

IN THE COURT OF APPEALS OF IOWA

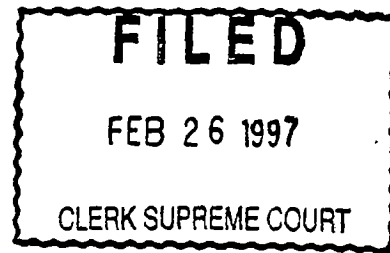
No. 6-698 / 95-1910

000370

**IN THE MATTER OF THE ESTATE OF
GERTRUDE THORNTON, Deceased,**

ROGER THORNTON,

Appellant.



Appeal from the Iowa District Court for Jasper County, Donna L. Paulson,
Judge.

Roger Thornton appeals a district court order approving the final report filed
in Gertrude Thornton's estate. **AFFIRMED AS MODIFIED.**

Joseph G. Bertogli, Des Moines, for appellant.

Gilbert R. Caldwell III of Caldwell, Caldwell & Caldwell, Newton, for
appellee Estate.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

SACKETT, P.J.

Plaintiff-appellant Roger Thornton appeals challenging the trial court's award of ordinary and extraordinary fees to Caldwell, Caldwell and Caldwell, the attorney for the executors of the estate of Gertrude Thornton. We affirm as modified.

A hearing on allowance of attorney fees stands in equity and thus is reviewable de novo. *In re Estate of Bolton*, 403 N.W.2d 40, 42 (Iowa App. 1987); *In re Estate of Bruene*, 350 N.W.2d 209, 211 (Iowa App. 1984).

Gertrude died in January 1992. Roger is one of her five children, who also are the five beneficiaries under her will. Harley Thornton, another of Gertrude's sons, and an unrelated person who subsequently withdrew were named executors. James Hicks was originally hired by the executors as attorney for the estate in February 1992. Hicks withdrew in July 1993 and the Caldwell firm was named attorney for the estate.

The estate was valued in the probate inventory at \$122,255.23. The primary asset was a 174-acre farm in Jasper and Marion counties initially valued in the probate inventory at \$71,192. The farm was offered at public auction and a bid of \$405 per acre was made by John Poole and Dan Birkenholtz. At a hearing seeking court approval, Roger offered \$410 per acre. His bid was rejected by the trial court and the sale for \$405 per acre was approved. Roger appealed and this court found the trial court abused its discretion in confirming the sale and remanded with instruction.

As a result, the sale was approved at \$510 per acre. Roger's attorney in the appeal withdrew and filed an attorney fee lien against Roger's interest in the estate for 41.4 hours of work on the appeal totaling \$4140.

Caldwell, Caldwell and Caldwell sought to close the estate and requested attorney fees of \$15,888, including charges for representing the estate in the appeal. The request included an itemized bill of time spent. All of the heirs but Roger agreed to the fees being paid. Roger objected contending, among other things, Hicks received a full statutory fee and the Caldwell firm should not receive any ordinary fees. Roger contended that he was successful in his appeal, and the Caldwell firm should pay his attorney on appeal, and their fees should not be paid. The trial court awarded \$15,888 as extraordinary fees to the Caldwell firm. This appeal follows.

Roger first contends his share of the estate should not be charged with attorney fees connected with the appeal because the estate's position on appeal was contrary to his position and his position prevailed. He further advances the estate should pay the fees of his attorney who had the trial court reversed on appeal because the result of the appeal was that the estate received more per acre for the farm.

We agree with Roger there is authority that suggests at times the estate is not justified in incurring attorney fees where there is a conflict between an heir and the estate. See generally *In re Estate of Law*, 253 Iowa 599, 603, 113 N.W.2d 233, 235 (1962); *Estate of Roggentien*, 445 N.W.2d 388, 389 (Iowa App. 1989). The estate

benefitted from services rendered in filing the appeal to the extent the sale price for the real estate was increased.

There is no definite rule when an executor or administrator can obligate an estate to pay attorney fees and expenses connected with litigation and the circumstances of each case need to be assessed to determine if the fees are reasonable and justified. *See Law*, 253 Iowa at 602, 113 N.W.2d at 234; *Roggentien*, 445 N.W.2d at 390. It is best to resolve the issue before the fees for litigation are incurred.

For an attorney to be paid a fee, it is generally necessary to show a benefit to the heirs and just cause for pursuing the matter. *Roggentien*, 445 N.W.2d at 390.

