IN THE COURT OF APPEALS OF IOWA

No. 2-493 / 11-0900
Filed September 6, 2012

**IN THE MATTER OF THE ESTATE OF
GLENN WOODROFFE, Deceased.**

ELDA WOODROFFE,
Appellant.

and

STEVEN J. WESTERCAMP, Executor
of the Estate of Glenn Woodroffe,
RANDOLPH W. WOODROFFE, and
JANICE M. WOODROFFE,
Appellees,

Appeal from the Iowa District Court for Lee (North) County, William L. Dowell, Judge.

Elda Woodroffe, decedent's widow and beneficiary of the estate, appeals the probate court's rulings denying her petition to remove the executor and granting the executor's application to approve a settlement agreement. **APPEAL FROM DENIAL OF PETITION FOR REMOVAL DISMISSED; APPEAL FROM RULING GRANTING SETTLEMENT AGREEMENT APPROVAL AFFIRMED.**

Kimberly A. Auge and William H. Napier of Napier, Wolf, Popejoy & Auge, LLP, Fort Madison, for appellant.

Steven J. Westercamp of Westercamp Law Firm, Farmington, pro se.

Robert S. Hatala of Simmons Perrine Moyer Bergman PLC, Cedar Rapids, for appellees Randolph and Janice Woodroffe.

Heard by Eisenhauer, C.J., and Doyle and Tabor, JJ.

DOYLE, J.

Elda Woodroffe, Glenn Woodroffe's widow and beneficiary of his estate, appeals from the probate court's denial of her petition to remove the executor and from its approval of the executor's proposed settlement agreement. We dismiss her appeal from the order denying her petition, and we affirm the probate court's ruling granting approval of the settlement agreement.

***I. Background Facts and Proceedings*.**

It would serve no useful purpose to repeat in detail the long and tortured history of this estate which has been pending since 2002. Background facts through 2004 are set forth in *In re Estate of Woodroffe*, 742 N.W.2d 94 (Iowa 2007).

In the prior appeal, the supreme court determined the machinery, equipment, and inventory used in the Woodroffe family sawmill business were owned by decedent Glenn Woodroffe and therefore properly included as assets of his estate. *Estate of Woodroffe*, 742 N.W.2d. at 108. Thereafter, in 2009, the executor of the estate submitted a proposed settlement agreement to the probate court, under which Randolph Woodroffe, a son who continues to operate the family business, would pay the estate for the machinery, equipment, and inventory using the values assigned to them in the probate inventory. Elda objected to the proposed settlement agreement, and she also petitioned to have the executor removed. She claimed the executor was undervaluing the property even though he was relying on the values that she herself had assigned to it when she was serving as the executor and had prepared the probate inventory in 2003.

The probate court denied Elda's petition for removal of the executor by an order filed October 15, 2010. Although Randolph filed a "request for expanded statement of issues, findings of fact, conclusions of law and order" on October 27, 2010, this request was never ruled upon. On May 9, 2011, the probate court entered its ruling granting approval of the executor's proposed settlement agreement, finding the agreement was fair, reasonable, and just for all parties involved and that approval of the settlement agreement was in the best interest of the estate.

Elda appeals.[1]

II. Petition to Remove Executor.

On June 7, 2011, Elda filed a notice of appeal challenging both the October 15, 2010 and the May 9, 2011 rulings of the probate court. In their appellate briefs, the executor and Randolph argue Elda's failure to file her notice of appeal within the Iowa Rule of Appellate Procedure 6.101(1)(b) thirty-day appeal deadline deprives the appellate courts of jurisdiction to entertain her appeal from the October 15, 2010 order. Elda perfunctorily responded to these

[1] Included in the 1187-page, two-volume appendix are over 400 pages of transcript. We note an all too frequently observed violation of the rules of appellate procedure: failure to place the name of each witness at the top of each appendix page where the witness's testimony appears. *See* Iowa R. App. P. 6.905(7)(c). Additionally, the table of contents did not state the name of each witness whose testimony was included and the appendix page at which each witness's testimony begins. *See* Iowa R. App. P. 6.905(4)(b). Although these transgressions may seem trivial, nonconformance with the rules impedes our ability to efficiently navigate an appendix. Observance of the rules of appellate procedure fosters judicial efficiency, thus assisting us in our efforts to meet our mandate to "dispose justly of a high volume of cases." *See* Iowa Ct. R. 21.30(1).

