

IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE ESTATE)
OF ARTHUR I. BOLTON,)

Deceased,)

E.A. HICKLIN,)

Appellant,)

and)

JOYCE MATTSON,)

Appellant,)

BRYCE BOLTON and FIRST)
NATIONAL BANK OF)
BURLINGTON,)

Appellees.)

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Appeal from the Iowa District Court for Louisa County
(No. 14,010), R. David Fahey, Judge.

This is an appeal from a remand of a determination of reasonable attorneys fees in a probate action and from a district court judgment which held a check written before the decedent's death but presented to the drawee bank after death void as an inter vivos gift. **AFFIRMED IN PART AND REVERSED IN PART.**

William Matthews of Wapello for appellant Hicklin.

Russell R. Newell of Columbus Junction for appellant Mattson.

Roger A. Huddle of Wapello for Appellee Bolton.

James M. Adams of Burlington for appellee First National Bank.

Considered en banc.

OXBERGER, C.J.

The death of Arthur Bolton gave rise to two separate issues for review. In one dispute, a former attorney for the estate of Arthur Bolton appeals from a district court order awarding him attorney fees lower than his requested compensation. A second dispute presents the question of whether a check written by the deceased and presented for value before his death, but presented to the drawee bank only after his death, is valid as an inter vivos gift. Our review in this equity proceeding is de novo. We affirm in part and reverse in part.

I. Attorney Fees

Bryce and Joyce, brother and sister, were the co-executors of their father's estate until the court found irreconcilable differences between them and appointed the First National Bank as a third co-executor with exclusive authority to proceed with certain probate functions. Hicklin, who until then had been attorney for the estate, relinquished that role and filed a petition for compensation. Bryce contested the order fixing Hicklin's attorney fees. An opinion issued from this court found the record insufficient to determine reasonable fees and remanded the case and ordered Hicklin to file with the district court a report in support of his requested compensation. See In re Estate of Bolton, 403 N.W.2d 40 (Iowa App. 1987). Hicklin complied. The district court awarded him reduced fees. Hicklin appeals.

Hicklin contends that he performed about 75% of the services of estate administration and that his report supports an award of 75% of the amount permitted by Iowa Code section 633.197 plus fees for a number of extraordinary services. He urges that the district court erred in awarding him a reduced amount. Bryce responds that Hicklin's claims are excessive. He urges that Hicklin performed only 50% of the services of estate administration and that items which Hicklin seeks to have qualify as extraordinary are not. The co-executor bank urges affirmance of the trial court order contending that the record supports the ruling of the district court as a reasonable exercise of discretion in the allowance of fees.

The Iowa statutory probate fee is the reasonable value of services rendered. Matter of Estate of Simon, 288 N.W.2d 549, 551 (Iowa 1980). The statutory fee allowed for executors and attorneys in Iowa is not a mandatory fee but a maximum fee for the customary work in estates. Id.

The trial court granted Hicklin the following:

1. \$5,792.00 for ordinary services;
2. \$17,302.00 for extraordinary services;
3. \$788.62 for expenses.

This court in Bolton I, 403 N.W.2d 40 (Iowa App. 1987) remanded with instructions. The opinion directed that: (1) Hicklin was not entitled to fees for his work advocating one executor against the other; (2) Hicklin was

entitled to extraordinary fees for the sale of the residence (4.3 hours at \$75 = \$322.50); (3) Hicklin was not entitled to an additional 1% on the sale of the residence. Bolton, 403 N.W.2d at 47-48. The award for extraordinary services in excess of \$322.50 was vacated and remanded with instructions. Id. at 48. It was determined that Hicklin may have been entitled to extraordinary fees for the preparation of federal estate tax and decedent's income tax returns. Id. If he wished extraordinary fees, Hicklin was directed to prepare a specific report pursuant to Iowa Rule of Probate Procedure 2(c)(1), (2), and (3). Id. Further, the expense award was affirmed (\$445.62) and \$343.00 claimed for legal assistant was set aside. Id.

Upon remand the trial court ordered: \$4,480.00 in ordinary expenses; \$2,550 in extraordinary expenses for federal estate tax work; \$1,305 in extraordinary expenses for income tax preparation; \$322.50 in extraordinary expenses for the sale of the home; and \$445.62 in an expense award. The trial court indicated that not all of the compensation for income tax preparation qualified as extraordinary expenses that some of this work was compensated in the ordinary expense award.

The compensation of an attorney rests in the reasonable discretion of the court. Simon, 288 N.W.2d at 552. The burden is on the attorneys to justify the fee claimed. Matter of Estate of Bruene, 350 N.W.2d 209, 217 (Iowa App.

1984); In re Estate of Myers, 238 Iowa 1103, 1106, 29 N.W.2d 426, 427 (1947).

Our de novo review of the record finds agreement with the trial court's order upon remand. The trial court has followed our directions and properly interpreted our order.

