IN THE COURT OF APPEALS OF IOWA

No. 3-473 / 12-1562
Filed August 7, 2013

IN THE MATTER OF THE ESTATE OF DONALD J. BRUESS, Deceased,
Estate-Appellee,

vs.

THE LAW FIRM OF JOHN GEHLHAUSEN, P.C.,
Intervenor-Appellant.

Appeal from the Iowa District Court for Winneshiek County, John J. Bauercamper, Judge.

A law firm appeals the district court's order approving its fees and expenses incurred in representing the estate in a wrongful death action. **AFFIRMED AS MODIFIED.**

James H. Cook and Erin Patrick Lyons of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellant.

Daniel L. Fretheim of Anderson, Wilmarth, Van Der Maaten, Belay & Fretheim, Decorah, for appellee Estate.

Kevin E. Schoeberl of Story & Schoeberl Law Firm, Cresco, for appellees Bruess, Bruess, Rothman, and Bruess.

Timothy Lynch of Lynch Law Office, for Dennis Bruess.

Darrell Bruess, League City, Texas, pro se.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

John Gehlhausen appeals the district court's order awarding him a forty percent attorney fee and court costs taxed by the federal court out of the settlement reached in a wrongful death action. Gehlhausen claims the district court should have enforced the attorney fee contract executed by the estate and approved by the probate court. He asserts the district court's order inadequately compensates him for a vast majority of the substantial expenses advanced in the litigation. He asks the district court order be reversed and the case remanded to the district court with instructions to enforce the fee agreement. We affirm as modified.

I. BACKGROUND FACTS AND PROCEEDINGS.

Donald J. Bruess (the decedent) was killed after his riding lawnmower rolled over, trapping him under water. He was survived by his eight adult children. An estate was opened, and Donald E. Bruess Jr. (Donald) was appointed administrator of the estate. Gehlhausen, a Colorado attorney specializing in lawnmower rollover cases, contacted the attorney for the estate after reading information about the death online. By the time Gehlhausen contacted the estate the two-year statute of limitation for the wrongful death claim was nearly expired.

A contingency contract was presented by Gehlhausen to Donald as administrator that provided Gehlhausen would receive a forty-percent

contingency fee for sums recovered prior to or through trial,[1] and would advance the cost of the expenses up to $250,000. Both the attorney fee and the expenses would be recoverable by Gehlhausen only if there was a recovery by settlement or trial. The contract also listed the expenses in detail that would be advanced and specified a nine-percent finance charge would be assessed on all costs advanced by Gehlhausen from the date of advancement. Each of the eight beneficiaries of the estate consented to entering into the contingency fee agreement and asked the court to approve the same. The court authorized Donald, as the administrator, to execute the contingency fee agreement to prosecute the wrongful death action on behalf of the estate.

The wrongful death lawsuit was filed in federal court in Iowa with the assistance of James Cook as local counsel. The case proceeded to mediation where the parties eventually agreed to a confidential settlement. Donald then sought court approval of the settlement and asked the court to "review the payment of the attorney fees and costs" from the settlement. Three of the beneficiaries objected to the settlement and asked the court to set a hearing to review the settlement and the payment of attorney fees and costs.

The court held that hearing on June 29 and July 5, 2012. At the hearing another of the beneficiaries objected to the settlement, and Donald joined with the four beneficiaries in questioning some of the litigation expenses claimed by Gehlhausen. Donald testified at the hearing he was never advised of the ongoing expenses Gehlhausen was incurring in the litigation until the mediation

[1] The fee would have escalated to 45% on appeal and 50% if retrial were ordered by a court.

when he asked for an estimate of the expenses. He was shocked to find out that Gehlhausen had advanced expenses which exceeded the amount of his contingent fee.

The court found the total amount of the settlement reasonable and in the best interests of the estate so long as it ignored the attorney fees and expenses Gehlhausen was requesting. It found that if the attorney fees and all the claimed expenses were paid, the eight beneficiaries would recover only a nominal amount.[2] After considering the six factors found in Iowa Code section 633.199 (2011) for determining the value of extraordinary attorney services, the court determined that reasonable compensation for Gehlhausen under the facts of the wrongful death case would be the payment of fees and expenses in the amount of forty percent of the recovery together with reimbursement for all court costs taxed by the federal court and actually paid by counsel. The court ordered all other expenses to be paid by trial counsel. Gehlhausen filed a motion to reconsider, which was denied by the district court. He now appeals.

