IN THE COURT OF APPEALS OF IOWA

No. 1-432 / 10-1882
Filed August 10, 2011

IN RE ESTATE OF FREDERICK R. HORNE, III, Deceased.

CARL N. HORNE and JENNIFER S. SIECK, Personal Representatives.

U.S. BANK NATIONAL ASSOCIATION,
Intervenor-Appellant,

vs.

LOCHER PAVELKA DOSTAL BRADDY & HAMMES, L.L.C., Attorneys for Personal Representatives Carl N. Horne and Jennifer S. Sieck, and CARL N. HORNE and JENNIFER S. SIECK, Personal Representatives,
Administrators-Appellees.

Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge.

U.S. Bank National Association appeals from the district court's order approving the fee arrangement of a law firm retained to litigate the claims of an estate. **AFFIRMED.**

Jonathan Kramer and Thomas H. Burke of Whitfield & Eddy, P.L.C., Des Moines, for appellant.

Thomas M. Locher of Locher Pavelka Dostal Braddy & Hammes, L.L.C., Council Bluffs, for appellees.

Ralph A. Froehlich of Locher Pavelka Dostal Braddy & Hammes, L.L.C., Omaha, Nebraska, admitted pro hac vice for appellees.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

On June 29, 2007, Frederick Horne (Rick) filed litigation in Nebraska. In his complaint, Rick alleged he had properly exercised an option to purchase real estate in Nebraska but the title holder had refused to honor the option. The fair market value of the real estate was anticipated to be substantially more than the option price of $5,700,000. The complaint sought specific performance of the contract. Rick was represented in the matter by Locher Pavelka Dostal Braddy & Hammes, LLC.

On December 3, 2007, before the real estate matter in Nebraska was resolved, Rick died. The co-administrators of Rick's estate revived the Nebraska litigation with Locher Pavelka continuing as counsel.

On June 9, 2008, U.S. Bank National Association filed a claim in probate against the estate based upon an unsatisfied judgment the bank had obtained against Rick. An inventory report showed the assets of the estate were insufficient to pay the claim; however, the report listed the pending litigation in Nebraska as an asset having an unknown value.

On January 26, 2009, U.S. Bank filed a motion to establish procedures for pursuit of litigation, requesting the court issue an order stating the co-administrators did not have authority to settle, dismiss, or fail to advocate the litigation in Nebraska without prior court approval. The co-administrators filed a motion for direction regarding litigation seeking guidance from the court as to whether they should continue to employ Locher Pavelka to pursue the litigation. On March 19, 2009, the court ordered the estate to preserve and continue to

pursue the litigation in Nebraska. The court also encouraged the co-administrators and Locher Pavelka to submit to the court for approval an attorney fee and litigation expense agreement.

On August 6, 2010,[1] the co-administrators filed an application to approve fee arrangement requesting the court approve a contingent fee arrangement providing that Locher Pavelka receive:

> a. One third (1/3) of the proceeds from the sale of the subject property in excess of the price to exercise the Option to Purchase of $5,700,000 if the Litigation is successful and there is no appeal; and
> b. Forty percent (40%) . . . of the proceeds from the sale of the subject property in excess of the price to exercise the Option to Purchase of $5,700,000 if an appeal is taken and the Estate succeeds on appeal.

On August 18, 2010, U.S. Bank filed a resistance to the application for approval of fee arrangement. In that resistance, U.S. Bank conceded that the litigation was "critical to the Estate's solvency" and agreed that the "prosecution of that case should be considered extraordinary fees". After an evidentiary hearing on this and other issues, U.S. Bank filed a second resistance to the application for approval of fee arrangement, asserting: (1) the fee arrangement did not comply with Iowa Court Rule 7.2(3); (2) the application was not eligible for consideration because an affidavit required by Iowa Code section 633.202 (2009) had not been filed; (3) a contingent fee arrangement was unreasonable as it provided payment based on factors unrelated to the value of the services rendered; and (4) the contingent fee arrangement was not ethical as the co-administrators were not well-informed as to the reasonableness of the fees. The

[1] The co-administrators had previously filed an application to approve fee arrangement in January 2010 with identical terms, but the district court did not rule on that application.

beneficiary and co-administrators filed statements recommending approval of the contingent fee arrangement.

