IN THE COURT OF APPEALS OF IOWA

No. 1-057 / 10-1072
Filed March 7, 2011

MARK MEIER,
Plaintiff-Appellant,

vs.

CRYSTAL GRUNDER, MARY KEPPY, BARBARA BUDELIER, MATTHEW MEIER, and SCOTT SNOW, Trust Officer of First National Bank of Muscatine, Iowa,
Defendants-Appellees,

Appeal from the Iowa District Court for Cedar County, Mark J. Smith, Judge.

Mark Meier appeals the district court's denial of his foreclosure petition. **AFFIRMED.**

Gregg Geerdes, Iowa City, for appellant.

Stuart Werling, Tipton, and Douglas Simkin, Tipton, for appellees.

Considered by Vogel, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

Mark Meier brought an action to foreclose a mortgage against property held in his father's estate. His sisters Mary Keppy and Barbara Budelier, beneficiaries of the estate, resisted the foreclosure alleging self-dealing on Mark's part. After a hearing, the district court found Mark had used estate funds and assets to purchase the mortgage and a funeral home confession of judgment, the personal services he claimed to have provided to secure and maintain the property were either not needed or not done, and all of this was done in breach of his fiduciary duty as co-executor and without consultation with the remaining heirs. The court then denied the petition for foreclosure. Mark now appeals the district court's ruling. We affirm.

***I. Background Facts*.**

Roger D. Meier, father of Crystal Grunder, Mary Keppy, Mark Meier, Barbara Budelier and Matthew Meier, died testate on May 17, 2004. Roger was a professional photographer in his lifetime, as well as a licensed gun dealer. He owned several real estate properties in Sunbury, including his residence and lot with a building known as the "store property." Roger had many safes at each location as well as valuable personal property. After his death, a substantial amount of his cash and personal property went missing.

Roger primarily photographed bowling tournaments and weddings. He owned and used high-end cameras and equipment, and he customarily compiled an inventory of his photography equipment each year. Roger's 2004 inventory showed his professional equipment to be valued in excess of $72,000. Mary testified she last saw this equipment in Mark's dining room after Roger died. As

a collector of cameras, Roger also had a large number of expensive Rolleiflex and Hasselblad cameras.

Additionally, Roger was known to have numerous safes packed full of rifles, shotguns, pistols, and handguns. There were five "large" safes in the store property, each containing an estimated $60,000 in guns. There were four or five smaller safes in Roger's house containing more guns. Roger kept an inventory of his guns, but it was not found after his death.

Roger collected quarters in quart glass canning jars. There were an estimated twelve to fifteen jars in Roger's house at his death, each containing approximately $400 to $500 in coins. Roger also kept ammunition boxes filled with silver quarters in the basement.

Roger kept large amounts of cash in two safes in his home. A basement safe contained what Roger called a "funeral fund." Matthew testified Roger showed him a stack of cash wrapped in plastic and told him it was "ten grand" for funeral expenses. Matthew said Roger told him there was more money in the safe stashed behind the funeral money. Roger also kept an $8000 "furnace fund" in the upstairs safe in his home, along with $30,000 to $40,000 in cash.

Roger died in the hospital during the early morning hours of May 17. Crystal, Mary, Mark, and Matthew met at Mark's house later that day to discuss funeral arrangements. Mary testified:

> [W]e were discussing—you kind of laugh and joke about things your father had done, and that type of thing. And we kind of got to arguing about how much to spend on the funeral. And I was telling them what Roger's last wishes were. And I says, let's just go count the money and let's see how much he left so we could know how much we can spend. And Mark immediately got very upset. His

> face turned bright red. He got very angry, and he goes, "Somebody broke into the safes and took all the money last night."

They then went to Roger's house, about a block away. Mary testified all the money was gone from the house, and the safes where Roger kept his cash were open. The jars full of coins were gone as were the ammunition boxes full of silver quarters. Matthew testified he inspected the safes and they appeared in "fine shape" and did not look like they had been forced open. Matthew tested one safe by closing it and then opening it with the combination given to him by Mark. He further testified that when the question of what happened to the money arose, everyone "denied it and [Mark] was the only one that turned red." Mark's demeanor became "less friendly."

