FILED
AUG 27 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-222 / 91-1079

IN THE MATTER OF THE ESTATE OF MILO M. BRADY, Deceased,

DAVENPORT BANK AND TRUST COMPANY, Executor,

Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge

The executor appeals a district court order denying its March 1991 application for additional attorney fees. **AFFIRMED.**

Jeffrey S. Bittner of Carlin, Hellstrom & Bittner, Davenport, for appellant.

Herbert M. Spector of Spector, Tappa & Nathan, Rock Island, Illinois, for appellee Susan Ryerson.

Thomas J. Pastrnak of Heninger & Heninger, P.C., Davenport, for appellee guardian ad litem for unborn children of Susan Ryerson.

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

OXBERGER, C.J.

This case is another in a series of cases concerning the estate of Milo Brady. Previous appeals resolved questions concerning the distribution of certain assets of the deceased and the admission of a lost will into probate. This case, though, concerns an award of ordinary and extraordinary fees to the executor's attorneys.

In May 1987, the executor, Davenport Bank & Trust Company, filed an application for permission to pay debts and expenses. The executor requested, inter alia, permission to pay attorney fees incurred by Michael Bush for the executor while he was a member of the Walton, Creen & Bush Law Firm. Bush currently is with the Carlin Law Firm. In October 1987, the district court determined that attorney fees should await the outcome of the appeal.

In July 1989, the executor again made an application for executor's and attorney fees. This request for attorney fees for Michael Bush did not include fees for work he did while with the Walton, Creen & Bush Law Firm.

On October 19, 1989, the district court entered its order on fees concerning the applications of the executor and its attorneys. As to attorney fees, the court allowed ordinary fees in the sum of $17,777.46. The court then stated, "The extraordinary fees and expenses which are allowed are $31,768.91. The fees of attorney Carlin and Bush are approved as paid. It is, therefore, ordered that the executor is authorized . . . to pay its attorneys the

sum of $17,777.46 for ordinary fees and expenses and an additional sum of $31,768.91 for extraordinary fees and expenses." Neither the executor nor the attorneys filed a timely motion to amend pursuant to rule 179(b) nor a notice of appeal from the October 1989 order regarding Bush's earlier fees.

On December 13, 1989, Jeffrey Bittner, attorney for the Executor, corresponded with attorneys John Flynn and Harold Spector regarding a nunc pro tunc order. However, the application was not filed until March 13, 1991. The executor stated that its July 1989 application for fees was in error since it did not include a bill of services rendered by Bush while a member of the law firm of Walton, Creen & Bush. In May 1991, the district court denied the executor's request for fees. The court determined that Iowa Rule of Civil Procedure 253 prevented it from granting the fee application since the executor's request was filed more than one year after entry of the initial order permitting attorney fees. The executor has filed this appeal. We affirm.

Scope of Review

Appellants request the issue be reviewed de novo, as an application for an order nunc pro tunc in equity. However, an application for an order nunc pro tunc was never filed. Only an application for fees and a motion to amend or modify the court's order were filed. Thus, this is an action at

law and our scope of review is for correction of errors at law. Iowa R. App. P. 4. See Hastings v. Espinosa,. 340 N.W.2d 603, 607 (Iowa App. 1983).

Appellants request this court review the propriety of the trial court's failure to apply the law regarding an application for an order nunc pro tunc. Once again, appellants did not file such an application and we do not consider this issue. It is not the province of the appellate courts to review the law regarding motions never filed for consideration by the trial court, nor, in fact ever filed at all. We are not a court of original jurisdiction, but an appellate court.

Iowa Rule of Civil Procedure 252 permits the court, upon timely notice, to correct, vacate, or modify a final order for specifically delineated reasons. Iowa Rule of Civil Procedure 253 states "A petition for relief under R.C.P. must be filed in the original action within one year after the rendition of the judgment or order involved."

An order approving executor and attorney fees is a final order. In re De Penning's Estate, 58 N.W.2d 9, 14 (Iowa 1953). Iowa Rule of Civil Procedure 253 prevents a party having notice of that hearing from requesting the order be vacated or modified more than one year after entry of the order. Id. at 15.

In this case, a hearing was held on the Executor's application for allowance of fees on August 9, 1989. The court filed its order on October 19, 1989, making findings

of fact and ordering fees paid. On March 13, 1991, eighteen months after entry of the final order, the Executor filed an application to include fees for services rendered in 1986. Judge Sohr's order approving executor and attorney fees was a final order. Thus, the application is barred, pursuant to Iowa Rule of Civil Procedure 253, since it was not filed until eighteen months after the final order was issued.

We note the parties had knowledge of the unpaid fees in December 1989, fourteen months prior to filing the application.

We affirm the decision of the trial court.

AFFIRMED.

Donielson, J., concurs; Sackett, J., specially concurs without opinion.