On October 29, 2010, the district court entered an order approving the contingent fee arrangement with certain added terms to ensure that the attorney fees awarded as a result of the litigation would not exceed the benefit of the litigation to the estate and its creditors like U.S. Bank. The court also provided for further scrutiny of the fee arrangement once the litigation concluded:

> Prior to settlement or distribution of any monies related to a favorable settlement, resolution, or court ruling in the Nebraska litigation, this court must first be consulted and approve the same. This is true as to distribution of attorney fees and costs as well.

U.S. Bank appeals, asserting the same grounds raised at trial as well as a claim that the district court failed to consider relevant statutory factors used in determining the reasonable value of legal services.

II. Standard of Review

Our review of this action in equity is de novo. Iowa R. App. P. 6.907. The probate court has "considerable discretion" in allowing attorneys' fees. *See In re Estate of Bass v. Bass*, 196 N.W.2d 433, 435 (Iowa 1972).

III. Attorney Fee Arrangement

U.S. Bank raised the procedural issues and the ethics of the fee agreement before the district court. The Bank acknowledged in its resistance to the fee proposal that the proposal was not a final application for "precise fees" but asked that its objections be heard and addressed "sooner rather than later." The district court did not address these issues expressly in its order. U.S. Bank did not file a motion to enlarge pursuant to Iowa Rule of Civil Procedure 1.904(2)

to request a ruling on its specific objections to the fee proposal. "[W]e have repeatedly said that a rule [1.904] motion is necessary to preserve error when the district court fails to resolve an issue, claim, or other legal theory properly submitted for adjudication." *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002) (internal quotation omitted). Because we find U.S. Bank's arguments regarding the ethics of the fee arrangement and claimed procedural problems under Iowa Court Rule 7.2(3) and Iowa Code section 633.202 are not preserved, we deem them waived. *See id.* ("When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.").

We also find U.S. Bank did not preserve error on its argument that the district court failed to consider statutory factors prior to its ruling. U.S. Bank states in its brief that no evidence was presented regarding these factors and the district court made no findings related to the statutory factors. U.S. Bank did not file a motion to enlarge on this issue. Accordingly, we find error was not preserved on this argument. *See id.*

The only remaining issue that was preserved by U.S. Bank on appeal is its argument that a contingent fee contract is unreasonable in this case because it provides for the determination of a fee based on factors having no logical relationship to the value of the services. U.S. Bank cites *Wunschel Law Firm, P.C. v. Claubaugh*, 291 N.W.2d 331 (Iowa 1980) in support of this argument.

In *Wunschel*, the supreme court considered whether a court should approve a contingent fee arrangement "for the defense of unliquidated tort damage claims in which the fee is fixed as a percentage of the difference

between the amount prayed for in the petition and the amount actually awarded." 291 N.W.2d at 332. The supreme court in *Wunschel* relied on and adopted the view of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association provided in an amicus curiae brief. *Id.* at 337.

The Committee stated "critical factors" in determining the amount of a contingent fee are: (1) the percentage and (2) the amount against which the percentage is taken in order to determine the fee. *Id.* at 336. The Committee then concluded the fee in *Wunschel* was not reasonable as required by the code, relying heavily on the fact that the amount against which the percentage was taken would not be determined "at a later date, by an independent party or by agreement of the client." *Id* at 337. Rather, because of the attorney's superior knowledge, the defense attorney would have the ability to exploit the client by inflating the prayer to the attorney's advantage or by increasing the prayer by amendment. *Id.* at 336. The Committee was also influenced by the fact that the defense attorney would not have to establish a lack of liability to be entitled to a fee. *Id.* at 337.

Such concerns are not applicable in the present case, where Locher Pavelka has no control over the sale price of the property and must succeed in litigation to be entitled to recover under the contingent fee arrangement. The district court further provided for a relationship between the fee and the value of the services to the estate by stating:

> [I]n the event of a successful resolution of the Nebraska litigation for the estate the court will look closely at the attorney fees recovered in the Nebraska litigation in determining what amount, if any, should be permitted for the attorney fees allowed due to the administration of the estate . . . . There is no assurance at this time

> that additional attorney fees will be awarded for fees related to administration.

The district court also concluded a contingent fee arrangement was the only mechanism by which the estate could afford to litigate the claim in Nebraska and required future court approval before the distribution of attorney fees. We find the determination of the fee in this case is based on factors having a logical relationship to the value of the services provided and is therefore not unreasonable under the logic of *Wunschel.*

AFFIRMED.