

IN THE COURT OF APPEALS OF IOWA

No. 9-111 / 08-1001

Filed April 8, 2009

**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,**

Executor-Appellant.

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

Dale Willows, conservator for child beneficiary, appeals the district court's award of attorney fees for counsel for the estate. **AFFIRMED AS MODIFIED.**

Christopher L. Surls and Timothy L. Baumann of Wm. B. Norton Law Firm, Lowden, for appellant.

Kenza B. Nelson and Eric Knoernschild of Stanley, Lande, & Hunter, Muscatine, for appellee.

Eric Syverud, Davenport, for minor child.

Considered by Sackett, C.J., and Potterfield and Mansfield, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

Loren and Tammy Bockwoldt, husband and wife, were killed in a car accident on March 12, 2005. They had one minor child who was a beneficiary of both estates. Loren also had an adult son, Brock, who was a beneficiary of only Loren's estate. The court appointed three co-executors to serve in both estates: (1) Dale Richard Willows, Tammy's brother; (2) Neal Bockwoldt, Loren's brother; and (3) Brock.¹ The co-executors designated Pete Wessels as the attorney for both estates. Willows was appointed as conservator for the Bockwoldts' minor child.

On February 8, 2007, Wessels filed an application for ordinary and extraordinary attorney fees and expenses in which he sought \$67,045 for the estate of Loren Bockwoldt.² On February 14, 2007, Willows filed a resistance to Wessels's application, asserting that the fees sought were excessive and that Wessels needed to separate his request for ordinary fees from his request for extraordinary fees. Wessels identified seven areas in which extraordinary work was done, but did not designate his fee itemizations as extraordinary or ordinary. After a non-evidentiary hearing on the matter, the district court authorized payment of the entire \$67,045 from Loren's estate. Willows appealed the district court's ruling regarding attorney fees.³ This court found that the district court

¹ On January 18, 2007, Wessels filed a motion requesting the district court to appoint corporate executors in place of the three co-executors. The district court removed Brock and Willows as co-executors of both estates, finding a conflict of interest. Neal later withdrew. The corporate executors have not participated in the fee dispute.

² Wessels also sought fees for Tammy's estate. However, Willows has conceded the reasonableness of those fees, and Tammy's estate is not at issue on appeal.

³ Willows also appealed several other rulings, which are not at issue on this appeal.

erred by failing to require Wessels to prove the reasonableness of his requested fees. *In re Estates of Bockwoldt*, No. 07-0531 (Iowa Ct. App. Dec. 28, 2007). We remanded the 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.” *Id.*

On January 30, 2008, Wessels filed another application for fees. This application requested previously sought fees from before the appeal, fees for appeal matters, and reimbursement of litigation expenses from Loren’s estate amounting to \$82,776.83. Wessels later withdrew the application for post-appeal attorney fees and expenses. On February 25, 2008, Willows filed a new resistance to Wessels’s application for fees, arguing that Wessels failed to identify which entries were for ordinary work and which were for extraordinary work.

A fee application hearing was held on February 25, 2008, to comply with this court’s remand order. During the hearing, the parties agreed to a continuance to allow Wessels the opportunity to reexamine his bill. On April 11, 2008, Wessels filed an additional pleading in regard to his application for interim ordinary and extraordinary attorney fees and expenses requesting a total of \$77,016 from Loren’s estate. Willows filed a response April 18, 2008, asking the court to deny Wessels’s request for extraordinary fees.