concerns in her reply brief without citing any supporting authority, contending that if she had taken an earlier appeal it would have been interlocutory.[2]

After all the briefs were filed with our supreme court, the executor filed a motion to dismiss claiming, in part, that Elda's appeal should be dismissed because she had not timely appealed from the October 15, 2010 order. Randolph joined in the motion. Elda resisted asserting that order was not a "final order" because it did not "finally adjudicate the rights of the parties and did not prevent the court from placing the parties in their original position," citing *In re Estate of Troester*, 331 N.W.2d 123, 125-26 (Iowa 1983). She argued it was the May 9, 2011 order that adjudicated the rights of the parties, and it was timely appealed. In a March 2, 2012 order, the supreme court indicated resolution of the "motion to dismiss and a determination of whether Elda's appeal is interlocutory or untimely will depend on whether Randolph's October 27, 2010 request was the type of motion that tolled the time for taking an appeal." The motion to dismiss was submitted with the appeal and transferred to this court.

Under Iowa Code section 633.36 (2009), "[a]ll 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." *See also In re Estate of Adams*, 599 N.W.2d 707, 709 (Iowa 1999); *In re Estate of Mack*, 373 N.W.2d 97, 99 (Iowa 1985). Orders that are final judgments under section 633.36 are appealable orders under Iowa Rule of Appellate Procedure 6.103(1). *See In re Estate of Young*, 273 N.W.2d 388, 391 (Iowa 1978). "The purpose of [section 633.36] is to allow a

[2] "Failure to cite authority in support of an issue may be deemed a waiver of that issue." Iowa R. App. P. 6.903(2)(g)(3).

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." *Troester*, 331 N.W.2d at 126. 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. 6.101(1)(b); *see also 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). If the appeal is not taken within the thirty days, it is untimely and we are without jurisdiction to entertain the appeal. *DeTar*, 572 N.W.2d at 182.

Although 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 orders concerning motions to continue or applications for a hearing." *Troester*, 331 N.W.2d at 126 ("[T]he fact that this order arose from a probate proceeding has no effect on our determination that this ruling is interlocutory. . . . We interpret the broad language of section 633.36 to exclude ordinary orders normally found in other civil actions."). A motion to amend or enlarge the district court's findings and conclusions pursuant to Iowa Rule of Civil Procedure 1.904(2) is the type of motion that tolls the time to file an appeal. *See* Iowa R. App. P. 6.101(1)(b). When a timely rule 1.904(2) motion "is pending prior to the taking of an appeal, the decree to which the motion is addressed becomes in effect interlocutory until the court rules on the motion." *Wolf v. City of Ely*, 493 N.W.2d 846, 848 (Iowa 1992); *see also IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 628 (Iowa 2000). However, a motion for an order nunc pro tunc does not extend the time for taking an appeal. *See* Iowa R. App. P. 6.101(1)(b); *see also Fed. Am. Int'l, Inc. v. Om Namah Shiva, Inc.*, 657 N.W.2d 481, 483 (Iowa 2003)

(addressing the types of motions that extend the time for filing a notice of appeal); *State v*. *Onstot*, 268 N.W.2d 219, 220 (Iowa 1978).

The parties had notice and a hearing before the court entered its October 15, 2010 order. The probate court's order was not a procedural order, such as an order concerning a motion to continue or application for a hearing. Thus, under section 633.36, the probate court's October 15, 2010 order was final, not interlocutory, and therefore appealable as a matter of right. But was the order "interlocutory" as a result of Randolph's motion filed after the court's October 15 order requesting an expanded statement of issues, findings of fact, conclusions of law and order?[3] We think not.

