IN THE COURT OF APPEALS OF IOWA

No. 6-894 / 05-1276
Filed January 18, 2007

SANDRA MCDONALD, DEBORAH PARIZEK and BRETT WARSON,
Plaintiffs-Appellants,

vs.

DOLORES E. WINDUS,
Defendant-Appellee/Cross-Appellant,

TOM MAAS and MARLA MAAS,
Defendants-Appellees.

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

The plaintiffs appeal from the district court order denying in part their claims against the defendants. **AFFIRMED.**

Rand S. Wonio of Lane & Waterman, L.L.P., Davenport, for appellants.

Thomas D. Hobart of Meardon, Sueppel & Downer, P.L.C., Iowa City for appellee Delores Windus.

Charles T. Traw of Leff, Haupert & Traw, Iowa City, for appellees Tom & Marla Maas.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

In 1983, Cyndi Lauper sang, "Money changes everything."[1] CYNDI LAUPER, *Money Changes Everything*, *on* SHE'S SO UNUSUAL (Portrait Records 1983). This sentiment is still true today. It is especially disheartening when it applies to a family who has lost a loved one and the survivors are left fighting over the remaining estate. This situation comes before the court all too often and we again address it here.

The plaintiffs, Sandra McDonald, Deborah Parizek, and Brett Warson, appeal from the district court order denying in part their claims against the defendants, their mother, Delores Windus, and their sister, Marla Maas, and her husband, Tom. The plaintiffs contend the district court erred in concluding their parents did not give them units of ownership in the K & D Farms limited partnership and in concluding the units of ownership were not converted by Delores and taken from them by her fraudulent misrepresentations. They further contend the district court erred in allowing Delores to proceed on her counter-claim, in denying their request for attorney fees, and in assessing any portion of the costs to Deborah and Brett. Delores cross-appeals, contending the district court erred in concluding she breached her fiduciary duty as executor/trustee of the Estate of Keith M. Windus. We affirm.

I. Background Facts and Proceedings. Keith and Delores Windus were married in 1953. Keith was a farmer. By 1978, Keith and Delores owned over eight hundred acres of farmland.

[1] The song "Money Changes Everything" was written by Tom Gay and performed by his band, The Brains, on their 1980 debut album, "The Brains." THE BRAINS, *Money Changes Everything*, *on* THE BRAINS (Mercury Records 1980).

On June 27, 1978, they formed and transferred ownership of their land to a limited partnership known as K & D Farms. The partnership paperwork was filed with the Iowa Secretary of State and the Muscatine County Recorder's office on December 26, 1978. Keith and Delores owned a twenty percent interest as general partners and an eighty percent interest as limited partners.

Sandra, Deborah, Bret, Marla, and Tracey (not a party to this case) are Keith and Delores's five daughters. After K & D Farms was formed, nine amendments were drafted, assigning a proportional interest as limited partners to each of the daughters. However, none of the amendments were ever filed with the Secretary of State or the Muscatine County Recorder and no written notifications were sent to the daughters. Additionally, the daughters never signed a partnership agreement with any of the amendments, and all income from K & D Farms was distributed to Keith and Delores. As such, the agreement did not comply with the Iowa Limited Partnership Act in effect at the time the amendments were signed. Tax returns filed for the partnership listed ownership as fifty percent for Keith and fifty percent Delores.

Marla and her husband, Tom, began working for Keith and Delores in the early 1980s, assisting in the farming operation. After two years, Keith and Delores agreed to rent part of the farm to Marla and Tom, allowing them to start their own farming operation. In exchange for renting approximately 240 acres of land, Marla and Tom were responsible for maintaining the land, and making repairs to the house and outbuildings located on the property. The cost of repairs and maintenance was to be credited to them when they purchased the land from Keith and Delores. Keith and Delores wished to keep the land in the

family after their death. When Keith retired from farming in 1993, Marla and Tom rented the entire farm.

In 1997, Keith and Delores wrote into their wills a provision stating Marla and Tom could purchase eighty acres of farmland at a discounted price, based on the value of the land claimed in the probate inventory of the survivor of them with a fifty-percent credit for improvements made to the land during the time that Tim and Marla were farming. The will did not state how the credit was to be calculated. Tom and Marla would pay ten percent of the remaining purchase price per year for a period of ten years with an interest rate two percent less than would be charged at West Liberty State Bank for similar loans.