Mark had been out of town photographing a state bowling tournament the weekend prior to Roger's death. Mark testified that upon his return on May 16, he found the safes where Roger kept his money open and the money gone. He testified he reported the theft to the sheriff who is now deceased. There is no evidence of such a report or of any investigation by law enforcement in the record before us.

On May 21, the family gathered at Roger's house to make an inventory. What camera equipment was found there was inventoried. They then went to the store property, but Mark would not allow the family to look in the safes.

At trial, Mark testified Roger's personal effects consisted of "[y]our usual household furnishings, camera equipment. He had a few guns. He ha[d] some old cars. Nothing of any particular value." When asked what happened to the photography equipment, Mark responded: "It's still in the house." Asked about

the guns and other personal effects, he responded: "They're still in his house, what was left." Mark denied taking any of his father's property for his own use.

According to the testimony, the multitude of guns in Roger's collection never appeared in the probate inventory, nor did the vast bulk of the camera and photography equipment. And, of course, none of the missing money was included in the probate estate.

***II. Proceedings*.**

A judge deftly painted the landscape of this litigation in a December 2009 probate order:

> This estate was opened on June 11, 2004, and remains open at this time. The decedent's children, Mary Keppy, Barbara Budelier, and Mark Meier, have been fighting among themselves since this probate was opened.
>
> The estate inventory includes certain real property located in Sunbury, Iowa, which is a tiny burg found in Cedar County. This real property is identified as multiple lots on which a home and a store belonging to the decedent are located. The store roof has apparently collapsed while this estate has been pending. The legal description and value of the pertinent property has been the subject of dispute throughout the legal wranglings that have taken place in what has been described as an insolvent estate.

Roger's will devised certain lots in Block 5 in Sunbury to Mark. Mark was also granted an option to purchase certain lots in Block 4 collectively known as "the store property." Mary was granted the option to purchase certain lots in Blocks 8 and 9 collectively known as Roger's residence. The remainder of the estate was divided equally among the five children. After the estate was opened, Mark and Matthew were appointed co-executors.

At the time of his death, Roger was indebted under a promissory note. The $4500 note, dated April 11, 2000, provided that beginning May 1, 2001,

annual payments were due on May 1 of each year in the amount of $250 plus interest. Payments were to continue to May 1, 2005, at which time the entire balance was due and payable. After Roger's death, no payments were made by the estate; evidently the result of the estate's lack of liquidity. The note was secured by a mortgage encumbering the store property. On May 12, 2005, Mark, while still co-executor, purchased the promissory note from the bank for $3824.80 and was assigned all rights and ownership in the note and mortgage.[1]

After not being paid, the funeral home filed claims in the estate for the funeral bill and for its attorney fees. On February 14, 2006, Mark, as executor, executed a confession of judgment on behalf of the estate, confessing indebtedness in the amount of $6260.40 in principal, plus $794.30 in late fees, and $827.77 in attorney fees. In December 2006, Mark purchased the judgment from the funeral home for $8500 and was assigned all rights and ownership in the judgment and lien.[2]

Acknowledging a conflict of interest, Mark filed a motion to appoint a substitute executor. In May 2007, Scott Snow, a trust officer of the First National Bank of Muscatine, Iowa, was appointed a substitute executor.[3]

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[1] Self-dealing, without prior court approval, is generally prohibited by the Iowa Probate Code. *See* Iowa Code § 633.155 (2009); *see also In re Guardianship of Jordan*, 616 N.W.2d 553, 559 (Iowa 2000) (noting section 633.155 requires that "interested persons" have adequate notice that a fiduciary is seeking court approval for an act of self-dealing); *In re Estate of Snapp*, 502 N.W.2d 29, 33 (Iowa Ct. App. 1993) (defining self-dealing as "those situations in which a fiduciary personally profits from transactions between himself and the estate" and noting that the statute mandates court approval of self-dealing to prevent the fiduciary from deriving a profit from the transaction). There is no showing in the record, nor does Mark assert he gave the requisite notice or obtained court approval of his purchase of the mortgage.

