IN THE COURT OF APPEALS OF IOWA

No. 0-962 / 10-1073
Filed June 29, 2011

IN THE MATTER OF THE ESTATE OF KENNETH R. COULSON, Deceased.

RANDY A. COULSON,
Executor-Appellant.

Appeal from the Iowa District Court for Woodbury County, James D. Scott, Judge.

A co-executor appeals the district court's order on the Final Report. **AFFIRMED.**

Larry A. Storm, Marci L. Iseminger, and Jonathan J. Blum of Crary, Huff, Inkster, Sheehan, Ringgenberg, Hartnett & Storm, P.C., Sioux City, for appellant.

Angie J. Schneiderman and Robert F. Meis of Berenstein, Moore, Heffernan, Moeller & Johnson, L.L.P., Sioux City, for appellee Estate of Kenneth R. Coulson.

Heard by Sackett, C.J., and Vogel and Danilson, JJ.

VOGEL, J.

Randy Coulson, one of the co-executors of the Estate of Kenneth Coulson, appeals the district court's order on the Final Report. The other co-executor is Kenneth's daughter and Randy's sister, Judy Berkley.[1] As the district court noted, nominating Randy and Judy to serve as co-executors was an "unfortunate choice" as they are estranged and operated independent of each other, with little regard to their fiduciary responsibilities. They did not work together during the administration of their father's estate, each hired their own attorney to represent their separate appointment as co-executor, and each filed their separate Final Report. After a careful recitation of the evidence presented on the hearing, the district court made fact findings and approved, with some exceptions, Judy's version of the Final Report. As many of the findings were based in large part on its credibility findings, we affirm the district court.

I. Background Facts and Proceedings.

Kenneth R. Coulson died on July 9, 2008, and his will was admitted to probate on August 26, 2008. He was survived by his three children—Judy, Randy, and Terry. His will provided for his estate to be divided among his three children, taking into account an inter vivos gift of $125,000 he made to Randy. Judy and Randy were nominated in the will to be co-executors and later so appointed.

Judy and Randy's working relationship quickly became extremely strained and remained so during the administration of the estate. A hearing on their

[1] A third sibling, Terry Coulson, was spared the task of being a co-executor and is not a party to this appeal.

separate final reports was held on May 6, 2010. The district court entered an order on May 21, 2010, which adopted Judy's final report, with some modification. Both parties filed post-trial motions, which the district court denied on June 21, 2010. Randy appeals.

II. Scope of Review.

> Our review in appeals from rulings by the probate court on objections to an executor's final report is de novo. We are not bound by the findings of the trial court, but give them weight, especially when the credibility of a witness is involved. We also confine our review to those propositions raised in support of reversal.

Estate of Randeris v. Randeris, 523 N.W.2d 600, 604 (Iowa Ct. App. 1994); *see also In re Estate of Wulf*, 526 N.W.2d 154, 156 (Iowa 1994) ("[T]he costs of administration are equitable in nature and our review is therefore de novo.").

We accord the district court considerable discretion in taxing executor and attorney fees to the estate. Iowa Code § 633.3(8) (2009) (defining costs of administration to include both attorney and executor fees); *In re Estate of Petersen*, 570 N.W.2d 463, 465 (Iowa Ct. App. 1997).

III. Analysis.

A. Money Paid to Financial Advisor.

Prior to Kenneth's death, he stayed with Judy for several months in an effort to straighten out his finances. Although he was ninety-five years of age, by all accounts he retained a sharp mind with full knowledge and control of his assets. As the district court found, "Kenneth was land rich (1.3 to 1.4 million) and cash poor. He had accumulated over $220,000 of credit card debt and had mortgage indebtedness against the farm exceeding $400,000 . . . the bank was

threatening foreclosure." Judy, a certified public accountant, arranged to have a business associate, William Austin, meet with Kenneth to assist him in getting his finances under control and negotiate a reduction in his substantial credit card debt.

Kenneth met with Austin approximately ten times, with Judy only attending one or two of those meetings. Austin was largely successful in his efforts, acting as Kenneth's attorney-in-fact he reduced the indebtedness, negotiated a handsome price for the sale of the farm, and arranged a "bridge" loan to secure interim payments to Kenneth's creditors. For his services, and after Kenneth's death, Austin submitted a bill to Judy for $35,000, which she paid. *See* Iowa Code § 633.435 ("The personal representative may pay any valid debts and charges against the estate even though no claim for such debts and charges has been filed, but all such payments made by the personal representative shall be at the personal representative's own peril.").