The hearing on Wessels’s fee application resumed on April 24, 2008. At the hearing, Willows accepted the reasonableness of Wessels’s request for ordinary fees of \$20,432.89 as well as expenses of \$640.50. Willows also

agreed to \$18,413 of extraordinary expenses.⁴ The district court did not require Wessels to break down his bill to show which fees were extraordinary as opposed to ordinary, as requested by Willows. The district court determined that Wessels would be unable to perform such a task given the passage of time and the difficulty of separating ordinary from extraordinary services in a single telephone call or conference. The district court also found that such a breakdown was not what the court of appeals expected when it remanded. The district court awarded Wessels all fees and expenses he requested: \$55,942.61 of extraordinary fees, \$20,432.89 of ordinary fees, and expenses of \$640.50. Willows appeals, asserting: (1) the district court erred by declining to require Wessels to separate ordinary fees from extraordinary fees on his fee application; (2) the district court's award of extraordinary attorney fees was excessive and unreasonable; and (3) the district court erred by awarding Wessels the entire ordinary fee before the estate is closed.

II. Standard of Review

A hearing on allowance of attorney fees is in equity, and our review is de novo. *Bass v. Bass*, 196 N.W.2d 433, 435 (Iowa 1972).

III. Ordinary and Extraordinary Attorney Fees

An award of attorney fees in probate cases in Iowa is governed by statute and the Iowa Rules of Probate Procedure. Iowa Code section 633.197 (2005) provides:

⁴ Willows arrived at this amount by reviewing Wessels's bill line by line and attempting to determine which hours had been billed for any of seven matters that Wessels had identified as extraordinary.

Personal representatives shall be allowed such reasonable fees as may be determined by the court for services rendered, but not in excess of the following commissions upon the gross assets of the estate listed in the probate inventory for Iowa inheritance tax purposes, which shall be received as full compensation for ordinary services:

- For the first one thousand dollars, six percent;
- For the overplus between one and five thousand dollars, four percent;
- For all sums over five thousand dollars, two percent.

Iowa Code section 633.198 allows payment of attorney fees to the personal representative's attorney, subject to the fee schedule provided in section 633.197. This fee is a "maximum fee for the customary work in estates." *In re Estate of Bolton*, 403 N.W.2d 40 43 (Iowa Ct. App. 1987). The code also provides,

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

Iowa Code § 633.199.

What constitutes reasonable fees depends upon a host of factors, including 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).⁵

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

⁵ Similar factors have since been codified in Iowa Code section 633.199.

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.

Iowa R. Prob. P. 7.2(3).

This court previously determined that Wessels had followed the proper procedure described in rule 7.2(3) when he designated the subject matters involved in his extraordinary fee request. However, we found that the district court failed to follow rule 7.2(3) when it heard Willows's objection without first requiring Wessels to carry his burden of proving that his requested fees were reasonable and necessary. We remanded for Wessels to "go forward to prove his fees . . . to meet his burden" and for the district court to make "specific findings regarding the reasonableness of ordinary fees and extraordinary fees granted." On remand, the district court held an evidentiary hearing on the resisted fee application, and Wessels presented his case with the help of counsel.

We find that the district court failed to follow our instructions on remand to require Wessels to prove the reasonableness of his fee request and to make a specific finding that the claimed extraordinary fees were reasonable. Wessels identified seven areas of work performed for Loren's estate that required "additional time": (1) litigation as to the guardianship of the minor child; (2) ownership of farm land interests and farm-related business interests, and sale of personal property/farm real estate; (3) co-executors that resided in three different states; (4) wrongful death litigation; (5) issues as to whether Loren had a valid will; (6) income tax issues; and (7) obtaining information on nine insurance

policies. The district court addressed one of the articulated extraordinary services before summarily concluding, “The other items noted by Wessels all support the fee recovery he seeks.” This does not constitute a specific finding that all claimed extraordinary fees are reasonable.

The district court stated in its ruling after remand that:

Willows has a larger obligation after Wessels specifically and extensively explained the unusual issues with which he had to come to grips . . . than to allege only in general terms without reference to specific services, some of the services Wessels provided were only “ordinary.”

This improperly shifted the burden of proof from Wessels to Willows. Wessels had the burden of proving that a fee allowance should be made. Iowa R. Prob. P. 7.2(3).