[2] There is no showing in the record, nor does Mark assert he gave the requisite notice or obtained court approval of his purchase of the confession of judgment.

[3] At some point, Matthew also withdrew as co-executor.

On January 9, 2009, Mark filed a foreclosure petition seeking to foreclose against certain real estate parcels owned by Roger at the time of his death. This real estate appears to be the store property and the residence property. The action was founded on the mortgage assigned to Mark. Additionally, he alleged the mortgage secured the funeral home judgment and "protective advancements" in the amount of $77,985.79 Mark alleged he made on behalf of the estate to secure and maintain the real property.

Mary and Barbara resisted,[4] contending Mark's actions concerning the purchase and assignments of the mortgage and funeral expense confession of judgment were made without notice to the remaining heirs and constituted self dealing and fraud. Further, as to the "protective advancements," they contended Mark committed waste and allowed the property to decline in value through neglect and lack of care. Mary and Barbara also counterclaimed alleging slander of title.

Trial was held on March 22, 2010. In its ruling thereafter, the district court found Mark used estate funds and assets to purchase the mortgage and the funeral home judgment, in breach of his fiduciary duty as a co-executor and without consultation with the remaining heirs. As to the advancements Mark claimed to have made to secure and maintain the property, the court found either the advancements were not needed or were not done. The court denied the

[4] Crystal Grunder did not file any responsive pleading, nor did she participate in the litigation. Matthew did not file any responsive pleading or participate in the litigation, but he did testify at the hearing. Scott Snow, the executor, filed a pro se answer. He did not, nor did anyone from the bank, participate in the litigation or testify at the hearing. A statement from Snow's answer may provide an explanation; "I have not received anything other than threatening letters from [Mark]. He has not and will not cooperate to have the estate completed." Snow's attempt to withdraw as executor in January 2009 was denied by the probate court.

foreclosure petition. Although Mark was found to have slandered the title to the real estate, the court declined to award damages to Mary and Barbara.

Mark appeals.

III. Scope and Standards of Review.

This mortgage foreclosure action is in equity. Iowa Code § 654.1 (2009); *First Fed. Sav. & Loan Ass'n of Storm Lake v. Blass*, 316 N.W.2d 411, 415 (Iowa 1982). Review of an equitable claim to foreclose a mortgage is de novo. *Iowa State Bank & Trust v. Michel*, 683 N.W.2d 95, 98 (Iowa 2004). "In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the district court, but is not bound by them. Iowa R. App. P. 6.904(3)(*g*).

IV. Discussion.

On appeal, Mark contends the district court erred in several respects. We address his arguments in turn.

A. Standing.

After having named his siblings as defendants, Mark curiously contends they now have no standing to challenge his foreclosure petition. He argues:

> It is the sole duty and responsibility of the executor to control the estate's property. Scott Snow, the appointed executor, exercised this authority and admitted in his answer that foreclosure was appropriate. The Defendant Beneficiaries, instead of directly challenging the acts of Executor Snow, now contend that they are entitled to circumvent his decision by raising for themselves the claim which Snow chose not to pursue. But this they cannot do because under Iowa Code [section] 633.350 these claims are under the exclusive control of the executor.

Mark's argument is premised upon his belief that Snow admitted in his answer to the foreclosure petition that foreclosure was appropriate. We think Mark reads

too much into the Snow's pro se answer. In response to Mark's allegations as to the amounts due, Snow responded: "I believe these are monies owing to the plaintiff but do not know what the specific amounts are." In response to the allegation the liens of the judgment and mortgage held by Mark should be foreclosed, Snow responded: "[This] item[] appears to be correct." We generally

> do not utilize a deferential standard when persons choose to represent themselves. The law does not judge by two standards, one for lawyers and the other for lay persons. Rather, all are expected to act with equal competence. If lay persons choose to proceed pro se, they do so at their own risk.

Metro. Jacobson Dev. Venture v. Bd. of Review, 476 N.W.2d 726, 729 (Iowa Ct. App. 1991).

