

IN THE COURT OF APPEALS OF IOWA

No. 7-765 / 07-0531
Filed December 28, 2007

**IN THE MATTER OF THE ESTATES OF
LOREN S. BOCKWOLDT, Deceased, and
TAMMY R. BOCKWOLDT, Deceased,**

**DALE RICHARD WILLOWS,
Conservator for Brandie Renee
Bockwoldt, the minor child of the
Decedents, and Co-Executor for the
Estates of Loren and Tammy Bockwoldt.**

Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

The conservator for the minor child of the decedents and co-executor of the decedents' estates appeals the district court's order ruling on various estate administration matters. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Timothy L. Baumann and Christopher Surls of Wm. B. Norton Law Firm, P.C., Lowden, for appellant Dale Richard Willows.

Thomas Reidel of Conway & Reidel, P.C., Muscatine, for appellee Estate of Tammy R. Bockwoldt.

Pete Wessels of Wessels & Stojan, P.C., Rock Island, Illinois, for appellee Estate of Loren S. Bockwoldt.

Eric Knoernschild, Muscatine, for Pete Wessels.

Brock Bockwoldt, Zion, Illinois, pro se.

Eric Syverud, Davenport, for Brandie Renee Bockwoldt.

Heard by Huitink, P.J., Vogel, J., and Robinson, S.J.,* but decided by
Huitink, P.J., Vogel and Mahan, JJ., and Robinson, S.J.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007)

PER CURIAM

Dale Willows, conservator for the minor child of the decedents and co-executor of the decedents' estates, appeals the district court's ruling awarding attorney fees to the attorney for the executors of the estates, requiring any recovery from the wrongful death suit ongoing in Arizona to be distributed according to Iowa law, removing the co-executors of the estates, and failing to remove the attorney for the executors of the estates. We affirm in part, reverse in part, and remand.

I. Background Facts and Proceedings

Loren and Tammy Bockwoldt, husband and wife, were killed in a car accident in Arizona on March 12, 2005. They left behind a minor child, Brandie Bockwoldt and Loren's adult son, Brock Bockwoldt, who resides in Illinois. Loren and Tammy were both Iowa residents. Brandie is a beneficiary of both estates. Brock is a beneficiary of Loren's estate only.

On April 7, 2005, the court appointed three co-executors to both Loren's and Tammy's estates—(1) Dale Richard Willows, Tammy's brother; (2) Neal Bockwoldt, Loren's brother; and (3) Brock. The co-executors designated attorney Pete Wessels as their attorney in both estates. Willows was also appointed as conservator for Brandie.

Wessels filed a report and inventory in each estate on July 11, 2005. The reports valued Loren's estate at \$190,052.41 and Tammy's estate at \$70,740.03. No supplemental reports have been filed. However, in Wessel's application for attorney fees filed February 8, 2007, he states the Bockwoldt estates' gross assets total \$1,704,429.13. The large increase is attributable to the discovery of

numerous life insurance policies on the couple's lives. In addition, in December 2006 each estate received \$200,000 from an underinsured insurance policy of the decedents'.

In his application for attorney fees, Wessels requested fees in the amount of \$66,404.50 plus \$640.50 in expenses for Loren's estate and \$5,802.00 plus \$86.50 in expenses for Tammy's estate. Willows, in his capacities as both co-executor of the estates and conservator of Brandie, resisted the application for attorney's fees. The district court granted the request for attorney's fees without specifying ordinary and extraordinary fees.

On January 18, 2007, Wessels filed a motion for appointment of corporate executors alleging conflicts among the co-executors. Willows filed a resistance to the motion on February 12, 2007. The district court appointed corporate executors to the estates, removing Brock and Willows as co-executors because of "current and potential conflicts of interest." Neal subsequently withdrew as co-executor of the estates.

