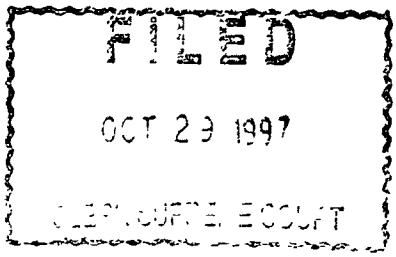
IN THE COURT OF APPEALS OF IOWA

No. 7-370 / 96-1443

000133



IN THE MATTER OF THE ESTATE OF LESLIE A. DUTCHER, Deceased,

ROGER DUTCHER and PHYLLIS DUTCHER,

Appellants.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke and Allan L. Goode, Judges.

Roger and Phyllis Dutcher appeal various district court rulings setting executor and attorney fees and rulings appointing executors and trustees in a probate action. **AFFIRMED IN PART; MODIFIED IN PART; AND REVERSED IN PART AND REMANDED.**

George S. Eichhorn of Eichhorn Law Office, Stratford, and Keith Ferguson of Ferguson Law Office, Dayton, for appellants.

Patrick B. Chambers, Webster City, for appellees Teresa Bergeson and Connie Tolle, executors.

Heard by Sackett, P.J., and Vogel and Mahan, JJ.

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SACKETT, P.J.

In this appeal, two heirs of Leslie A. Dutcher, his son Roger Dutcher and his granddaughter Phyllis Dutcher, challenge court-ordered executor fees, court-ordered extraordinary attorney fees, and the appointment of a noncorporate executor and trustee. The estate requests this court to award appellate attorney fees. We affirm in part, modify in part, and reverse in part and remand.

Leslie died testate on December 16, 1989. His wife Nettie M. Dutcher, now deceased,[1] survived him. He was also survived by two sons. His son Roger, one of the objectors, has four children including Phyllis, the second objector. His son Charles has two daughters, Teresa Bergeson and Connie Tolle, who currently serve as executors and trustees.

Leslie's will gave Nettie his personal property if she survived and provided his real estate go to a trust. Basically, the will directed the trustee to pay income to Nettie during her lifetime. Then the income was to go to Leslie's sons, Roger and Charles. On the death of either of them, the income was to go to the sons' surviving children. The Iowa State Bank and Trust Company of Dayton, Iowa, was named trustee. The Iowa State Bank and Trust Company of Dayton, Iowa, was no longer in operation at the time of Leslie's death.

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[1] Nettie died on September 1, 1994.

After Leslie's death, Nettie filed an application to have herself appointed trustee and executor. She was appointed. A probate inventory was filed showing the estate before debts, but excluding one-half of the value of joint tenancy property held with Nettie, as $575,393.81.

I. Ordinary Attorney Fees. On March 19, 1991, Nettie waived fees as executor and asked the court to fix the fees of her attorney. On the same date, ordinary attorney fees were set in the amount of $11,647.88.

The objectors' appellate brief contends the gross estate for the purpose of computing the maximum fee allowed by statute was not properly calculated. This issue was subsequently withdrawn and will not be addresed.

The objectors advance a number of other objections to the attorney fees, most directed to the exceptionally long time it took to probate Leslie's estate. They have failed to show where the numerous objections they raise here were raised in the district court. We do not condone the lengthy probate; but on the record before us, we affirm the award of $11,647.88 in ordinary attorney fees for the attorney for the executor.

II. Appointment of Substitute Executors and Trustees. On September 28, 1994, following Nettie's death, Teresa Bergeson and Connie Tolle, decedent's granddaughters and the only children of decedent's son Charles, were named as substituted and successor executors. The current objectors, Roger and Phyllis, asked

for their removal. A hearing was held. The objectors appeared. The court refused to remove the executors in an order dated January 12, 1995 and mailed to the parties on January 18, 1995. No appeal was taken from this order within thirty days of its issuance. This appeal was not filed until August 12, 1996.

Iowa Code section 633.36 provides that "[a]ll orders and decrees of the court sitting in probate are final decrees as to the parties having notice and those who have appeared without notice." *See In re Estate of Myers*, 269 N.W.2d 127, 128 (Iowa 1978); *In re Estate of Jarvis*, 185 N.W.2d 753, 756 (Iowa 1971). No appeal being taken within thirty days of the order appointing the administrators, we are without jurisdiction to entertain this issue on appeal. *See* Iowa R. App. P. 5(a); *Gordon v. Wright County Bd. of Supervisors*, 320 N.W.2d 565, 567 (Iowa 1982).

The objectors in objecting to the final report questioned whether the real estate was transferred to the trust and objected to the trustees continuing in that capacity. The district court did not specifically address these objections. The record before us is not sufficient for us to determine whether these challenges are valid but they need to be resolved. We remand to the district court to consider these challenges. We do not retain jurisdiction.

III. Executor Fees. On June 14, 1996, the court entered an order fixing the fees of the executors Teresa Bergeson and Connie Tolle in the amount of $11,627.88. On July 26, 1996, the court entered a second order nunc pro tunc fixing the fees of the executors in the amount of $10,000.