Although Randolph's motion's label is indicative of a 1.904(2) motion, we look to the substance of a motion, not its label, to determine its legal significance. *See Iowa Elec*. *Light & Power Co*. *v*. *Lagle*, 430 N.W.2d 393, 395 (Iowa 1988); *Kagin's Numismatic Auctions*, *Inc*. *v*. *Criswell*, 284 N.W.2d 224, 226 (Iowa 1979). Randolph's request asked the probate court to amend its order with respect to its finding concerning the interest rate set out in a proposed settlement agreement between the estate and Randolph. It appears the probate court never took any action on Randolph's request. In light of all the circumstances and the substance of Randolph's motion, we conclude Randolph believed the interest rate in the

[3] Although Elda makes no argument that Randolph's October 27, 2010 request tolled the time for taking an appeal, we address the issue in view of the March 2, 2012 supreme court order that indicated resolution of the "motion to dismiss and a determination of whether Elda's appeal is interlocutory or untimely will depend on whether Randolph's October 27, 2010 request was the type of motion that tolled the time for taking an appeal." Further, the supreme court stated: "Although not addressed by the parties, an additional consideration may be whether Randolph's October 27, 2010 request was essentially an application for a nunc pro tunc order and whether that is the type of motion that extends the time for taking an appeal."

court's findings of fact was a scrivener's error, an evident mistake.[4] The appropriate way to correct an obvious error is by a nunc pro tunc order. *Graber v. Iowa Dist. Ct.*, 410 N.W.2d 224, 229 (Iowa 1987) (holding a nunc pro tunc order can be used only to correct obvious errors or to make an order conform to the judge's original intent). We therefore view Randolph's "request" as one for an order nunc pro tunc, not one requesting the court to change or correct its thinking or conclusions. As a motion for an order nunc pro tunc does not extend the time for taking an appeal, the filing of Randolph's motion did not extend the time for Elda to appeal from the probate court's October 15, 2010 ruling. Consequently, Elda's 2011 appeal is untimely.

Because Elda's appeal of the 2010 order is untimely, we are without jurisdiction to entertain the appeal. *See DeTar*, 572 N.W.2d at 182. We therefore grant the motion to dismiss this appeal, and we do not consider Elda's

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[4] In paragraph sixteen of its findings of fact, the probate court found that a June 8, 2009 proposed compromise settlement between the estate and Randolph provided the estate's claim to the sawmill inventory, machinery, and equipment would be released "in exchange for Randolph paying the [e]state the values noted on the probate report and inventory, plus [five-percent] simple interest." This is an accurate finding. After Elda resisted approval of this compromise of claim, the probate court ordered mediation. The mediator reported to the court on August 7, 2009, that the executor and Randolph had reached a tentative agreement for the sale of the machinery, equipment, and inventory. This settlement agreement was reduced to writing and filed with an application to approve on August 14, 2009. The August 2009 settlement agreement provided that Randolph pay three-percent interest. The probate court referenced this agreement in paragraph seventeen of its findings, but did not mention the interest rate provided in the agreement.

Randolph's October 27, 2010 request states: "Paragraph [number sixteen] of the ruling makes a finding that the proposed compromise settlement agreement provided for [five-percent] interest rate." This is true. The June 2009 agreement does provide for a five-percent interest rate, and the probate court so found. He further states: "The agreement signed by the [e]state and [Randolph] provides for a [three-percent] interest rate." This is also true. The August 2009 signed settlement agreement does provide for a three-percent interest rate. The probate court made no mention of this agreement's interest rate. The probate court made no error regarding applicable interest rates in its findings of facts. Nonetheless, Randolph requested the court to amend its order with respect to the interest rate set out in paragraph number sixteen.

claims that the probate court abused its discretion in denying her petition for removal of the executor.

III. Grant of Application to Approve Settlement.

Elda's appellate brief succinctly states the fighting issue on appeal:

> This [issue], in its simplest terms, is a determination of whether the executor's offer to sell all of the machinery and equipment owned by the estate to [Randolph] is fair and reasonable and in the best interests of the estate and the beneficiaries. The offer of sale is essentially in two parts: the machinery and equipment as one and the business inventory as the other. The inventory has been accepted by all parties during the negotiations as being worth $80,800 based on the probate inventory amount which, in turn, was based on a federal income tax return signed under penalties of perjury by [Randolph] shortly after the death of Glenn. However, the beneficiary of the estate as to the machinery and equipment (Elda) strongly objects to the offer of sale of such assets for the principal sum of $29,000.[5,6]

Our review is de novo. *See* Iowa R. App. P. 6.907; *see also* In re Esate of Roethler, 801 N.W.2d 833, 837 (Iowa 2011).

