

IN THE COURT OF APPEALS OF IOWA

No. 4-199 / 93-0962

IN THE MATTER OF THE ESTATE OF DEAN W. McLAIN,

JEANNE McLAIN HARMS, Executor, and **WILSON, HALL & CRAIG,** Attorneys for Executor,

Appellants,

vs.

TERRY C. MILLER, Conservator for Gertrude D. McLain, and **DEANNA JENNINGS,**

Appellees.

Appeal from the Iowa District Court for Mills County, Glen M. McGee, Judge.

The attorneys for decedent's estate, and the executor of the estate, appeal a judgment of the district court denying their request for attorney fees for services rendered to the estate. **AFFIRMED.**

Patrick J. Craig, Jack A. Hall, and Mitchel T. Behr of Wilson, Hall & Craig, Eldora, for appellants.

Mark D. Swanson of the Swanson Law Firm, Red Oak, and Gary T. Gee, Shenandoah, for appellees.

Heard by Donielson, C.J., and Sackett and Huitink, JJ.

DONIELSON, C.J.

Dean McLain died on November 26, 1991. Surviving him were his wife, Gertrude, age eighty-two, and three children, Evelyn Jeanne McLain Harms, age fifty-six, Deanna M. Jennings, age fifty-three, and Jack D. McLain, age fifty. Pursuant to the will, Gertrude was appointed executor of the estate. N. Michael D'Angelo of Oakland, Iowa was appointed attorney for the estate. Gertrude subsequently discharged D'Angelo and designated Patrick Craig of Eldora as attorney.

On October 16, 1992, upon Deanna's petition, the district court removed Gertrude as executor and appointed Jeanne Harms in her place. Craig was renamed attorney for the estate. Craig and his law firm were also appointed as attorneys for Gertrude's conservator. However, on January 19, 1993, Terry Miller was appointed conservator for Gertrude, and Gary Gee was appointed guardian for the conservatorship. On March 31, 1992, Mark Swanson entered an appearance on behalf of Deanna as a beneficiary under the will and in Gertrude's conservatorship. Harms, as executor, and Craig objected to Swanson's participation, arguing because Deanna was a specific legatee under the will and had received all that she was entitled to, she had no legal interest in the residual estate.

On April 24, 1993, Craig, on behalf of the law firm, filed an application for extraordinary fees and expenses requesting $26,536 for extraordinary services, $2911 for

out-of-pocket expenses for the estate, and $18,618 for ordinary services as provided for in Iowa Code section 633.198 (1993). On May 18, 1993, Miller, as Gertrude's conservator, filed a combined objection to the application for fees. Swanson, on Deanna's behalf, also objected to the fee request.

At a hearing on the fee request, Craig testified he and his law firm incurred extraordinary fees because the original attorney for the estate, D'Angelo, was not cooperative in turning over information. Craig stated, as an example, that he had to trace all the 1991 grain sales from the McLain farm since incomplete records were kept. Craig also testified there was some concern someone had embezzled from the McLain holdings. He also stated extraordinary services were involved regarding the federal estate tax return and the making of a Q-TIP election under section 2056(b)(7) of the Internal Revenue Code. Craig testified he undertook a significant amount of work to fend off an IRS audit of McLain's tax returns. Jack Hall, Craig's partner, testified that there was also litigation involved in a number of matters.

The district court, after careful consideration, noted it could not in good conscience approve the request for fees as fair and equitable, even when Gertrude, Jack, and Jeanne consented to such an allowance. The district court noted Jeanne was left out of the will. The district court found this created considerable discord and suspicion,

which engendered extra work in the guardianship and conservatorship. The district court questioned whether the resulting agitation was completely necessary. The district court also found the allegations of embezzlement groundless, and the claims of extraordinary expenses based on a federal tax audit were without merit since the returns were accepted as filed. The district court also frowned upon the law firm obtaining an ex parte order for fees relating to the firm's work for the conservatorship from a judge outside the district where the probate was filed. Jeanne McLain Harms and the law firm have appealed.

Harms and the law firm assert the district court placed too much emphasis on the fees the law firm received for work on the conservatorship. They further maintain Deanna had no legal interest in the estate once she received her share under the will. They insist Deanna, since she was not an interested party, should not have been allowed to participate in the hearing. Finally, Harms and the law firm argue the district court abused its discretion in disallowing all the fees, rather than simply reducing the amount. The law firm insists there was no duplication of services between the conservatorship and the probated estate.

An application for attorney fees and expenses, since it does not fall within the category of actions triable at law in probate, is a proceeding in equity. Iowa Code § 633.33 (1993). We review proceedings in equity de novo.

Iowa R. App. P. 4. We give weight to the findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Iowa's probate code gives the trial court discretion in allowing extraordinary attorney fees and expenses. Iowa Code §§ 633.199 ("Such further allowances as are just and reasonable may be made by the court"). Iowa Rule of Probate 2 was adopted in 1979 to assist attorneys and Iowa courts in understanding the required showing of necessity in requests for extraordinary fees. Matter of the Estate of Mabie, 401 N.W.2d 29, 32 (Iowa 1987). The supreme court stated:

> Rule 2 requires an attorney seeking extraordinary fees to inform the court of the necessity of the extra services, the time involved for these matters and the responsibilities assumed in performing extra services. This in turn allows the court to make an informed decision regarding the necessity and value of the attorney's claimed extra services to the estate. The rule also states that "in appropriate cases" the attorney shall explain in the written statement the importance of the services to the estate and the result obtained, or, more succinctly stated, the benefit to the estate of the extra service.

Id.

The application submitted in this case contains a general statement of the litigation, tax, and other matters which the attorneys argue required extraordinary services. The application also includes an itemization of the time spent. We do not find sufficient justification in the application for an award of extraordinary fees. See Bass

v. Bass, 196 N.W.2d 433, 435 (Iowa 1972) (placing the burden on the claimant to show the necessity and value to the estate of the services alleged to have been rendered). We conclude the law firm has not complied with Iowa Rule of Probate 2 in providing support for its claimed extraordinary fees. "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." Mabie, 401 N.W.2d at 32. We therefore affirm the district court's denial of the application for extraordinary fees and expenses. Since our determination of this issue is dispositive, we do not address the other issues raised by appellants.

AFFIRMED.