

IN THE COURT OF APPEALS OF IOWA

No. 1-380 / 90-1180

FILED

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CLERK SUPREME COURT

IN THE MATTER OF THE ESTATE OF GAYL W. WESTPHAL, Deceased.

GAYL BRICE WESTPHAL, WENDY JONES, KELLY OTTO WESTPHAL,
LESLIE BROIHIER, ANGELA PURCELL, DANA WESTPHAL, and
JACQUE TERRY,

683

Objectors-Appellants,

vs.

NORTHWEST BANK AND TRUST CO.,

Executor-Appellee.

Appeal from the Iowa District Court for Scott County,
Max R. Werling, Judge.

Objectors appeal a district court judgment substantially approving the final report by Northwest and rejecting the objectors' claim that Northwest mismanaged the estate. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

Jack E. Dusthimer of Carlin, Hellstrom & Bittner,
Davenport, for appellants.

Joe B. Slavens, Davenport, for appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

Gayl W. Westphal died in January 1981. Pursuant to his will, Northwest Bank & Trust Co. was named executor. Northwest filed a petition for probate of the will in February 1981.

In November 1981 the estate's preliminary tax report was filed indicating a total value of the estate to be approximately \$1 million. The major assets of the estate consisted of three parcels of commercial real estate.

Real estate values declined sharply after the decedent's death. Northwest was unable to sell the real estate. In order to pay certain expenses of the estate, Northwest filed an application to borrow money in 1982. Northwest subsequently loaned the estate \$55,000 and took a mortgage on estate property as security.

In 1987 and 1988 Northwest received court approval to sell the various parcels of real estate. The proceeds from the sales were substantially less than the 1981 appraised values.

In May 1989 Northwest filed its final report and application for discharge. Northwest also sought fees for its work in handling the estate. The beneficiaries filed an objection to the final report, a petition making claim against Northwest for mismanagement, and a request for the fees to be reduced and a surcharge entered against Northwest. The beneficiaries claimed Northwest failed to maximize the return on the sale of the estate's property.

The district court substantially approved the final report but denied Northwest's request for additional ordinary fees.

The beneficiaries appeal contending the district court erred: (1) in ratifying the fees paid Northwest and its attorneys, (2) in determining Northwest should not be held liable for self-dealing, and (3) in failing to impose a surcharge on Northwest for the depreciation in the value of the estate. Northwest's cross-appeal challenging the district court's denial of additional ordinary fees was dismissed as untimely. Northwest seeks appellate attorney fees.

I. Scope of Review. In this equity action, our review is de novo. Iowa Code § 633.33 (1991); Iowa R. App. P. 4. We give weight to the trial court's fact findings, especially on credibility, although we are not bound by them. In re Estate of Simon, 288 N.W.2d 549, 551 (Iowa 1980).

II. Executor and Attorney Fees. Personal representatives and their attorneys are entitled to the reasonable value of their ordinary services as may be determined by the court, not in excess, however, of the percentages specified in Iowa Code section 633.197. In determining a reasonable amount for a legal fee, relevant factors a probate court may consider include, among others: the size of the estate, the time necessarily spent by the attorney, the nature and extent of the service, the

amount involved, the difficulty of handling, the results obtained, and the experience of the attorney. In re Estate of Bolton, 403 N.W.2d 43-44 (Iowa App. 1987). To a considerable extent, the compensation of an attorney rests in the discretion of the court. Id. at 44.

In the present case, the maximum permissible ordinary fees would have been \$18,302.29. Northwest paid itself \$10,266.60 in fees, minus \$875 which the trial court ordered reimbursed to the estate. The record reflects the size of the estate and the responsibilities assumed by Northwest were substantial. Northwest was required to manage and sell three different parcels of property. The prevailing economic conditions rendered the estate difficult to administer. We determine the trial court did not abuse its discretion in ratifying the fees paid Northwest and its attorneys.

III. Self-Dealing. On September 7, 1982, Northwest filled an application requesting authority to borrow money to pay debts, taxes, and expenses of administration, including executor and attorney fees. Northwest asked the court for authority "to arrange a \$50,000.00 credit line with Northwest Bank & Trust Company with such rates, maturities, renewals and security as the Executor shall deem advisable." The trial court authorized Northwest to

borrow money in the maximum aggregate amount of \$50,000.00 with and from Northwest Bank & Trust Company or any other lender, either commercial or private, deemed suitable by the Executor, with such rates, maturities, renewal terms and security as the executor shall deem to be commercially

competitive and reasonable in circumstances, and to use the funds so obtained to the extent necessary to pay Estate debts, taxes, interest, charges and expenses of administration, including the fees of the Executor and its attorneys, as the same become due.