Following trial in January 2011 on the proposed settlement agreement, the probate court concluded in its ruling:

> Elda asserts using the values listed on the probate report—for the machinery, equipment, and inventory—fails to adequately compensate the estate and thus Elda as beneficiary because they are obviously erroneous and would result in their sale under-value. The court notes that Elda did not seek to amend the probate inventory in any respect while she was the executor of the estate. Nor did [the temporary executor] seek to amend the probate

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[5] In his brief, Randolph states:

> [Elda] mistakenly asserts that all parties have agreed that the value of the sawmill inventory on [Glenn's] date of death was $80,800. [Randolph] maintains that [Glenn] owned no inventory on the date of his death. However, Randolph has agreed to pay that amount for inventory in an effort to peacefully resolve the matter without further litigation.

[6] We note Elda makes no references to the pertinent parts of the record in her argument. *See* Iowa Rs. App. P. 6.903(2)(g)(3), 6.904(4)(b).

> inventory as executor until almost five years after it had been admitted to probate, and, only then, at Elda's insistence.
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> As executor, Elda had borne a fiduciary duty to identify and take possession of Glenn's property as well as a duty to identify and value all of Glenn's assets as accurately as possible. When Elda completed the probate inventory after Glenn's death she valued the commercial machinery and equipment at $29,000 and the inventory at $80,800. The reported value of the materials and equipment of $29,000 was the value determined by the county assessor's office. "The actual value of all property subject to assessment and taxation shall be the fair and reasonable market value of such property except as otherwise provided in this section." [Iowa Code § 444.21(b)]. Market value is the fair and reasonable price—between a willing buyer and a willing seller—in the year in which the property is listed and valued. *Id.* Therefore, Elda had a reasonable basis on which to report the values determined by the county assessor's office on the probate report and inventory as their actual, fair market values for the probate proceeding.
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> Consequently, it is appropriate for the parties to rely on, or at least recognize, the impact of the previous values given by Elda which were not amended during her time as executor or during the preliminary negotiations with Randolph to compromise any claims he might have had against the estate. Further, as executor, [the temporary executor] closely examined the sawmill's financial records for the ten years prior to Glenn's death upon Elda's request to determine if the reported values were accurate. After his review, [the temporary executor] reported that it was "almost [an] insurmountable task" to ascertain the identity and date of death value of the machinery and equipment. Yet, now Elda objects to the "settlement agreement" using the numbers she originally reported as executor. It was not until relatively recently in this drawn out proceeding that Elda managed to provide the successor Executor and the Court with other valuations for the property.

(Internal footnotes omitted.) Finding no fraud to support Elda's claims, and noting the estate had limited financial resources and that "[a] timely resolution would prevent the squandering of any remaining resources of the estate on unnecessary litigation," the probate court found the settlement agreement to be fair, reasonable, and just for all involved parties.

The ruling of the probate court identifies and considers all the issues presented. After a careful de novo review, we agree with the probate court's analysis and we approve of the reasons and conclusions of the court's ruling. We therefore affirm this issue pursuant to Iowa Court Rule 21.29(1)(d).

IV. Paragraph Six of Glenn's Last Will and Testament.

In her appellate brief, Elda presents an issue concerning paragraph six of Glenn's Last Will and Testament; a bequest to his son Reginald and his daughters Jeanne and Anita.[7] The issue was not raised or decided by the probate court. Because we do not consider issues raised for the first time on appeal, Elda has failed to preserve this claim for our review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

V. Conclusion.

For the reasons stated above, we dismiss Elda's appeal from the order denying her petition for removal of the executor, and we affirm the probate court's ruling granting approval of the settlement agreement.

APPEAL FROM DENIAL OF PETITION FOR REMOVAL DISMISSED; APPEAL FROM RULING GRANTING SETTLEMENT AGREEMENT APPROVAL AFFIRMED.

[7] Again, Elda makes no references to the pertinent parts of the record in her argument. *See* Iowa Rs. App. P. 6.903(2)(g)(3), 6.904(4)(b).