II. Gift

Approximately ten days before his sudden and unexpected death, Arthur Bolton wrote a check for \$20,000 to Joyce with the apparent intent of making an inter vivos gift. Joyce endorsed the check and mailed it to the Old Court Savings and Loan with instructions to use it to establish a certificate of deposit in joint tenancy with her father. The father died before the check was presented to the drawee bank.

The district court ruled that the check is void as an inter vivos gift, and Joyce appeals from that order. She contends that because the check was presented for value before the death of the testator, it is operative and unassailable under the relation-back doctrine.

Bryce and the co-executor respond that the district court correctly ruled that the check was an asset of the estate. They urge that the relation-back doctrine applies only to charitable gifts and that in this case the donor's death prior to the presentment of the check at the drawee bank revokes the attempted gift.

We proceed to analyze the cases cited by the parties in their briefs. In In re Estate of Knapp, 197 Iowa 166, 197 N.W. 22 (1924), the decedent had delivered an instrument in writing to his daughter, Martha A. Brissler, for "The Linden Bank to pay to the order of Martha A. Brissler \$1,000. Due 10 days after my death." (Emphasis added.) We agree with appellant, Joyce Mattson, the very nature of the instrument in Knapp was testamentary and could not have been completed between the parties before the drawer's death.

In the case of In re Estate of McAllister, 214 N.W.2d 142 (Iowa 1974), the decedent had given thirty-three \$3,000 notes to members of his family at various times during the three-year period immediately before his death. Our supreme court held those notes were not binding obligations against the estate on the principle a note executed as a gift is regarded as a promise to make a gift in the future and is not enforceable. It lacks consideration. Id. at 145. McAllister is not on point with the present transaction.

In DePenning v. Bedell, 242 Iowa 102, 110, 44 N.W.2d 385, 390 (1950), the decedent had executed a mortgage to secure three \$3,000 notes given to some of his children. The supreme court held those instruments represented unexecuted gifts. In Latcham v. Latcham, 195 Iowa 221, 224, 191 N.W. 977, 978 (1923), the supreme court held a note by decedent during his lifetime to his wife and payable after his death as being gratuitous, a mere promise

to give money at a future time, and cannot be enforced. As can be readily seen these cases involve notes and not a negotiable check payable on demand. Latcham and DePenning are not in point with the factual situation before us and are not precedent or controlling authority for our determination.

In the case before us, the trial court found Arthur I. Bolton wrote a \$20,000 check payable to his daughter, Joyce Mattson. The check was drawn on Bolton's checking account at the State Bank of Wapello, dated August 28, 1984. The check was mailed to Joyce Mattson in Joppa, Maryland. She received it on or before September 1, 1984. Joyce endorsed the check and mailed it to Old Court Savings & Loan, Inc., with instructions to establish a certificate of deposit in joint tenancy between her and her father. Old Court Savings & Loan, Inc., followed Mrs. Mattson's instructions and established the certificate of deposit jointly in her and her father, the decedent. On September 7, 1984, Arthur Bolton suddenly and unexpectedly died. At the time he wrote the check, Bolton was in good health and did not anticipate imminent death. The check was not presented to the drawee State Bank of Wapello until after Arthur Bolton's death. On September 17, 1984, the bank refused payment in accordance with its normal practice. Upon instructions from the attorney for Bolton's estate, the bank honored the \$20,000 check on November 8, 1984.

The check at issue here is a negotiable instrument as defined by Iowa Code section 554.3104. The relevant portions of that Code section reads as follows:

554.3104 Form of negotiable instruments--"draft"--"check"--"certificate of deposit"--"note."

1. Any writing to be a negotiable instrument within this Article must
 - a. be signed by the maker of drawer; and
 - b. contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and
 - c. be payable on demand or at a definite time; and
 - d. be payable to order or to bearer.
2. A writing which complies with the requirements of this section is
 - * * *
 - b. a "check" if it is a draft drawn on a bank and payable on demand.

The trial court relied, in part, upon Iowa Code section 554.3409 and ruled the State Bank of Wapello, the drawee, should not have honored this check. Section 554.3409(1) reads as follows:

554.3409 Draft not an assignment.

1. A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it.

The State Bank of Wapello is not a party to this litigation and it followed the instructions from the decedent's estate's attorney when it honored the check to Joyce Mattson. We determine whether or not a bank should

or should not honor a check is no criteria to establish if a gift was made. Iowa Code section 554.3409 is not applicable to this situation and is not controlling authority.

The trial court found Arthur Bolton was in good health and did not anticipate imminent death at the time he wrote the check on August 28, 1984. He died suddenly and unexpectedly on September 7, 1984, after Joyce Mattson had endorsed his check and mailed it to Old Court Savings and Loan, Inc. Joyce Mattson placed this check into the streams of commerce before her father's death, in the ordinary course of business.

For these reasons we determine this transaction between Arthur Bolton and his daughter, Joyce Mattson, to be a valid completed gift during his lifetime, or a gift inter vivos, and not a gift in contemplation of death or a gift causa mortis.

AFFIRMED IN PART AND REVERSED IN PART.