This court found no justification in refusing the \$410 per acre offer. *Thornton v. Estate of Thornton*, 531 N.W.2d 651 (Iowa App. 1995). The estate's advocating for the \$405 per acre offer on appeal was adverse to Roger's position. The other heirs do not challenge the fees. Roger's share of the estate should not be charged with one-fifth of the charges made by the Caldwell firm to handle the appeal.

Roger hired his own attorney on the appeal. He contends because the result of the appeal benefitted the estate there is a basis to charge part or all of the fee for his attorney to all of the heirs. The estate contends there is not. Both sides rely on *In re Estate of Myers*, 238 Iowa 1103, 29 N.W.2d 426 (1947) to support their positions. *Myers* does suggest that an attorney representing an heir who advocates a

position that benefits an estate should have some compensation from the estate for work done. *Id.*, 238 Iowa at 1110, 29 N.W.2d at 429. However, the attorney in *Myers* was authorized to act by the probate court. *See id.* Roger's attorney had no authority from the probate court to act on behalf of the estate. His fees are not the estate's responsibility.

Roger next contends to pay the Caldwell firm what it requested will result in the executor paying in excess of the maximum statutory fee for ordinary services and the Caldwell firm did not support the claim for extraordinary fees.

Fees for ordinary services rendered to an estate are fixed based on reasonable services rendered, but not in excess of the amount allowed by statute. *Matter of Estate of Simon*, 288 N.W.2d 549, 551 (Iowa 1980). Fees for ordinary legal services should not be assessed in excess of the statutory maximum, even though the ordinary legal services will be performed by two separate attorneys. *Bolton*, 403 N.W.2d at 43.

The award of attorney fees in probate cases is governed by Iowa Code sections 633.197 to 633.199. Iowa Code section 633.197 (1993) provides:

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 all 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.

For purposes of this section, the gross assets of the estate shall not include life insurance proceeds, unless payable to the decedent's estate.

We agree with Roger the estate should pay no more for ordinary services than the statutes provide. Hicks' fee was set at \$2500. He was paid \$2300.¹ The probate inventory was amended after Hicks withdrew. The allowable statutory fee considering the amended inventory was \$2894.06. Consequently, Hicks received \$594 less than the allowable statutory fee.

The trial court considered items which should come under the ordinary fee limitation for extraordinary fees. Our review convinces us that the ordinary services included in the extraordinary fee request totaled \$1220. We subtract from this amount the \$594 and modify to reduce Cadwell's fee by \$626 which represents charges in excess of the maximum for ordinary services.

Roger also contends the extraordinary fees were not justified. Iowa Code section 633.198 (1995) provides:

There shall also be allowed and taxed as part of the costs of administration of estates as an attorney's fee for the personal representative's attorney, such reasonable fee as may be determined by the court, for services rendered, but not in excess of the schedule of fees herein provided for personal representatives.

¹ On September 11, 1992, Hicks was paid \$1250; and on September 4, 1993, he was paid \$1050.

A claim for extraordinary fees comes under Iowa Code section 633.199, which states:

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

Iowa Rule of Probate Procedure 2(c) provides:

(c) 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 (1) the necessity for such expenses or services, (2) the responsibilities assumed, and (3) 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.

See also Matter of Estate of Mabie, 401 N.W.2d 29, 30-31 (Iowa 1987); *Roggentien*, 445 N.W.2d at 390-91; *Bolton*, 403 N.W.2d at 47.

In endeavoring to ascertain a reasonable legal fee, relevant factors include 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, responsibility assumed, results obtained, and the experience of the attorney. *Bruene*, 350 N.W.2d at 217 (quoting *Glynn v. Cascade State Bank*, 227 Iowa 932, 289 N.W.

722 (1940)). "To a considerable extent the compensation of an attorney rests in the discretion of the court." *Id.* Yet, this must be a reasonable degree of discretion. *Id.*

The question we need address, therefore, is whether the trial judge abused her discretion in setting the extraordinary fees. We do not find an abuse of discretion.

We modify to decrease the amount paid to the Caldwell firm. We find the fees associated with the appeal of *Thornton v. Estate of Thornton*, 531 N.W.2d 651 (Iowa App. 1995), including consideration of the petition for rehearing, are \$6075. We have found that charges in excess of the maximum statutory fee are \$626. We have found Roger does not have to pay his share of either amount. Accordingly, the report is amended to decrease the amount payable to Caldwell by \$1340 and increase the amount payable to Roger by \$1340.

Other issues raised by Roger not discussed in this opinion have been found to be without merit or not timely raised.

We have considered Caldwell's request for attorney fees on appeal and award none. Costs on appeal shall be paid by the estate and shall be deducted equally from the share going to each heir.

AFFIRMED AS MODIFIED.