But, in a bit less strict vein, our appellate courts also have recognized that pro se litigants are entitled to a liberal construction of their pleadings. *See Munz v. State*, 382 N.W.2d 693, 697 (Iowa Ct. App. 1985); *see also Knight v. Knight*, 525 N.W.2d 841, 843 (Iowa 1994) (finding "some leeway must be accorded from precision in draftsmanship" of pro se petitions). In this light, we can hardly characterize Snow's responses as an unequivocal admission that foreclosure is appropriate. But, even if construed as an admission foreclosure was appropriate, such an admission does not strip the beneficiaries, as equitable titleholders, of their right to contest the foreclosure.

Mark argues that under Iowa Code section 633.350 "it is the sole duty and responsibility of the executor to control the estate's property." Section 633.350 Code provides, in part, that

> all of the property shall be subject to the possession of the personal representative as provided in section 633.351 and to the control of the court for the purposes of administration, sale, or other

> disposition under the provisions of the law, and such property, except homestead and other exempt property, shall be chargeable with the payment of debts and charges against the estate.

Iowa Code § 633.350; *DeLong v. Scott*, 217 N.W.2d 635, 637 (Iowa 1974) ("decedent's real property. . . [is] subject to possession by the decedent's personal representative during probate proceedings for purposes of administration, sale, or other disposition under provisions of law."). Mark further asserts these matters are under the exclusive control of the executor. Not so. A fiduciary has no unfettered right to control the estate's property as he or she pleases.[5] Mark disregards the language in section 633.350 subjecting a decedent's property "to the control of the court for the purposes of administration, sale or other disposition under the provisions of law." Specifically, a fiduciary's actions concerning disposition of claims by or against an estate are subject to court approval. *See* Iowa Code §§ 633.114-.115; *see also* Iowa Code § 633.117 (concerning encumbered assets). We therefore reject Mark's argument on this point.

Mark asserts Snow is "the only party who can contest the foreclosure of the real estate held in the estate." Iowa Code section 633.350 also provides that on death, title to decedent's property, real and personal, passes to the person it was devised to under a will or to the person who succeeds to it as provided by the probate code. Generally, a person instantly receives title to property under a will at the time of the decedent's death. *In re Estate of Tolson*, 690 N.W.2d 680, 683 (Iowa 2005). "[W]hile title to real property passe[s] instantly to the devisee

[5] A fiduciary includes personal representative, executor, and administrator. *See* Iowa Code § 633.3(17).

the property [is] nevertheless in the possession of the personal representative of the estate and subject to sale or other disposition." *In re Estate of Ragan*, 541 N.W.2d 859, 861 (Iowa 1995) (citing *DeLong*, 217 N.W.2d at 637). At the time of the attempted foreclosure, Mary, Barbara, and Matthew, as beneficiaries under Roger's will, held equitable title to the property, subject to control of the court for purposes of administration, sale, or other disposition under provisions of the law. *See In re Estate of Ferris*, 234 Iowa 960, 978-79, 14 N.W.2d 889, 899-900 (1944). As equitable titleholders to the property being foreclosed upon, Mary, Barbara, and Matthew had standing to contest the foreclosure petition. Further, their standing was not divested by Snow's somewhat equivocal pro se answer that foreclosure was appropriate, for this record is devoid of any court order approving Snow's response to the foreclosure suit.

***B. Denial of Foreclosure*.**

Mark contends under the evidence presented at trial he is entitled to foreclose his mortgage and judgment lien and that he is entitled to recover his protective advancements. In resistance to the foreclosure, Mark's siblings in this action claim the lack of notice to them of Mark's purchase of the estate's debts constituted fraud and self-dealing thus rendering the judgment liens he obtained to be voidable. On appeal they acknowledge their theory of defense was that Mark pilfered assets of the estate and then used them to purchase the mortgage and the judgment, which he now seeks to enforce. In response, Mark claimed the money and guns were stolen and the safes were open when he came to look. The district court specifically found Mark's testimony not credible.

Although Mark said he reported the theft to the sheriff, no proof of such a report appears in the record, nor is there any proof of any investigation by law enforcement. Additionally, the evidence established the safes were not forced open, but instead opened by their combinations. It is undisputed that Roger kept the safe combinations on a slip of paper in his wallet.