Over the years, Marla and Tom made substantial improvements to the land. They replaced the heating, cooling, and plumbing in the house on the property they rented. They also finished the basement, built a fence, removed grain bins, and removed cement platforms. Finally, they cared for Keith's cattle for five and one-half months a year, allowing Keith and Delores to travel south for the winter and do other traveling. Marla and Tom were not compensated for this work.

Keith died on March 18, 1999. His will was admitted to probate on June 3, 1999. Delores was appointed executor and administered the estate. On May 16, 2000, one month after the closing of the estate, Delores sold 577.71 acres of farmland to Marla and Tom for the purchase price of $720,000, or $1200 per acre. The sale included the house and outbuildings. Delores claims the value of the land was closer to $1800 an acre, but that she gave one hundred percent

credit to Marla and Tom for the improvements made on the property during the time they rented the farmland.

In 1987, Delores and her daughters started a business known as Windy Concepts, Inc. It ran two businesses in Iowa City: the Artist Colony and the Bridal Chalet. The business was profitable through 1994 but then began losing money. The corporation obtained a loan from West Liberty State Bank on which Keith, Delores, and all five daughters signed unlimited personal guarantees. A building was purchased and the Windy Concepts partnership was created to own the building housing both businesses. Sandra was bought out of Windy Concepts, Inc. for $17,000.

In December 1998, Keith mortgaged approximately 160 acres of farmland owned by K & D Farms for $230,000. Keith then loaned this money to Windy Concepts, Inc. to pay off two $40,000 notes owed to the bank and to pay off other creditors. Keith and Delores also incurred $60,000 to $70,000 in credit card debt to maintain the businesses. In the fall of 2001, Delores asked the four daughters remaining in Windy Concepts, Inc. to pay their proportionate share of the outstanding debt with money inherited from their paternal grandfather. Tracey and Marla each paid $9097.73 for their share, but Deborah and Brett refused to pay. Windy Concepts, Inc. has since been dissolved.

Keith's will created a standard marital deduction trust, which was to place $650,000 in assets in the trust for purpose of avoiding federal estate tax. Delores was to act as the trustee and receive income from the trust for her health, education, and welfare. Delores was allowed to invade the principal of

the trust if necessary. At Delores's death, the remainder of the trust was to go to all five daughters in equal shares.

The assets placed in the trust were as follows: a one-half interest in 220 acres of farmland at $2200 an acre, plus a house and outbuildings, totaling $392,000; the two notes due and owing from Windy Concepts, Inc.; and an unsecured promissory note to the trust from Delores, which could only be collected if there were sufficient assets in her estate upon her death.

On October 5, 1999, Delores's attorney, J. Brad Person, sent a letter to the "remaindermen under the will of Keith M. Windus, deceased" asking them to sign an enclosed waiver of accounting and notice. He also told them their mother would be asking them to sign a quit claim deed for their parent's farm. He prepared a cancellation and dissolution of K & D Farms, and the quit claim deed. The quit claim deed conveyed any interest the daughters and their husbands had in the real estate owned by Delores and the estate of Keith to Delores and the estate of Keith. Person notarized the last two documents, although none of the daughters or their husbands were present or had signed the documents. Delores took the documents to them for their signature, informing them it was necessary to close the estate. They signed all three documents without reading them. Cancellation of K & D Farms was filed with the Secretary of State on November 9, 1999.

On June 25, 2004, Sandra, Deborah, and Brett filed a petition in equity, alleging their interests in K & D Farms has been converted by Delores, Marla, and Tom and taken from them as a result of Delores's fraudulent misrepresentations. They alleged Delores had breached her fiduciary duty to

them as trustee of the trust, severely diminishing their interest in the trust. They requested relief including a cancellation and dissolution of the partnership, declaring the sale of the farmland to Marla and Tom void ab initio, and the reopening of Keith's estate to appropriately fund the trust. Finally, they requested an award of their attorney fees and other equitable and legal relief deemed necessary and proper by the court.

On July 21, 2004, Delores answered. On September 30, 2004, Marla and Tom answered. On February 2, 2005, Delores filed a motion for leave to amend her answer, seeking to assert a counterclaim. The district court struck the counterclaim "with the exception of its claim pertaining to the amount due and owing West Liberty State Bank" by Deborah and Brett. Delores filed a recast counterclaim against Deborah and Brett on May 31, 2005, three weeks after the trial's conclusion.