II. SCOPE AND STANDARD OF REVIEW.

This action was tried in probate court as a proceeding in equity and our review is thys de novo. *See* Iowa Code § 633.33; *In re Estate of Thomann*, 649 N.W.2d 1, 3 (Iowa 2002). We give weight to the trial court's findings of fact, especially its determinations of credibility, but we are not bound by them. Iowa R. App. P. 6.904(3)(g). While our review of the amount awarded for attorney fees is de novo, "we review a district court's decision that services were

[2] The amount the estate would recover was less than 20% of the settlement amount.

extraordinary under section 633.199 for abuse of discretion." *In re Estate of Bockwoldt*, 814 N.W.2d 215, 222 (Iowa 2012). We will reverse if the district court "exercises its discretion on grounds or for reasons that are clearly untenable, or to an extent clearly unreasonable." *Id*.

III. LITIGATION EXPENSES.

No party has appealed the court's approval of the settlement amount, so the only issue before us on appeal is the portion of the court's order pertaining to the allocation of attorney fees and expenses to Gehlhausen. The attorney fee contract between Gehlhausen and the estate called for a forty percent attorney fee plus the costs advanced by Gehlhausen in the prosecution of the wrongful death lawsuit. Gehlhausen claims the court's failure to award these costs to him has resulted in a substantial net loss and was manifestly inadequate.

The application of the administrator requested the court approve the settlement and "review" the payment of attorney fees and costs. Three beneficiaries filed an objection to the amount of the settlement and the payment of attorney fees and costs. At the hearing a fourth beneficiary joined in objecting to the settlement and attorney fees and cost. In addition, the administrator, while supporting the amount of the settlement, joined with the four beneficiaries in objecting to the amount of attorney fees and costs stating he found some of the costs "very inflated" and not real.

Of the expenses for which Gehlhausen seeks reimbursement, the beneficiaries objected to the expenses incurred for counsel to attend mock trials and focus groups out of state. Gehlhausen testified he that what he learned from

attending as many as four to eight mock trials/focus groups during the course of this litigation benefited this case and other similar cases on which he as working at the time. He charged a portion of the cost to each of his pending cases including the estate in this case. He never submitted a specific fact pattern based on the facts of this case to a mock trial as he felt it was not necessary for this case.

The beneficiaries objected to costs incurred for consultation with expert witnesses who were ultimately excluded from testifying by the federal district court. Counsel spent tens of thousands of dollars on consultation with experts. Two experts were excluded by the federal court, while a third expert would have been permitted to testify at trial as to the opinions disclosed in his initial and rebuttal reports.

Gehlhausen also charged the estate for "finance charges" on each of the invoices he generated. The attorney fee agreement permitted him to charge a nine-percent annual finance charge on all costs advanced from the date of advancement.[3] The cost invoices were not presented to the estate until after the mediation, at which time the finance charges amounted to more than $6000. Gehlhausen asserted the finance charge was necessary as he had to borrow the money used to advance the costs.

The estate was charged thousands of dollars in copying costs and legal research expenses. The beneficiaries also objected to the forty percent attorney fee, asserting a more reasonable fee would have been the standard one-third.

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[3] We note the invoice statements say the finance charge was calculated at seven percent instead of nine percent as stated in the attorney fee contract.

The beneficiaries did not object to approximately $4700 in expenses related to: travel to the mediation, expenses incurred by local counsel, postage, long distance telephone calls, filing fees, supplies, file storage fee, mileage expenses, fax charges, and toll roads.

Ordinarily, an estate, its beneficiaries, and an attorney, may agree upon the compensation for the attorney so long as the rights of the creditors or minors are not implicated. *In re Estate of Rorem*, 66 N.W.2d 292, 302 (Iowa 1954). However, courts are not bound by the terms of the agreement, and the attorneys are only entitled to a "'just and reasonable' allowance." *Id.* at 296. Iowa Code section 633.199 provides the courts a list of relevant factors to consider in determining the value of the attorney services provided, though the list is not exclusive. Included in the list are the following:

> 1. Time necessarily spent by the personal representatives and their attorneys.
> 2. Nature of the matters or issues and the extent of the services provided.
> 3. Complexity of the issues and the importance of the issues to the estate.
> 4. Responsibilities assumed.
> 5. Resolution.
> 6. Experience and expertise of the personal representatives and their attorneys.

Iowa Code § 633.199.