Further, the district court refused to close the estates due to unfinished estate matters and the possibility of a recovery from the ongoing wrongful death suit in Arizona. The district court ruled that, for the time being, any recovery be divided equally between the estates. At the hearing regarding whether to close the estates, the parties offered few legal arguments regarding the division of the wrongful death proceeds. The attorneys were unable to inform the court whether the suit was brought in the names of the children or the estates. The court's ruling left the door open for further argument on the issue if and when a recovery was made.

On February 26, 2007, Willows filed a motion asking the court to reconsider its ruling. Willows attached the online printout from the Arizona courts public access website which lists Brock and “restricted” as the plaintiffs in the suit. Willows asserts that Brandie’s name is listed as restricted because she is a minor. The document does not list the estates as parties. In addition, the motion cited both Iowa and Arizona law in making its argument that the wrongful death proceeds should be distributed according to Arizona law. The court denied his motion the same day. Willows appeals. The estates (appellees) respond.

II. Standard of Review

A district court’s allowance of attorney fees, removal of fiduciaries, and direction for distribution of funds are all tried in equity. Iowa Code § 633.33 (2007); *In re Estate of Wulf*, 526 N.W.2d 154, 155 (Iowa 1994); *In re Estate of Jones*, 492 N.W.2d 723, 725 (Iowa Ct. App. 1992). Our review is therefore de novo. Iowa R. App. P. 6.4. We also make a de novo review of the district court’s removal of the co-executors to determine if there was an abuse of discretion. *Schildberg v. Schildberg*, 461 N.W.2d 186, 190 (Iowa 1990); *In re Estate of Lovell*, 344 N.W.2d 576, 579 (Iowa Ct. App. 1983).

III. Merits

A. Attorney Fees

Willows argues the district court improperly shifted the burden of proving Wessels’s attorney fees away from Wessels and onto the objecting parties. Additionally, he argues the district court was required to make findings regarding which fees were ordinary and which fees were extraordinary pursuant to Iowa Code sections 633.198 and 633.199.

Sections 633.197 and 633.198 allow reasonable attorney fees, not to exceed two percent of the gross assets of the estate plus \$120.00, for the personal representative's attorney to be taxed as costs of administration of the estate. *Estate of Randeris v. Randeris*, 523 N.W.2d 600, 606 (Iowa Ct. App. 1994). This amount is a ceiling, or maximum, amount that can be paid to an attorney for any ordinary expenses of administering an estate. *In re Estate of Bolton*, 403 N.W.2d 40, 46 (Iowa Ct. App. 1987). In addition, the district court may allow the payment of necessary and extraordinary expenses. Iowa Code § 633.199.

Iowa Rule of Probate Procedure 7.2(3) governs the procedure for requesting extraordinary fees:

When an allowance for extraordinary expenses or services is sought pursuant to Iowa Code section 633.199, the request shall include a written statement showing the necessity for such expenses or services, the responsibilities assumed, and the amount of extra time or expense involved. In appropriate cases, the statement shall also explain the importance of the matter to the estate and describe the results obtained. The request may be made in the final report or by separate application. It shall be set for hearing upon reasonable notice, specifying the amounts claimed, unless waivers of notice identifying the amounts claimed are filed by all interested persons. The applicant shall have the burden of proving such allowance should be made.

The compensation of the personal representative's attorney largely rests in the discretion of the district court. See *Glynn v. Cascade St. Bank*, 227 Iowa 932, 939, 289 N.W. 722, 725 (1940). The district court must assure the allowance is supported by sufficient evidence to support the fees claimed and not excessive. See *id.* at 940, 289 N.W. at 726. In addition to the size of the estate, the district court, in determining the reasonableness of claimed fees, must consider the time

necessarily spent by the attorney, the nature and extent of the service, the amount involved, the difficulty of handling and the importance of the issues, the responsibility and liability assumed by the attorney, the results obtained, and the experience of the attorney. *Bolton*, 403 N.W.2d at 43-44.