The district court found that Kenneth and Austin entered into an oral agreement for the work Austin was to do and the amount he could charge.[2] There was partial performance of the work undertaken prior to Kenneth's death. Although somewhat skeptical of the amount charged, the fee was reasonable and it benefited Kenneth and ultimately his estate. While the district court faulted Judy for not seeking either Randy's approval or authority from the court, Austin's

[2] The fee was originally negotiated to be the difference between what Kenneth's credit card debt was and the amount the debt was reduced to ($69,000). The court found this of no benefit to Kenneth and was not a "good bargain," but as Austin had cut his fee in half before submitting his bill to Judy, the court found his charge to be "reasonable."

fee was a valid claim against the estate and Judy's payment to Austin was allowed.

On appeal, Randy has listed multiple reasons why the bill should not have been paid, and why Judy should bear the full cost of paying Austin herself. Randy's focus is faulting the district court for finding that Austin proved the existence and terms of an oral contract with Kenneth. Ordinarily, the existence of an oral contract and its terms are questions to be decided by the trier of fact. *Gallagher, Langlas & Gallagher v. Burco*, 587 N.W.2d 615, 617 (Iowa Ct. App. 1998). The district court, while pointing out some weaknesses of the services claimed to have been performed for Kenneth, found that Austin had sufficiently proven the terms of an oral contract such that it was appropriate for Judy to pay his submitted invoices. *See id.* ("To prove the existence of an oral contract, the terms must be sufficiently definite for a court to determine with certainty the duties of each party, the conditions relative to performance, and a reasonably certain basis for a remedy."). We agree that the evidence supports the contract for services was entered into between Kenneth and Austin, and the terms were sufficiently definite such that Austin was able to begin the work negotiated for and obtain at least partial results prior to Kenneth's death. We also agree that the work Austin performed proved to benefit the estate and his claim was therefore reasonable for Judy to pay. As Terry surmised, "he saved the estate completely, because he made it so that my father could deal with his debt and save the farm from foreclosure." We affirm the district court's allowance of the payment to Austin.

B. Wachovia Bank Accounts.

Prior to his death, Kenneth opened two accounts—a checking account that held a date-of-death amount of just under $5,000 and a money market account valued at approximately $95,000. Judy listed both accounts on Schedule E-1 (joint interest property) of the Report and Inventory, claiming to be the joint owner. Randy asserts the money in the two Wachovia accounts were assets of the estate, and not jointly owned by Kenneth and Judy. Judy claims the assets should pass outside of the estate, as she is the surviving joint tenant.

Randy correctly notes that no documentary evidence was produced at trial showing Judy's name on the accounts.[3] Judy testified her name was on the account, but she was not aware of the joint ownership until after Kenneth died, when a Wachovia representative advised her of the ownership nature of the accounts. A "Customer Access Agreement" was introduced into evidence. The agreement contained Kenneth's signature in a separate box bearing the words, "RIGHT OF SURVIVORSHIP . . . : REQUIRED." Following that were the terms of joint ownership. The district court found that Kenneth opened a joint account with Judy.

Randy argues that because the $100,000 deposited into the money market account was the down payment for the sale of the farm, it was conditioned on the completion of the real estate transaction. He further argues

[3] Randy argues for the first time on appeal that the creation of the joint accounts does not comport with North Carolina law. This is an argument that he failed to make before the district court, and therefore the district court had no opportunity to consider the merits of this assertion. We find the issue is not preserved for our review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2006) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

that because the sale did not close until six months after Kenneth died, Judy could not claim joint ownership of such a conditional payment.

The real estate contract did contain this clause:

> If Seller fails to remove any title objection(s) prior to closing, [Buyer] may (i) take title to the real estate subject to the objection(s); or (ii) terminate this Contract without liability or further obligation, and shall be entitled to a full refund of the down payment.

However, nothing in the contract required the funds be held in an escrow account. Thus if the down payment had been disposed of by either Kenneth or Judy and the sale not completed, the money would need to be returned to the buyer. That did not happen, as the transaction was closed in January 2009.

Randy also argues that because Kenneth made Judy his attorney-in-fact, there was a confidential relationship and a presumption of undue influence. Kenneth opened the accounts and signed the customer access agreement on February 4, 2008. Kenneth appointed Judy his attorney-in-fact on March 11, 2008. The down payment money was deposited into the account by Kenneth after he appointed Judy his attorney-in-fact.

Even if there were a presumption of undue influence, the evidence supports that Judy rebutted the presumption. *See Jackson v. Schrader*, 676 N.W.2d 599, 604 (Iowa 2003) ("Where a confidential relationship is found to exist, and inter vivos conveyances are challenged, the burden of proof shifts to the benefited parties to prove—by clear, satisfactory, and convincing evidence—their freedom from undue influence."). The evidence demonstrated that Kenneth had a sharp mind and was aware of his financial situation. He voluntarily went to North Carolina to seek financial help from his daughter. Judy was unable to

provide the assistance Kenneth required and found someone who was able to do the job. Further, she was not even aware of the ownership nature of the accounts until after Kenneth's death, nor was there any evidence in the record Judy had accessed either account prior to Kenneth's death. Thus, we agree with the district court that Judy rebutted any presumption of undue influence. *See Jackson v. Schrader*, 676 N.W.2d 599, 605 (Iowa 2003) ("[W]e hold that the rule for rebutting the presumption of undue influence arising from a confidential relationship only requires the grantee of a transaction to prove by clear, satisfactory, and convincing evidence that the grantee acted in good faith throughout the transaction and the grantor acted freely, intelligently, and voluntarily.").