In October 1986, Northwest loaned the estate \$55,000 and took a mortgage on estate property as security. Objectors claim Northwest's actions constituted self-dealing and were in violation of Iowa Code sections 633.155, 633.160 and 633.388. We disagree. Objectors admit they received ten days' notice of Northwest's application to borrow money. The trial court specifically authorized Northwest to borrow from itself. A portion of the money borrowed was applied to outstanding tax debts, thus avoiding additional tax liability. We conclude these transactions do not reach the level of self-dealing. We will, however, again review this transaction in section IV of this opinion.

IV. Surcharge. Objectors contend the trial court should have surcharged Northwest for the depreciation in the value of the estate. Objectors primarily complain Northwest waited too long to sell the estate property, and as a result, it failed to maximize the return.

The general rule concerning a fiduciary who retains property of the estate instead of selling it was noted by the Iowa Supreme Court in In re Estate of Ring, 132 Iowa 216, 190 N.W.2d 710 (1906). The court stated:

Generally speaking, an administrator is not held personally liable where he has acted in good faith and with ordinary care and prudence in the

management of an estate, and he is not liable for loss or depreciation in the value of the property in the absence of a showing of bad faith or negligence.

Id. at 222, 190 N.W.2d at 713. "If an executor were bound at his peril to guard against [fluctuation in market values], there would be as much reason in holding him to a liability for selling too soon as there would be for having held too long." In re Estate of Fisher, 128 Iowa 626, 630, 104 N.W. 1023, 1024 (1905).

In the present case the trial court noted:

It is easy, in the clear light of hindsight, to see the problems in this estate were that at the time of Decedent's death real estate values were still on the rise but sharply declined shortly thereafter. The properties held by the decedent were speculative, development-type properties; and the appraisers felt they were worth a great deal of money. Meetings were held between the bank and the heirs and various real estate sales companies Acceptable offers were not found. . . . The problems in this estate were created by the economy, not by the executor or its attorneys.

We agree with the trial court that any loss to this estate caused by the economy should not be surcharged to Northwest. We disagree, however, that the estate's problems were solely created by the economy and declining land values.

The properties were initially listed at their appraised values of approximately \$1,411,000. They eventually sold for \$336,058.98. Objectors claim the properties could have been sold at a profit during the first eight years of administration if they had been marketed and maintained

properly. Although objectors assert the listing prices were too high, thereby preventing lower offers, the record reveals objectors felt the estate was worth the appraised values. In addition, objectors rejected certain offers brought to their attention labeling them as "ridiculous."

The record also reveals, however, Northwest allowed two property listings to expire for approximately two years and one listing to expire for one year. In addition, the evidence shows the properties were not properly maintained. The grounds were unkept, and trash was allowed to accumulate inside the buildings. There was a hole in the roof of one of the buildings. Exterior door locks did not work, thus allowing vagrants to take residence in the buildings.

We determine Northwest failed to take appropriate steps to make the property rentable or to sell the property before its value further deteriorated because of vandalism and a lack of maintenance. As a result of Northwest's negligent inaction, assets of the estate depreciated in value. A surcharge for negligence in marketing and maintaining this real estate is justified. See In re Estate of Thomas, 454 N.W.2d 66, 68-69 (Iowa App. 1990). The record is insufficient to determine the surcharge that should be imposed. We reverse this issue and remand for further hearing to determine the resulting loss in value to the estate and the appropriate surcharge. We do not retain jurisdiction.

As previously discussed in section III, in September 1982 the court authorized Northwest to "borrow money in the maximum aggregate amount of \$50,000.00." (Emphasis added.) Northwest exceeded its authority and borrowed \$55,000. Northwest's deliberate action constituted a breach in its fiduciary duty and shall be considered by the trial court in determining the appropriate surcharge.

V. Appellate Attorney Fees. Northwest seeks fees and expenses for this appeal and for continuing the administration of the estate during the appeal. We deny the requested fees and expenses.

VI. Conclusion. We affirm the fees paid Northwest and its attorneys. We affirm Northwest should not held liable for self-dealing. We reverse on the surcharge issue and remand for further hearing to determine the appropriate surcharge. We do not retain jurisdiction. Northwest's request for fees and expenses on appeal is denied.

Costs of this appeal are charged one-half to appellee and one-half to appellants.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.