

IN THE COURT OF APPEALS OF IOWA

No. 0-172 / 09-0929
Filed May 12, 2010

**IN THE MATTER OF THE ESTATE OF
DELORES F. MIENKE, Deceased.**

**JESSE J. MIENKE and
DANIEL MIENKE,**
Petitioners-Appellants.

Appeal from the Iowa District Court for Polk County, Ruth B. Klotz,
Associate Probate Judge.

Petitioners appeal the probate court's order to close an estate.

AFFIRMED.

Daniel Mienke, Fruita, Colorado, appellant pro se.

Jesse Mienke, Delta, Colorado, appellant pro se.

Robert Nading of Nading Law Firm, Ankeny, for appellee estate.

Considered by Vogel, P.J., Eisenhauer, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.**I. Background Facts & Proceedings**

Francis and Delores Meinke were the parents of Rose, Fran, Daniel, Patrick, and Jesse.¹ Francis died, and his estate passed to his wife, Delores. Delores died on August 29, 2006. Her will provided that her property would be divided equally among her children, with Fran's share to be divided equally among Fran's children. Delores's will provided that Daniel owed her \$46,000 and Jesse owed her \$15,000, and that these amounts would be subtracted from their shares. Also, \$30,000 was to be taken from Patrick's share and added to the share of Rose.

On October 9, 2006, Rose filed a petition for probate of Delores's will. Rose was appointed as the executor of Delores's estate. Daniel filed a motion seeking to have Rose removed as the executor.² The probate court denied the motion for removal. The beneficiaries, other than Rose, also filed a petition contesting the validity of the will. The court dismissed this petition as untimely on July 19, 2007. On July 24, 2007, the court also denied a motion to reconsider.

The final report was filed on March 7, 2008. On that same day the probate court entered an order setting a hearing on the report for April 16, 2008, and providing for notice. As shown by an affidavit of mailing filed of March 11, 2008, notice of the hearing was timely provided to all interested persons.

¹ Fran predeceased her parents. She is survived by her children, Jody, Sheila, and Rachael.

² While the present probate estate was pending, in 2007 probate proceedings were initiated in the estate of Francis. Many matters were filed in the probate proceedings for Delores's estate by the executor of Francis's estate, Donnie Burgmaier.

Following the April 16 hearing, the court entered an order approving the final report on April 29, 2008. The court found that no parties had filed any objections to the final report. It ordered that upon payment of outstanding charges the executor calculate, file, and serve a proposed distribution. The court set a hearing for June 13, 2008, on the computation of the distributive shares. It ordered that any resistance or objection to the computation of distributive shares be filed and served ten days before the hearing.

After the final report was approved, Daniel and Jesse filed a motion for appointment of an attorney to be paid for by the estate. The probate court entered a ruling on the issue on May 27, 2008, denying their request for the appointment of an attorney. On June 11, 2008, the court denied a motion for reconsideration of its ruling denying the appointment of an attorney.

Daniel also filed a motion claiming certain documents were improper because they had been prepared by attorneys for the estate, and also notarized by the same attorneys. On June 9, 2008, the probate court denied the motion on the grounds of res judicata, and because the motions lacked legal basis and merit.

The executor filed a proposed distribution on May 23, 2008. An affidavit of mailing notice shows the proposed distribution was served on the beneficiaries. A hearing on the proposed distribution was held on June 13, 2008. The probate court entered an order on June 19, 2008, approving the executor's proposed distribution of estate assets. The court noted "there have been no objections filed by any interested party."

A final accounting by the executor was submitted on June 25, 2008. Subsequently, Jesse filed a request for readjustment of the distribution. On July 3, 2008, the probate court determined the request was untimely. The court also stated that such filings incurred court costs, and that because the distribution of the estate had been approved, there were no estate funds available to pay these court costs. The court ruled that the clerk “shall not accept for filing in this proceeding any document unless an Order authorizing the filing of the specific document has been entered by the Associate Probate Judge or a District Court Judge.”³

Daniel apparently served a written objection to the final report on July 9, 2008, but did not file it until July 24, 2008. There is no ruling in the record on this objection.⁴ The probate court entered an order on June 10, 2009, approving the final distribution, discharging the executor, and closing the estate. Daniel and Jesse appealed the order closing the estate.

II. Standard of Review

Except for actions to set aside or to contest wills, for the involuntary appointment of a guardian or conservator, or for the establishment of contested claims, probate cases are tried in equity. Iowa Code § 633.33 (2009). We

³ Daniel and Jesse filed an application for an interlocutory appeal on July 24, 2008. The supreme court ruled the appellants could appeal as a matter of right. The appellants were ordered to file a combined certificate. Appellants failed to comply with appellate rules, and the appeal was dismissed. Procedendo issued on June 19, 2009.

