Arthur's malpractice action be combined for the purposes of "conducting discovery including interrogatories, request for production of documents and depositions." The court then vacated the \$250,000 attorney's fee authorized to Cowie. Cowie appealed the district court's order vacating the \$250,000 attorney's fee and Goodman defended the appeal through final briefing, a remand order and further proceedings. On September 21, 2005, the district court renewed its previous order that Goodman participate in discovery and stated:

The Court made it clear that for the purposes of saving the estate duplicative expenses, the law action and the estate action were to be combined to allow the executor to participate in the discovery process initiated by the Plaintiff's attorney in the law action. The Court confirms that this was the intention of the Court at the time the order was entered.

In 2006, the malpractice action was settled and as part of the settlement Cowie retained \$50,000 of the \$250,000 of attorney's fees previously allowed and moved to dismiss his appeal of the prior district court order that had vacated the order allowing his extraordinary attorney's fees.

In December of 2006, the work in Orville's estate was nearing completion. Goodman had previously been allowed \$19,000 in attorney's fees. U.S. Bank, after a two-and-one-half year involvement, requested an executor's fee of \$5000 and Goodman requested an additional \$106,916.04 in attorney's fees, which included \$1016.04 of costs. After a hearing,² the district court authorized that Goodman be paid an additional \$30,430 in attorney's fees and \$374.88 in costs, denying any further amounts. The district court set this reduced amount after noting that multiple attorneys had already been paid for work done in the estate and that some of Goodman's participation in the discovery of the malpractice action was unnecessary. Goodman filed a motion to reconsider and after a hearing, the district court denied U.S. Bank's request for executor's fees and declined to award Goodman any further attorney's fees. U.S. bank, by Goodman, appeals from this order.

² Although the district court and the parties referred to this hearing in their briefs, a transcript of the hearing was not included in the record.

II. Standard of Review

Probate proceedings regarding attorney's fees stand in equity; therefore our review is de novo. Iowa Code § 633.33 (2001); Iowa R. App. P. 4; *In re Estate of Petersen*, 570 N.W.2d 463, 465 (Iowa Ct. App. 1997). We give weight to the factual findings of the district court, but are not bound by them. Iowa R. App. P. 6.14(6)(g). To a considerable extent the compensation of an attorney rests in the discretion of the district court, but this must be a reasonable degree of discretion. *In re Estate of Bruene*, 350 N.W.2d 209, 217 (Iowa Ct. App. 1984) (quoting *In re Estate of Simon*, 288 N.W.2d 549, 552 (Iowa 1980)).

III. Discussion

On appeal, Goodman argues the district court erred in denying executor fees and the majority of the executor's attorney's fees. Iowa Code sections 633.197 to 633.199 (2005) govern the award of executor and attorney's fees in probate cases. A claim for extraordinary fees is governed by Iowa Code section 633.199, which provides:

Such further allowances as are just and reasonable may be made 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.

In determining what is a reasonable attorney fee, the court may consider many factors, including the size of the estate, nature and difficulty of the services performed, fee customarily charged for similar services, competency and efficiency exercised in the estate, experience of the attorney or executor, actual time devoted to the estate, and results obtained. *In re Estate of Randeris*, 523 N.W.2d 600, 607 (Iowa Ct. App. 1994). The person requesting compensation for

services has the burden to show the services rendered and the value thereof. *In re Estate of Bruene*, 350 N.W.2d 209, 217 (Iowa Ct. App. 1984).

In this case, Orville's estate was valued at \$2.15 million and involved issues unique to the usual administration of an estate, including unraveling a series of actions taken by previous executors which jeopardized the assets of the estate. Federal and Iowa tax issues were revisited and litigation ensued, designed to reduce and recapture \$250,000 of attorney's fees that were previously authorized. See *In re Estate of Seablom*, 231 Iowa 608, 612, 1 N.W.2d 701, 703 (Iowa 1942) (discussing that an administrator performed services not usually required in the administration of an estate). The district court was presented with evidence of the standard hourly rates upon which attorneys specializing in probate matters might charge and in an August 2004 court order, approved an hourly rate for Goodman's services. Furthermore, the district court noted that Goodman's competency was not in question as he has nearly nineteen years of experience in the estate area with seventy-five percent of Goodman's law practice consisting of probate and estate planning. Goodman has been involved in over 600 estates and numerous IRS audits. The district court found "Goodman's expertise came into play with regard to the IRS audit, and he is commended for his efforts to resolve those issues with the IRS to the benefit of the estate." The benefit to the estate was also apparent in that Cowie's prior authorization of \$250,000 in attorney's fees was reduced to \$50,000 and complex tax issues were resolved to the benefit of the estate.