Mirroring much of section 633.139, Iowa Rule of Professional Conduct 32:1.5 lists factors to be considered when determining whether a fee is reasonable:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses, or violate any restrictions imposed by law. The factors to be

> considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

Our supreme court has explained that contingent fee agreements may not necessarily be subject to reexamination "at the conclusion of successful litigation with respect to the factors applicable to noncontingent fees." *Comm. on Prof'l Ethics & Conduct v. McCullough,* 468 N.W.2d 458, 461 (Iowa 1991). Nonetheless, "[c]ontingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this rule." Iowa R. of Prof'l Conduct 32:1.5(a) cmt.3.

With respect to the first factor under both the statute and the rule, Gehlhausen testified as to the number of hours he, his associates, and his support staff spent working on this case; however, he did not provide the court with a detailed statement of the hours. We therefore have no way of knowing or assessing what amount of this time was "necessary" for this case. We recognize, however, that "time spent" may not be as significant a factor in contingent fee cases as in some other fee cases, as the amount of time required

to be invested by the attorney is indeed one of the contingencies he assumes in such a case.

The case involved a products liability action against the manufacturers of a riding lawnmower. Gehlhausen testified he did not know of an attorney who would take a products liability action for less than a forty percent contingency due to fact the cases are usually difficult to win and expensive to pursue. He testified he was using the best experts in the country on these cases and would not waste money on expenses when he has to shoulder the expenses if there is no settlement or he loses at trial. He stated the experts in this case went to the scene of the accident, obtained an exemplar mower because they were unable to obtain the mower actually used in the accident, performed tests, prepared reports, and helped him respond to defense motions. There was no specific testimony offered as to the nature or complexity of the issues in this case.

As for the responsibilities assumed, Gehlhausen was lead counsel on this product liability case and was responsible for all pleadings and discovery conducted. The administrator for the estate testified he would not have pursued the wrongful death claim had he not been contacted by Gehlhausen. The case resolved with a settlement amount that was less than initially expected by the beneficiaries. Gehlhausen testified this small settlement amount was due to concerns that developed late in the investigation of the case relating to liability. Both Gehlahausen and the mediator agreed the settlement amount was in the best interests of the estate, though Gehlhausen testified if he had known of the problems with the case, he likely would not have taken the case. The risk and

reward of whether unknown facts or problems develop in a case are among the contingencies assumed by Gehlhausen when he took this case on a contingent fee basis. He knew or should have known that such risks were greater when he accepted (in fact solicited) the case on the eve of the expiration of the statute of limitations.

Gehlhausen testified he had extensive experience in this particular litigation area of products liability of lawnmowers, representing plaintiffs all over the country in rollover cases. He has been a trial lawyer since 1968 and has held every office in the Colorado Trial Lawyers Association. He is a fellow of the American College of Trial Lawyers and was the seventh recipient of the Colorado Trial Lawyer's Lifetime Achievement Award. He clearly has the experience and expertise in litigating cases involving an alleged defect in a lawnmower, though he does not have specific expertise in Iowa law, having to rely on local counsel for support. Gehlhausen had a separate fee splitting agreement with local counsel to divide the forty percent attorney fee, though Gehlhausen advanced all costs.

The heart of the dispute in this case is on the substantial expenses incurred solely at Gehlhausen's discretion, without consultation of, or advance notice to, the administrator of the estate. Although the fee agreement that he drafted ostensibly gave him that authority, both Iowa Code section 633.199 and rule 32:1.5 overlay that agreement with the requirement that the entire fees and expenses be reasonable. Gehlhausen is seeking total fees and expenses that exceed eighty percent of the recovery in this case. On its face, that is shocking.

We agree that Gehlhausen should be reimbursed for some additional reasonable expenses, which directly benefited the estate through the prosecution of the case. The expenses for mock trials and focus groups that were not specific to this case and were simply part of educating himself on similar cases are his own expense. This education is part of his qualifications to justify the contingent fee arrangement, which he claimed was based in part on his special expertise in this area. He spent tens of thousands of dollars on experts that he employed without prior approval or knowledge of the administrator of the estate and who were excluded from testifying in the trial of this case. Under the facts of this case, the estate should not have to bear the burden of whatever error in judgment resulted in the exclusion of those witnesses.

The beneficiaries did not object to about $4700 in specified expenses, and we, too, find those appropriate. The deposition expenses incurred in the amount of $4865.18 should also be reimbursed, as should $29,136 related to engagement of the expert who would have been allowed to testify.