⁴ This may have been due to the probate court’s earlier ruling, on July 3, 2008, that the clerk of court should not accept any further filings in the case unless an order authorizing the filing of the specific document had been entered by the court. Additionally, Daniel’s written objection raised issues already previously decided by the court. Furthermore, the written objection was not timely; the final report had been approved on April 29, 2008.

determine the probate court was acting in equity in ordering the estate closed. Our review is therefore de novo. Iowa R. App. P. 6.907 (2009).

III. Merits

Appellants contend the estate was closed prematurely because several issues had not been adequately adjudicated. Appellants raise the following issues: (1) the attorney for the estate improperly notarized documents; (2) the Francis Mienke estate was improperly closed; (3) they were denied counsel paid for by the estate; and (4) evidence concerning the execution of Delores's will was suppressed or destroyed.

On appeal, appellants are challenging several earlier rulings by the court. Under section 633.36, "All 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." *In re Estate of Adams*, 599 N.W.2d 707, 709 (Iowa 1999). Under this section, all orders of a court in probate proceedings are final judgments if they are entered on notice and hearing.⁵ *In re Estate of Mack*, 373 N.W.2d 97, 99 (Iowa 1985). On the other hand, orders entered without notice are not final and are reviewable by the court at any time. Iowa Code § 633.37; *In re Estate of Borrego*, 490 N.W.2d 833, 836 (Iowa 1982); *In re Estate of Heller*, 401 N.W.2d 602, 605 (Iowa Ct. App. 1986).

Orders that are a final judgment under section 633.36 are appealable orders under Iowa Rule of Appellate Procedure 6.1(1). See *In re Estate of*

⁵ While section 633.36 provides that it applies to "[a]ll orders," the Iowa Supreme Court has determined this section does not apply to procedural rulings, such as motions to continue or applications for a hearing. *In re Estate of Troester*, 331 N.W.2d 123, 126 (Iowa 1983).

Young, 273 N.W.2d 388, 391 (Iowa 1978). “The purpose of this statute [section 633.36] is to allow a prompt appeal from those orders and rulings on probate matters during the administration of the estate rather than at the time of the final report.” *In re Estate of Troester*, 331 N.W.2d 123, 126 (Iowa 1983). If an order is a final judgment under section 633.36, then an appeal must be taken within thirty days from the entry of the order. Iowa R. App. P. 6.5(1); *In re Estate of Myers*, 269 N.W.2d 127, 128 (Iowa 1978); *In re Estate of DeTar*, 572 N.W.2d 178, 182 (Iowa Ct. App. 1997).

The parties had notice and a hearing before the court approved the final report. The court noted in the order approving the final report, “[n]o beneficiary filed any objections and/or resistances with the Court since the Estate’s mailing to all beneficiaries of the Final Report and Notice of Hearing.” The order approving the final report was a final judgment under section 633.36. As the appellants did not appeal that order within thirty days, any later challenge to the matters in the final report is untimely. See *Myers*, 269 N.W.2d at 128.

Additionally, in the order approving the final report, the court set a hearing on the computation of distributive shares, ordered that all the beneficiaries receive notice, and set a deadline for written objections. In the order approving the distribution the court found, “there have been no objections filed by any interested party.” The parties received notice and a hearing on the matter of the proposed distribution of the estate assets, and the order approving the distribution is a final judgment. See Iowa Code § 633.36. Appellants did not

appeal that order, dated June 19, 2008, within thirty days. Any complaints about the distribution are therefore untimely. See *Myers*, 269 N.W.2d at 128.

The notice of appeal, filed on June 17, 2009,⁶ is timely only as to the June 10, 2009 order approving the final distribution, discharging the executor, and closing the estate. The appellants' arguments on appeal, however, do not concern the contents of the June 10, 2009 order. Appellants claim only that the estate should not be closed due to their complaints about previous orders entered in the probate proceedings. We have concluded appellants' complaints about these earlier orders are untimely.

We additionally note that this case does not involve the Francis Mienke estate, and appellants' claims involving that estate are not properly raised in this appeal. The present appeal involves only the Delores Mienke estate.

We conclude appellants are not entitled to relief in this appeal because their claims are either untimely, or involve a different estate. We affirm the decision of the probate court closing the estate.

AFFIRMED.

⁶ The estate filed a motion to dismiss the appeal, claiming appellants had filed the notice of appeal only with the clerk of the supreme court, and had not filed a copy with the clerk of the district court, as required by Iowa Rule of Appellate Procedure 6.6(1). The Iowa Supreme Court ruled the notice of appeal would be "deemed filed with the clerk of the district court on June 17, 2009, the date the notice was mailed to that clerk and served."