Wessels followed the correct procedure described in rule 7.2(3). He filed a written statement with the court detailing the issues for which he incurred extraordinary expenses. The extraordinary issues Wessels claimed to have dealt with included: (1) litigation as to the guardianship of Brandie; (2) ownership of farmland interest and farm-related business interests; (3) disagreement among co-executors; (4) issues as to whether Loren had a valid last will and testament; (5) various income tax issues, complicated by the lack of records and no continuity in income tax preparers in recent years; (6) obtaining necessary information on nine insurance policies in Loren's estate and six insurance policies in Tammy's estate; and (7) the division of assets between the two estates. Attached to the statement was Wessels's billing statement for the two estates. It consisted of more than fifty pages, each entry describing the work performed.

However, at the hearing the district court did not require Wessels to go forward to prove his fees before asking the other parties if they objected. Rule 7.2(3) requires that this burden be placed on the applicant. It is not clear the district court required that here. Further, the district court made no specific findings as to which fees were ordinary and which were extraordinary. We therefore remand this issue to the district court for a hearing requiring the

applicant to meet his burden and for specific findings regarding the reasonableness of ordinary fees and extraordinary fees granted.

B. Distribution of Wrongful Death Proceeds

In regard to the distribution of the wrongful death proceeds, the district court ruled:

For the time being, the Court orders that one-half of the recovery from the Arizona courts be placed in Loren's estate and the other one-half be placed in Tammy's estate. Should the recovery in Arizona, if any, assist the Iowa Courts in how to hold or distribute the wrongful death recovery funds in Iowa, this Order may be amended upon request of any of the interested parties. Unless there is a further order by the Court, recoveries from the wrongful death action will be obtained in accordance with Arizona law, but distribution of the proceeds from that recovery will be governed by Iowa law.

(Emphasis added.) Willows argues the district court exceeded its authority in making this ruling. Both parties agree that Arizona law will control the recovery in the wrongful death suit. Their dispute lies in whether Iowa or Arizona law will control the distribution of any recovery. Willows argues that under Iowa law we must apply the most significant relationship test to determine which state's law is applicable. Under this test, he claims that, because the accident occurred in Arizona and all parties to the suits are domiciled or headquartered in different states, Arizona law should apply. He further interprets the Arizona wrongful death statute as requiring the wrongful death action be brought by Brock and Brandie individually.

The appellees argue the district court didn't make a final determination that any proceeds must be distributed one-half to each estate, but rather left it open for further argument after a recovery has been made. In addition, the

appellees argue the Arizona wrongful death statute allows for either the decedents' children or their estates to bring the wrongful death suit. We note that at the hearing no party was able to inform the district court in whose name the Arizona suit was filed. The appellees further point out there was already a distribution of a \$500,000 settlement in December 2006 in which \$200,000 was distributed to each estate. The other \$100,000 was distributed to the law firm handling the wrongful death action. Willows did not object to this distribution. It appears, however, that the \$500,000 payment was a payout from an insurance company, not a recovery from the wrongful death action. Wessels concedes this in his December 4, 2006 application for wrongful death proceeds distribution.

We agree with the appellees that the district court has made no final determination as to the distribution of the proceeds. Therefore, we find the appellants' argument on this issue not ripe for appeal. At the hearing, the district court judge stated:

So at this point in time, one of the things I am ruling today, subject to your right to correct me through legal authority, is that the distribution of funds will be made through Iowa law and that the recovery will be placed into the estates, half in one and half in the other, when the monies come from Arizona and then the estates can decide how it is going to be distributed.

. . . .

What I do now is leave the estates open and order that half of the money recovered goes into each estate when it's recovered, and then when something happens, if what you're saying is right, Bill, that it comes out that, you know, for Loren's death it's worth this many dollars and Tammy's death is worth that many dollars, then come back in and say Judge, your 50-50 distribution is wrong because here's how it was determined in Arizona.