C. Family Settlement Agreement.

Randy next asserts the district erred in finding that a family settlement agreement had not been reached. He claims that the three siblings agreed to divide the residue of the estate into three equal shares, allowing the inter vivos gift of $125,000 from Kenneth to Randy to remain outside the assets of the estate.

Parties are encouraged to settle their legal disputes and therefore, family settlement agreements are generally favored when permitted. *See Gustafson v. Fogleman*, 551 N.W.2d 312, 314 (Iowa 1996). Settlement agreements are essentially contracts. "All contracts must contain mutual assent, . . . usually given through an offer and acceptance." *Magnusson Agency v. Pub. Entity Nat. Co.-Midwest*, 560 N.W.2d 20, 26 (Iowa 1997). In order to be an offer, there must

be a definite intent to be bound and it must be certain as to the terms and requirements. *Id*.

On the day of Kenneth's death, Judy and Randy spoke about the possibility of a family settlement agreement. On his own volition, Austin attempted to mediate an agreement among the siblings, to ensure the financial work he had performed was implemented. He believed an unbiased third party needed to be appointed as executor in order to settle the estate. He sent a letter to Randy, which stated, "I suggest you give serious consideration of the suggestion that Security Bank be named as Executor." The letter proposed some terms of a settlement agreement. Further, the letter closed with a request that Randy contact Austin to discuss the letter and "next actions to be taken." Austin also testified there were other conditions that were conveyed verbally. Judy and Terry testified that although they were aware Austin was attempting to negotiate a settlement, they did not authorize Austin to enter into a binding agreement on their behalf. Terry also testified that Randy later had a family settlement agreement prepared and asked him to sign it, but he did not do so. The district court found the letter was merely settlement negotiations, and there had been no meeting of the minds to create a binding agreement between the beneficiaries.

We agree that there was only evidence of negotiations. Although Randy argues *he believed* the letter was a binding agreement, our examination is not a subjective one but rather an objective one. *Magnusson Agency*, 560 N.W.2d at 26 ("We look for the existence of an offer objectively, not subjectively."). The letter suggested terms and required further action in order to reach an

agreement. Randy did not take further action. Finally, Randy's behavior did not indicate he believed an agreement had been reached. We affirm the district court on this issue.

D. Breach of Fiduciary Duty and Executor Fees—Judy & Randy.

Randy next asserts that because Judy breached her fiduciary duties as a co-executor, Judy should not have been allowed to take an executor's fee. He argues that Judy did not consult him or get court approval when compromising claims and paying creditors and that Austin performed many of the duties Judy should have performed. He also asserts that he should have been awarded a fee of one-half of the allowed executor's fee or $14,500.

Iowa Code section 633.76 provides:

> Where there are two or more fiduciaries, they shall all concur in the exercise of the powers conferred upon them, unless the instrument creating the estate provides to the contrary. In the event that the fiduciaries cannot concur upon the exercise of any power, any one of the fiduciaries may apply to the court for directions, and the court shall make such orders as it may deem to be to the best interests of the estate.

Judy testified there was animosity between her and Randy and after some initial efforts, communication became impossible. Prior to Kenneth's death, Judy claimed that Randy had threatened her on many occasions. After Kenneth's death, the threats did not stop and Judy presented taped phone messages from Randy which supported the issuance of a restraining order. The tapes and transcript of those phone calls were introduced into evidence, which support Judy's claim that Randy was threatening to kill her.[4] Judy freely admitted that

[4] Some of the more disturbing statements Randy made, in the December 2009 phone messages were: "I'm not going to accept $132,000 without it costing your life. . . You'd

she did not consult with Randy on many of the estate transactions. She paid all the estate bills and settled claims at her own peril and the district court found no impropriety in any of the actions Judy took. *See* Iowa Code § 633.435.

The district court found,

> The estate funds were handled by Judy. When Randy failed to sign necessary documents early in the probate of the estate, Judy decided to simply handle the financial affairs by herself. Based on the transmittal letters and the testimony of Austin and Judy, the Court believes Randy was provided with copies of bank statements and other estate papers, even though he denies receiving them.
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> . . . .
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> . . . [Randy] threatened Judy with death if she did not forgive their father's inter vivos gift to him of $125,000. On many occasions Randy refused to cooperate with the designated attorney . . . and did not attend to routine probate matters. It is true that Judy should have obtained court direction under section 633.76 concerning payment of Bill Austin's fee and the disposition of the joint tenancy account. However, both of those matters were ultimately resolved in Judy's favor. Randy has no damages resulting from this fiduciary misconduct.