In denying Goodman's request, the district court found that none of Goodman's actions regarding the tax matters were excessive, but that

Goodman's participation in the discovery phase of Arthur's malpractice action against Cowie was unnecessary. The district court stated that "it is better practice to obtain court authorization *before* commencement of the contemplated action." Goodman argues that the court had approved of his participation and that his participation was necessary to preserve the assets of the estate. See *In re Estate of Petersen*, 570 N.W.2d 463, 466 (Iowa Ct. App. 1997) (discussing that although prior authorization of attorney's fees for the defense of a will contest is the better practice, it is not required or dispositive because just cause must be established in either case).

The district court did approve of Goodman's participation in discovery multiple times. In a December 2004 order, the district court found that protection of the estate was a paramount concern, and therefore combined discovery for the estate and Arthur's malpractice action in order to prevent duplicative services. Goodman then participated and openly addressed the district court in an August 2005 hearing regarding a defense motion in the malpractice action. In a September 2005 order the district court again stated:

The Court made it clear that for purposes of saving the estate duplicative expenses, the law action and the estate matter were to be combined to allow the executor to participate in the discovery processes initiated by the Plaintiff's attorney in the law action. The Court confirms that this was the intention of the Court at the time that the order was entered.

We agree with Goodman that he did receive prior authorization by the district court for the work he was directed to do and at the hourly rate he would charge. In denying the fees, the district court stated in hindsight that it did not "provide *carte blanche* to Attorney Goodman to duplicate services." Unfortunately, there

was no indication in the court's previous orders as to how Goodman should restrict his participation. Rather, it was just the opposite. The court had initially indicated in its November 24, 2004 order that

combining the proceedings as requested by the Executors prevents duplicative services and allows for all of the appropriate information to be brought to the surface for analyzing all allegations raised in the civil proceedings as well as those raised by the Executors herein.

Attorney Thomas L. Staack, who represented Arthur in the malpractice action, attested that while some duplication could not be avoided in the combined proceedings, "Goodman took all necessary steps to reduce duplication of work."

Additionally, we agree with Goodman that his participation was necessary to recapture and preserve the assets of the estate as well as examine other serious irregularities that had previously occurred in the administration of the estate. He undertook to straighten out a convoluted estate, which had been badly mismanaged, if not defrauded. Goodman's participation in discovery and litigation in the civil matter successfully and dramatically reduced the \$250,000 in attorney's fees that were authorized in a previously obtained *ex parte* fee order. See *In re Estate of Wulf*, 526 N.W.2d 154, 157 (Iowa 1994) ("[A]n action benefits an estate if it involves increasing or preserving the size of the estate."). Moreover, Goodman accounted for all of his work, by attaching to his fee application, a detailed and exhaustive itemization of time.

We find that Goodman has met the statutory requirements for claiming extraordinary fees. Goodman is entitled to his fees for the services he provided regarding the estate administration, the tax matters, the discovery conducted in conjunction with Arthur's attorney malpractice action, and defending the appeal

of the district court's order vacating the \$250,000 fee granted to Cowie. However, we do not disturb the district court's ruling denying Goodman's fees stemming from the conservatorship action as he should have been compensated for his time and expertise for that work from the conservatorship assets, rather than from the estate. Accordingly, we reverse and remand, directing the district court to enter an order approving an attorney's fee of \$102,516. We also reverse the district court's denial of executor's fees without explanation and direct the district court to enter an order approving the \$5000 requested executor's fee. See Iowa Code § 633.197 (authorizing executors to be paid a reasonable fee for services rendered).

AFFIRMED IN PART AND REVERSED IN PART; REMANDED WITH INSTRUCTIONS.