The district court made a finding as to the reasonableness of the total compensation and approved a fee of forty percent plus the court costs actually paid by counsel that can be taxed by the federal district court. Based on our de novo review, we find the forty percent attorney fee permitted by the district court for payment of all fees is reasonable in this case, but it must be augmented with the reimbursement of expenses that were reasonably necessary in order to arrive at a total fee and expense allocation that satisfies the reasonableness requirement of Iowa law. *See* Iowa R. of Prof'l Conduct 32:1.5(a) cmt.3.

"Reasonablenss" should be measured not only as to the estate, but also as to Gehlhausen. We are mindful that but for his representation of the estate it would likely not have pursued recovery at all. We find that total expenses of $38,701.18 should be reimbursed, plus the costs actually paid to the federal court as previously ordered. We recognize this amount falls short of the amounts claimed by Gehlhausen. However, many of the expenses claimed are suspect in light of the case and its recovery. While some other itemized expenses may not, in isolation, have been unreasonable, the total fees and expenses provided in this ruling is a "'just and reasonable' allowance" to Gehlhausen in light of the facts of the litigation, the amount of the settlement, and the amount to be recovered by the estate.[4] *See Rorem*, 66 N.W.2d at 296.

Costs on appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.

Danilson, J., concurs; Doyle, P.J., dissents.

[4] A confidentiality provision was a condition of the settlement as approved by the district court. Accordingly, we have been circumspect in our disclosure of actual dollar amounts.

DOYLE, P.J. (concurring in part and dissenting in part)[5]

I concur with the majority's conclusion that the forty percent attorney fee is reasonable in this case for payment of all attorney fees. I note the contingent fee contract was agreed to by the administrator of the estate, consented to by the beneficiaries (including the present objectors), and approved by the probate court before the filing of the product liability suit.

I also agree with the majority's observation that the heart of the dispute is the substantial expenses incurred solely at attorney Gehlhausen's discretion, without consultation of, or advance notice to, the administrator of the estate. I do not mean to suggest Gehlhausen had any legal or contractual obligation to consult or give advance notice to the administrator or court before incurring litigation expenses. The fee contract provided Gehlhausen with authority to incur up to $250,000 in expenses without the administrator's further written authority. Even had he consulted with the administrator or the court before incurring expenses, there is nothing in the record to suggest the costs would have been disapproved, for the case was initially thought to be worth a substantial sum. But as happens occasionally, the case "went south," rendering the potential recovery substantially less than originally thought.

Lack of money changes everything.[6] With the settlement substantially less than first anticipated, the objectors now criticize Gehlhausen's spending,

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[5] For what it is worth, I note an all too frequently observed error: failure to place a witness's name at the top of each appendix page where that witness's testimony appears. *See* Iowa R. App. P. 6.905(7)(c).

[6] Apologies to Cyndi Lauper. *See* Cyndi Lauper, *Money Changes Everything*, on "She's So Unusual" (Portrait Records 1983).

even though that spending was instrumental in bringing about a settlement. Some of their criticism is understandable, even if only through Monday-morning quarterbacking. But, Gehlhausen did himself no favors by coming to the hearing ill prepared.

Although the contingent fee agreement gave Gehlhausen free reign to incur litigation costs of up to $250,000 without the administrator's further written authority, the costs incurred were subject to the jurisdiction of the probate court and allowable only if "just and reasonable." Iowa Code § 633.199 (2011); *see also In re Estate of Rorem*, 66 N.W.2d 292, 296 (Iowa 1954) (holding the probate court was not required to allow the amounts the executors had contracted to pay their attorneys, as the attorneys were entitled only to a "just and reasonable" allowance). Furthermore, regardless of whether the probate court has jurisdiction, an attorney may not charge or collect "an unreasonable amount for expenses." Iowa R. Prof'l Conduct 32:1.5. It was Gehlhausen's burden to establish the expenses incurred were just and reasonable. *In re Estate of Myers*, 29 N.W.2d 426, 428 (Iowa 1947) ("The burden of showing the services rendered and value thereof rests upon the claimant.").