On July 1, 2005, the district court entered its findings of fact, conclusions of law, and judgment entry. The court found the plaintiffs had no interest in K & D Farms. It further found Delores and Keith did not contemplate a gift to their daughters of any limited partnership interest in K & D Farms. The court found it was a breach of Delores's fiduciary duties to the remainder beneficiaries to fund the trust with items of little or no value. It ordered the estate to be reopened and the two promissory notes from Windy Concepts, Inc. and one promissory note from Delores be exchanged in the trust with the remaining 110 acres of real estate owned by Delores. The court ordered judgment in favor of Delores against Deborah and Brett of $9097.73 with interest. No attorney fees were

awarded and costs were assessed seventy-five percent against Delores and twenty-five percent against Deborah and Brett.

II. Scope and Standard of Review. Our review for cases in equity is de novo. Iowa R. App. P. 4. We must examine the facts as well as the law and decide the issues anew. *Johnson v. Kaster,* 637 N.W.2d 174, 177 (Iowa 2001). While weight is given to the trial court's fact findings, we are not bound by them. *Israel v. Farmers Mut. Ins. Ass'n. of Iowa,* 339 N.W.2d 143, 146 (Iowa 1983).

III. K & D Farm Interests. The plaintiffs first contend the district court erred in concluding they have no interest in the K & D Farm partnership. They argue the ownership shares in the corporation were a completed gift.

A gift is made when the donor has a present intention to make a gift and divests himself "of all control and dominion over the subject of the gift." *In re Estate of Crabtree*, 550 N.W.2d 168, 170 (Iowa 1996). The transfer of dominion and control must be an actual, present transfer, not a future transfer. *Id.* The transfer must also be accompanied by donative intent, delivery, and acceptance. *In re Marriage of Liebich*, 547 N.W.2d 844, 851 (Iowa Ct. App. 1996). The intent of the grantor is the controlling element. *Id.* Although less positive proof is required to establish gifts between parent and child, delivery is still required. *Gartin v. Taylor*, 577 N.W.2d 410, 412 (Iowa 1998).

We conclude there is insufficient evidence to prove Keith and Delores made a completed gift to the plaintiffs. There is evidence that Keith and Delores established K & D Farms and made the subsequent amendments for estate planning purposes in the event of their simultaneous death. The limited partnership agreement and its amendments were never signed by any of the

children. As a result, the amendments did not comply with the Iowa Limited Partnership Act in effect at the time they were made. Furthermore, the children never received income from the partnership, nor did Keith and Delores account for profits or losses, hold partnership meetings, or file gift tax returns for the children.

The plaintiffs criticize the district court for relying on Delores's testimony in concluding it was her and Keith's intentions to gift the ownership interest only in the event of their simultaneous deaths. They contend her credibility should be doubted. However, we give weight to the district court's findings, particularly with regard to witness credibility. Iowa R. App. P. 6.14(6)(*g*). Delores's testimony is bolstered by evidence of Keith and Delores's actions over the years.

The plaintiffs further allege Delores's testimony regarding donative intent constituted hearsay and violated the parole evidence rule. However, in addition to failing to prove donative intent, we conclude the plaintiffs have failed to prove delivery. *See Tucker v. Tucker*, 138 Iowa 344, 348, 116 N.W. 119, 121 (1908) ("The law is equally well settled that a gift of corporate stock may be made by the assignment of the certificate of shares and manual delivery thereof . . . ."); *Kintzinger v. Millin*, 254 Iowa 173, 184, 117 N.W.2d 68, 75 (1962) (holding the delivery of a separate instrument assigning corporate stock is deemed delivery of the stock); *In re Trust of Willcockson*, 368 N.W.2d 198, 205 (Iowa Ct. App. 1985) (holding that a bond held by the donor in a safety deposit box in the name of the donee was an incomplete gift due to lack of delivery where the donor kept the key to the safety deposit box).

Because the plaintiffs have failed to prove the gift was completed, their conversion claim must fail. We affirm the district court's denial of the plaintiffs' conversion claim.