The objectors first contend there should not have been two executor fees set. The executors' brief advances they never received a copy of the June 14, 1996 order and that is the reason they got the July 26, 1996 order. The executors admit the orders are duplicate orders though they are for different amounts. The executors' brief advances they intend only to justify the larger amount. We therefore modify to strike the order awarding the executors $10,000 entered on July 26, 1996.

We look to the objectors' challenge to the $11,627.88 fee for the executors. Their appellate brief first contends the gross estate for the purpose of computing the maximum fee allowed by statute was not properly calculated. This issue has subsequently been withdrawn from our consideration. We find it unnecessary to address it.

On June 14, 1996, on an unverified application of the executors, signed not by the executors but by the attorney for the estate, the executors fees were set. Every application requesting compensation for a fiduciary should be verified. *See* Iowa R. Prob. P. 2. This issue, however, was not raised in the trial court and will not be considered on appeal.

The objectors next contend that because one-half of the estate work had been completed before these executors were appointed, they should not receive a full fee but rather should have no more than one-half the maximum fee allowed by statute. They also object to the fee application and the fact fees were fixed without notice.

On May 29, 1996, objector Phyllis filed a request for notice of time and place of hearing under Iowa Code section 633.41. We agree that after Phyllis filed a request for notice she should have been notified of the fee application. This challenge has been rendered moot because Phyllis had an opportunity to object to the issue in the final report.

The objectors further contend it may be appropriate to penalize the fiduciaries under Iowa Code section 633.162 (1995), though they do not say for what reason or how.

The current executors have not served through the entire estate proceeding. Nettie, the first executor, waived her fees. We agree with the objectors the current executors fees should be no more than one-half the statutory maximum. We reduce the executors fees to $5813.94.

IV. Extraordinary Attorney Fees. On June 14, 1997, the court granted the attorney for the estate $8397.52 in extraordinary attorney fees. The objectors contend there was no compliance with Iowa Code section 633.199 (1995) or Iowa Supreme Court Probate Rule 2(c). They further contend the way the estate was processed does not justify an award of an extraordinary fee.

A hearing on allowance of attorney fees stands in equity and thus is reviewable de novo. *Estate of Simon*, 288 N.W.2d at 551; *Estate of Bass v. Bass*, 196 N.W.2d 433, 435 (Iowa 1972).

Iowa Rule of Probate Procedure 2(c) provides:

> (c) When an allowance for extraordinary expenses or services is sought pursuant to section 633.199, The Code, 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.

The statutory fee allowed executors and attorneys in Iowa is not a mandatory fee, but a maximum fee for customary work in estates. *In re Estate of Simon*, 288 N.W.2d 549, 551 (Iowa 1980).

In endeavoring to ascertain a reasonable legal fee, relevant factors include the time necessarily spent by the attorney, the nature and extent of the services, the amount involved, the difficulty of handling and the importance of the issues, responsibility assumed, results obtained, and the experience of the attorney. "To a considerable extent the compensation of an attorney rests in the discretion of the court. Yet, as stated, this must be a reasonable degree of discretion." *Estate of Bolton*, 403 N.W.2d 40, 47 (Iowa App. 1987) (quoting *Glynn v. Cascade State Bank*, 227 Iowa 932, 289 N.W. 722 (1940)); *In re Estate of Bruene*, 350 N.W.2d 209, 217 (Iowa App. 1984).

Iowa Code section 633.199 (1997) provides the following as to fees above the statutory maximum:

> 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.

These sections are founded on quantum meruit; personal representatives and their attorneys are entitled to the reasonable value of their ordinary services not exceeding the specified percentages, and to the reasonable value of their extraordinary services, if any. *Estate of Simon*, 288 N.W.2d at 550; *In re Estate of Engelkes*, 256 Iowa 213, 218-19, 127 N.W.2d 111, 114 (1964); *Glynn v. Cascade State Bank*, 227 Iowa 932, 937-38, 289 N.W. 722, 724-25 (1940).

Attached to the application for extraordinary fees is a listing of hours spent on the entire estate. No attempt was made to separate the hours claimed to be spent on services qualifying for extraordinary fees. The attorney for the executor advanced on oral argument it is the court's responsibility to sort it out. We strongly disagree. The hours listed were multiplied by $105 an hour for a total of $20,045.40. The ordinary fees ordered of $11,647.88 were subtracted to arrive at $8397.52, the amount claimed as extraordinary fees.

In *Bolton*, we refused to find a computation that entered time spent and subtracted the maximum statutory fee received to be a sufficient application to justify

the allowance of extraordinary fees. *Estate of Bolton*, 403 N.W.2d at 46-47. The application for extraordinary fees failing to comply with Iowa Rule of Probate Procedure 2(c), we vacate the order fixing extraordinary fees. The attorney for the executor shall receive no more than $11,647.88.

The executors and attorney request attorney and executors fees for time spent on appeal. They cite no authority supporting their request. We deny their application for fees and expenses.

AFFIRMED IN PART; MODIFIED IN PART; AND REVERSED IN PART AND REMANDED.