A substantial portion of the contested expenses relate to the engagement of two expert witnesses, Drs. Griffin and Ketchman. Both were ultimately excluded from testifying by the federal district court. The federal court's order excluding the witnesses is a part of our record, but the Magistrate Judge's Report and Recommendation, which apparently details the reasons for excluding the experts' testimony and upon which the order is based, is not a part of the record

before us. So our record on this point is a bit skimpy. Nevertheless, the record we do have indicates expert Dr. Griffin was excluded as "untimely." At the hearing on the objections to the fees and costs, Gehlhausen testified Dr. Griffin was struck from testifying because the magistrate felt Dr. Griffin was not a proper rebuttal expert. Gehlhausen explained he had hired Dr. Griffin as a rebuttal witness to counter some testimony of the chief defense expert. However, Gehlhausen did not address the untimeliness finding by the federal court. Furthermore, Gehlhausen did not bring his experts' billing records to the hearing, so he could not, except in the most general of terms, describe what work Dr. Griffin did on the case. Moreover, Gehlhausen could not specifically recall Dr. Griffin's hourly rate, rather he estimated it to be between $250 and $450 an hour. Under the circumstances, I agree that Gehlhausen has not met his burden to establish the expenses related to Dr. Griffin were just and reasonable.

Gehlhausen had worked with Dr. Ketchman some ten to twenty times before engaging him for the estate's wrongful death lawsuit, and Gehlhausen had successfully used Dr. Ketchman in previous litigation. In this case, the federal court excluded Dr. Ketchman from testifying on *Daubert*[7] grounds because he had not personally designed a rollover protection system. Losing a *Daubert* challenge is not necessarily the product of poor judgment by counsel. As Gehlhausen so aptly put it, "the *Daubert* law is what is in the eye of the beholder." In other words, each trial court is different and sometimes an expert

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[7] In *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 589 (1993), the Supreme Court charged trial judges with the responsibility of acting as gatekeepers to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."

gets stricken in one court, but not another. It would be bad precedent to automatically deny reimbursement of an expert's fees based solely upon the results of a *Daubert* ruling. To do so would have a chilling effect on litigation as no lawyer would risk spending his or her own money on a legitimate expert if recovery of that expense was solely contingent upon the whim of a court's *Daubert* ruling. That having been said, Gehlhausen, again, failed to meet his burden to demonstrate the expense for the expert was just and reasonable. Not having brought Dr. Ketchman's billings to the hearing, Gehlhausen could not tell what specific work Dr. Ketchman did on the case, nor could he account for specific charges. Rather, he could only account that the charges were for "services performed." Furthermore, Dr. Ketchman's hourly rate is not revealed in the record before us. Under the circumstances, I agree that Gehlhausen has not met his burden to establish the expenses related to Dr. Ketchman were just and reasonable.

The objectors are critical of photocopy costs, Westlaw research fees, and finance charges. While not specifically mentioning these items, the majority effectively slashes reimbursement of these costs. I do not find the photocopy costs to be out of line. Although Gehlhausen could not provide any specific detail for certain charges, he explained:

> The defense sends us sometimes a ton of documents, and we need to print them out or get them in some fashion to our experts. That's part of it. And then we have to make copies ourselves, and that's why these files get so darn large. Then, in addition, our relevant evidence in these cases consists of thousands or articles that I have collected through—no, it wouldn't be thousands of articles, but thousands of documents I have collected through the years with regard to this lawn tractor rollover problem and the

> rollover protection system solution. We have two—actually, in our offices, we have three Bizhubs, which just almost continually have to grind out copies for experts. And then the experts' file, the defense always wants a copy of that. It's not medical records. It's that type of thing.

It is not unusual in these kinds of cases to incur substantial photocopy expenses in responding to discovery requests and in preparing experts. Gehlhausen related the Westlaw research charges to the pursuit of the estate's case, and in his opinion, the charges were reasonable. The finance charges were provided for in the court-approved fee contract. Gehlhausen explained he had to borrow money from the bank to finance the litigation. The cost to borrow the money was passed on to the estate. I believe these expenses to be just and reasonable.

Although substantial in light of the ultimate settlement, the costs do not appear to be out of line for a case of this complexity. Gehlhausen testified, "We wouldn't have a recovery if we hadn't done the work." He summed it up by stating:

> The fee expenses, I believe, are appropriate because of the amount or because of what we did that are reflected on this fee statement. I'm the guy who basically is—and if I lose the case, money I spend on these costs is gone. So it is not my motive to waste money on costs at all. But on the other hand, I want to do—I feel I have the best experts in the country in these cases, and I want to do what's necessary because I believe most of these cases—well, I know this: You have to prepare them for trial if you're going to get any kind of settlement, and this case, up to the point essentially at the settlement conference, was prepared for trial.

I concur with the majority concerning attorney fees. I also concur with the majority regarding reimbursement of expenses and no reimbursement for the expenses related to Drs. Griffin and Ketchman and the mock trials and focus groups, but I dissent to the extent the majority provides for no reimbursement of

photocopy, Westlaw, and finance charges. I would allow reimbursement of those expenses.