The court then noted that without court approval, Judy paid herself and Randy each approximately one-half of the maximum statutory allowable fee of $14,500 each. *See* Iowa Code § 633.197 (providing a formula for determining the maximum allowable fee). With the district court's tenor of dissatisfaction on varying levels with both executors, the district court found that payment to each of the maximum statutory amount was "clearly improper." These fees were reduced, and the court found a reasonable fee for Judy was $7500 and for Randy was $3500.

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better give me money. It's my inheritance and we can all go on living. Otherwise you're going to die."

The record clearly demonstrates that the co-executors did not and could not work together. None of the payments made by Judy caused damage to the estate. We agree with the district court that Randy has not shown any fiduciary misconduct that would warrant an elimination or further reduction in the fees paid to Judy. Further, considering the credibility assessments and fact finding of the district court, there is no merit in Randy's claim that he should have been paid the full $14,500.

E. Extraordinary Attorney Fees to Randy's Attorney.

Randy asserts the district court erred in not awarding extraordinary attorney's fees to Randy's attorney. Iowa Code section 633.199 provides,

> 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 and services. Necessary and extraordinary services shall be construed to include but not be limited to services in connection with real estate, tax issues, disputed matters, nonprobate assets, reopening the estate, location of unknown and lost heirs and beneficiaries, and management and disposition of unusual assets. Relevant factors to be considered in determining the value of such services shall include but not be limited to the following:
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> 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.

The district court found,

> In this case, the fiduciaries are not being sued or defending a lawsuit from a third-party. Rather, they are fighting among themselves. Approximately half of their issues concern preservation of estate assets, and the other half are personal

> matters. The estate should only be required to pay for work that benefits the estate, not the fiduciaries individually.
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> Most of the estate work was performed by Judy's attorney, Mr. Meis. . . .
>
> Randy's designated attorney, Mr. Storm, who transferred much of his work to his partner, Mr. Blum, focused about half of his efforts on matters affecting the estate and half on Randy's personal issues. Randy's challenges to Bill Austin's fee and the joint tenancy account were reasonable attempts to protect assets of the estate. His other services for enforcement of the alleged family agreement, advances to Randy through partial distribution, and complaints against Judy were for Randy's personal interests, not protection of the estate assets.

The court then reviewed the appropriate factors and awarded the maximum fee for ordinary services as divided between Judy and Randy's attorneys. The court denied Randy's attorney's request for extraordinary fees.

Randy argues that his attorney's work "largely benefited the estate" and points to his challenges to the fees paid to Austin and the nature of the joint bank accounts. However, the district court did find this particular work was in an effort to protect estate assets, but that this was only a portion of the work Randy's attorneys completed. The court found about half of the work completed was for Randy's personal interests, and in his brief Randy makes no argument regarding that work. *See Petersen*, 570 N.W.2d at 466 ("We will not grant attorney's fees and expenses at the estate's expense where the litigation narrows down to a contest of personal interests between will proponents and contestants, because just cause for incurring these expenses does not exist under such circumstances."). We affirm the district court's denial of the request for extraordinary fees.

We affirm the district court's order on the final report.

AFFIRMED.

Danilson, J., concurs; Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concurs in part and dissents in part)

I concur in part and dissent in part.

AUSTIN CLAIM. I believe that Judy should be surcharged for the $35,000 she paid to William Austin for alleged services performed under what Austin claimed to be an oral contract. First, I question whether there was an enforceable contract for a number of reasons including that: (1) there is not clear satisfactory and convincing evidence there was a contract, (2) there is no record or itemized statement of the services allegedly performed, (3) no billings were sent to decedent prior to his death, (4) no statement was sent to the co-executor, and (5) Austin is not a licensed Iowa realtor.

Furthermore, I am unable to sanction Judy's conduct in the manner she handled the billing for a number of reasons: (1) she was operating in a fiduciary capacity in paying and did not exercise the duties expected of a fiduciary, (2) no claim was filed in the estate, (3) she did not seek court approval to pay nor did she consult with the other executor, (4) at or near the time she made payment she was employed in some capacity by Austin and there is a serious question of whether this created a conflict of interest.

THE WACHOVIA BANK ACCOUNTS. I disagree that these are joint tenancy accounts that should pass to Judy. There are several valid reasons advanced by Randy as to why they should not be. The most compelling of which is the fact that there is no written documentation supporting Judy's position that they are.

CONCLUSION. I would therefore modify the distribution to charge Judy's share with the $35,000 she paid from estate assets and hold that the two

Wachovia accounts are part of the residue of the estate. I concur with the balance of the majority's opinion.