What became of Roger's wallet is disputed by the parties. Mark asserted Mary and Matthew took the wallet after Roger died, based upon a nurse's note indicating Roger's "personal belongings [were] sent home with daughter and son." Conversely, Mary maintained that Mark had taken Roger's wallet, testifying that she asked hospital personnel if she needed to take Roger's personal belongings home with her and was told Mark already had Roger's personal effects, including his wallet.

Mark's siblings also claimed Mark went on a $150,000 spending spree shortly after Roger's death. Mark countered that the newly purchased items were not worth nearly what his siblings thought, and the items were purchased with earned and borrowed funds, a workers' compensation settlement, and a cashed-in IRA.

"Generally, we give considerable deference to the district court's credibility determinations because the court has a firsthand opportunity to hear the evidence and view the witnesses." *In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007); *see also In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) ("A trial court deciding dissolution cases 'is greatly helped in making a wise decision about the parties by listening to them and watching them in person.' In contrast, appellate courts must rely on the printed record in

evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented." (internal citations omitted)). A witness's facial expressions, vocal intonation, eye movement, gestures, posture, body language, and courtroom conduct, both on and off the stand, are not reflected in the transcript. Hidden attitudes, feelings, and opinions may be detected from this "nonverbal leakage." Thomas Sannito & Peter J. McGovern, Courtroom Psychology for Trial Lawyers 1 (1985). From this favorable vantage point, a trial judge is in the best position to assess witnesses' interest in the trial, their motive, candor, bias, and prejudice.

At the end of the day, the district court determined Mark used estate funds and assets to purchase the mortgage and the funeral home judgment. Further, the court found this was done in breach of his fiduciary duty as co-executor and without consultation with the remaining heirs. On our de novo review, after giving the appropriate weight to the fact findings and credibility determinations of the district court, we agree with the district court's conclusion. We therefore affirm the denial of the foreclosure petition.

One seeking equity must have clean hands. "What is material is not that the plaintiff's hands are dirty, but that he dirtied them in acquiring the rights he now asserts . . . ." *Anita Valley, Inc. v. Bingley*, 279 N.W.2d 37 (Iowa 1979).

Mark also alleges the mortgage he held secured "various protective advancements and other amounts advanced or expended by [Mark] in regard to the obligations or properties described [in the petition]" totaling $77,985.79. At trial, Mark presented testimony and a detailed fifty-four page exhibit to establish the protective advancements he claimed to have made on behalf of the estate.

He calculated the estate owed him $124,347.46 for cash advances, mortgages and liens, property taxes, utility bills, insurance, mowing, tire disposal, backhoe work, and clean-up charges, plus interest thereon. He claimed Snow approved these expenditures and work. However, some of the advancements claimed were made while Mark was still a co-executor, before Snow was appointed substitute executor, and before Mark took an assignment of the mortgage.[6] That Roger's siblings never approved the advancements is not in dispute.

We, like the district court, viewed the photographs and reach the same conclusion: "[I]t would appear that there is little, if any, maintenance done on the buildings and the lawn area is poorly maintained." Frankly, the buildings depicted in the photographs are plainly dilapidated. While under Mark's watch, the roof caved in on the store property. We agree with the district court's finding that such advancements were not needed or they were not done.

***C. Slander of Title*.**

Mary and Barbara filed a counterclaim for slander of title. Although the district court found that Mark did act to the detriment of the equitable title held by the heirs, the court found no showing of damages and declined to make a damage award. Mary and Barbara did not appeal this decision. On appeal, Mark's asserts the counterclaim should have been dismissed. In view of the fact no damages were awarded, we find the issue moot.

[6] There is no showing in the record, nor does Mark assert court approval was obtained for these advancements.

***D. Appellate Attorney Fees*.**

Mary and Barbara request appellate attorney fees. A party generally has no claim for attorney fees unless a statute or contractual term allows for such award. *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines*, 510 N.W.2d 153, 158 (Iowa 1993). Mary and Barbara cite to no authority for an award of appellate attorney fees, and we decline to award any.

***V. Conclusion*.**

On our de novo review, we agree with the findings and conclusions by the district court. We therefore affirm the ruling of the district court.

AFFIRMED.