(Emphasis added.) The district court begins its written ruling on this issue with the words, "for the time being," indicating its ruling is not final. In addition, at the

hearing the district court indicated to the attorneys that they could file motions to change the temporary ruling when more information on the recovery in Arizona became available. At both the hearing and in its ruling, the district court indicated it was concerned about protecting Brandie's interests. It wanted to ensure that, since she is a minor and the daughter of both decedents, Brandie receives her fair share of the proceeds.

For the reasons stated above, we find that the district court has not yet made a final ruling which can be appealed. See *Mason City Prod. Credit Ass'n v. Van Duzer*, 376 N.W.2d 882, 884-85 (Iowa 1985) (holding that a party may only appeal a final judgment); *Grains of Iowa, L.C. v. Iowa Dep't of Agric.*, 562 N.W.2d 441, 445 (Iowa Ct. App. 1997) (requiring a final ruling). Willows should make his arguments to the district court if and when a recovery is made in the wrongful death action. The district court has not been afforded the opportunity to consider detailed information on the Arizona lawsuit and the terms of the recovery obtained, Arizona law, or hear arguments regarding the proper distribution under the most significant relationship test.

C. Removal of Executors

Willows appeals the district court's decision to remove the co-executors of the estates and appoint corporate executors. He claims the reasons Wessels offered in his motion to appoint corporate executors do not support removal. Wessels alleges that the co-executors have difficulty agreeing on estate matters and that they have inherent conflicts in guarding the interests of the beneficiaries. Specifically, Wessels points out that the same executors cannot fulfill their duties to ensure the best interests of the beneficiaries of two estates at the same time.

It is impossible to argue, on behalf of the beneficiaries of both estates at the same time, that each should get a bigger share of distributions. Instead, right or wrong, the co-executors divided all of the distributions as equally as possible between the two estates.

In addition, Wessels points out that Brock, as a beneficiary of Loren's estate but not Tammy's, has an interest in getting as much money into Loren's estate as possible. Similarly, Willows, as conservator to Brandie, must look out for her best interests, which would require getting as much money into Tammy's estate as possible. It is impossible for Willows to reconcile the fiduciary duties he owes to both Brandie and the estates.

The district court has broad discretion in its decision to remove an executor. *Lovell*, 344 N.W.2d at 579. Executors are fiduciaries. Iowa Code § 633.3(17). As a fiduciary, an executor has a duty to act in the best interests of the beneficiaries of the estate. *See Vos v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36, 52 (Iowa 2003). If an executor has adverse interests to the interests of the beneficiaries of the estate, this duty cannot be fulfilled. *See In re Estate of Cutler*, 368 N.W.2d 724, 727 (Iowa 1985). Iowa Code section 633.65 allows removal of a fiduciary when he or she "is, or becomes, disqualified under sections 633.63 and 633.64, has mismanaged the estate, failed to perform any duty imposed by law, or by any lawful order of court, or ceases to be a resident of the state." Both a conflict of interest and unwarranted hostility between the executor and beneficiaries can support removal of the executor. *In re Estate of Randeris*, 523 N.W.2d at 606. A district court has the authority to remove an

executor even though there has been no actual misconduct if the person is unsuitable to act as executor. *Cutler*, 368 N.W.2d at 728.

It is clear that at least two of the three co-executors possessed conflicts of interests that made it impossible for them to act as true fiduciaries to the beneficiaries of the estates. In addition, because there are different beneficiaries in each estate, it is impossible to act in the best interests of all of them at the same time. The district court did not, therefore, abuse its discretion in removing the co-executors and appointing corporate executors.

D. Removal of Attorney Wessels

Willows claims the district court should have removed Wessels as the attorney for the executors of the estates due to the conflict of interest he had in representing both estates' executors. Although the district court did not remove him as attorney for the executors of either of the estates, Wessels subsequently withdrew from representation of the executor of Tammy's estate. Therefore, there is no longer an actual, justiciable controversy. Because the issue is moot, we do not address it. *E. Buchanan Tel. Coop. v. Iowa Utils. Bd.*, 738 N.W.2d 636, 640-41 (Iowa 2007).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.