Further, we disagree with the district court that Wessels “specifically and extensively explained the unusual issues with which he had to come to grips.” Before the first appeal to this court, Wessels had identified seven areas of work that could be considered extraordinary. This court remanded for Wessels to prove his fees. Thus, this court expected Wessels to go beyond merely enumerating the seven areas requiring extraordinary work. Wessels failed to designate or even estimate the time or expense he spent on any or all of these seven issues. Rather, he testified that his extraordinary fees were all of those left after subtracting the maximum ordinary fees permitted by statute. Wessels’s total fees were more than three times the statutory maximum for ordinary fees.

A review of the record shows that, even after remand, Wessels did not specify which fees represented work on extraordinary matters. Wessels testified by deposition that he was not “making an extraordinary application for any

specific item listed” because it was all for “ordinary work until it’s taken as a conglomerate.” Wessels refused to “pick out any particular provision and say that it’s extraordinary versus ordinary,” claiming that he had “no clue as to what was put forth on . . . specific issues.” Wessels’s interpretation of the relevant code sections was that so long as he provided some extraordinary services, all his fees above the section 633.197 cap became presumptively compensable under section 633.199. This is not how the code sections operate.

Section 633.198 authorizes payment of reasonable attorney fees “as full compensation for all ordinary services.” The fee schedule provided in section 633.197 provides the maximum any attorney can collect on fees for ordinary services, regardless of the amount of time spent to perform such services. However, if an attorney performs “actual necessary and extraordinary” services, compensation will be provided under section 633.199. Section 633.199 does not automatically allow payment of any fees requested by the attorney that exceed the cap set by section 633.197. Rather, section 633.199 provides for the payment of extraordinary fees, fees for non-ordinary services including but not limited to “services in connection with real estate, tax matters, and litigated matters.” “We have defined extraordinary services as those which in character and amount [are] beyond those usually required.” *In re Estate of Mabie*, 401 N.W.2d 29, 31 (Iowa 1987).

Wessels must prove that all fees claimed under section 633.199 are necessary and extraordinary in character. “It is not the role of this court or the district court to divine those services that are extraordinary from an attorney’s itemization of services.” *Id.* at 32. Rule 7.2 “requires an attorney seeking

extraordinary fees to inform the court of . . . the time involved for these matters” *Id.* Wessels failed to provide the district court with a sufficient record on which it could have found that his claimed extraordinary fees were reasonable.

We conclude that the district court did not have an adequate basis to determine whether Wessels’s claimed extraordinary fees were “just and reasonable,” nor did the district court make the required finding. We therefore set aside the district court’s award. Willows conceded at trial that all of the ordinary fees, in the amount of \$20,432.89, a portion of the extraordinary fees, in the amount of \$18,413, and expenses of \$640.50 were warranted. Willows made that concession after a painstaking review of Wessels’s itemization of fees. We accept Willows’s concession and approve those fees and expenses but no others, awarding Wessels a total of \$39,486.39.

IV. Timing of Fee Award

Willows also argues that the district court erred by awarding the entire ordinary fee at this time. He asserts that Wessels’s award should be limited pursuant to Iowa Rule of Probate Procedure 7.2(4) because the estate is still open. Rule 7.2(4) states:

One half of the fees for ordinary services may be paid when the federal estate tax return, if required, and Iowa inheritance tax return, if required, are prepared. When a federal estate tax return is not required, the one-half fee may be paid when the Iowa inheritance tax return is prepared or, when it is not required, when the probate inventory required by the Iowa Probate Code is filed. The remainder of the fees may be paid when the final report is filed and the costs have been paid.

We find that the district court properly awarded attorney fees at this time. Rule 7.2(4) governs the timing of *payment* of attorney fees from the estate.

However, attorney fees may be *awarded* before the final report is filed. “It is customary . . . 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.” *Randeris*, 523 N.W.2d 600, 606 (Iowa Ct. App. 1994). We affirm the district court’s award of ordinary attorney fees.

AFFIRMED AS MODIFIED.