IV. Breach of Fiduciary Trust. We next consider Delores's claim that the district court erred in holding that she breached her fiduciary duty as executor/trustee in funding the trust with two promissory notes from Windy Concepts, Inc. and an unsecured promissory note she signed. She argues the court erred in ordering Keith's estate be reopened.

"It is a well established doctrine of trust law that trustees have a duty of loyalty to the trust they are administering and to its beneficiaries, and must act in good faith in all actions affecting the trust." *Harvey v. Leonard*, 268 N.W.2d 504, 512 (Iowa 1978). A trustee cannot use her position, directly or indirectly, for her own advantage. *Coster v. Crookham*, 468 N.W.2d 802, 806 (Iowa 1991). As a general rule, trustees are prohibited from engaging in self-dealing transactions with the trust and from obtaining personal advantage from their dealings with trust property. Iowa Code § 633.155 (1999).

We conclude Delores engaged in self-dealing and thereby breached her fiduciary duty to the plaintiffs. By funding the trust with the promissory note she signed, which was not an asset of Keith's estate as directed in his will, Delores received a larger personal share of Keith's estate, thereby benefiting from her dealings as executor and trustee.

Delores argues funding the trust with the promissory note was authorized in Article XIV of the will, which states Delores has the following power:

> To invest and reinvest the available funds of the trust estate in, or exchange trust assets for, such securities and properties as the

> trustee deems advisable regardless of whether such securities and properties are of the kind and class authorized by law.

We reject this argument. Delores did not invest trust funds in the promissory note. Nor does anything in Article XIV allow Delores to engage in self-dealing.

Delores next argues the district court erred in directing Keith's estate be reopened to reassign assets for the trust. She argues reopening of the estate is barred because more than five years has passed since the final report was approved, as set forth in Iowa Code section 633.488. She also argues reopening is barred by section 633.489.

Section 633.488 allows an estate to "be reopened at any time within five years from the entry of the order approving the" final report. Although five years had passed at the time the district court entered the order appealed from, five years had not passed when the plaintiffs filed the petition requesting the estate be reopened. The final report was filed April 20, 2000. The petition was timely filed June 25, 2004.

Section 6.33.849 states in pertinent part:

> Upon the petition of any interested person, the court may, with such notice as it may prescribe, order an estate reopened if other property be discovered, if any necessary act remains unperformed, or for any other proper cause appearing to the court.

The final clause of this section permits the district court to exercise discretion in considering a petition that alleges a cause for reopening other than the two causes specifically enumerated. *In re Estate of Witzke*, 359 N.W.2d 183, 185 (Iowa 1984).

We conclude the district court did not abuse its discretion in ordering the reopening of Keith's estate. In *In re Estate of Lynch*, 491 N.W.2d 157, (Iowa 1992), our supreme court noted that prior to 1964, the law stated:

> Mistakes in settlements may be corrected in the probate court at any time before his final settlement and discharge, and after that time by equitable proceedings, on showing such grounds as will justify the interference of the court.

Lynch, 491 N.W.2d at 160 (quoting Iowa Code § 689.9 (1962)). The court noted most cases where equity has granted relief under section 689.9 were based on fraud. *Id.* The court then found the district court had not abused its discretion in ordering the reopening of an estate for the purpose of correcting a mistake in the court's allowance of fees to prevent the executor and the attorney from profiting from the mistake in lieu of trying to hold them liable. *Id.* at 160-61.

Delores argues the estate cannot be reopened, citing to our supreme court's declaration in *Witzke*, 359 N.W.2d at 185, "It is generally held that fraudulent misrepresentations by an administrator selling estate property does not render the estate liable for damages but only the administrator personally." However, we conclude *Lynch* is more on point with the factual situation before us where the court ordered the reopening of the estate to properly fund the trust and prevent Delores from profiting from her breach of fiduciary duty. We conclude the district court did not abuse its discretion.

V. Delores's Counterclaim. Deborah and Brett contend the district court erred in allowing Delores to file an amended counterclaim post-trial.

Prior to trial, Delores filed a motion for leave to amend her answer, seeking to add a counterclaim. The district court denied the counterclaim "with the exception of its claim pertaining to the amount due and owing West Liberty

State Bank by Plaintiffs Parizek and Warson." The court directed Delores to recast her counterclaim to reflect its ruling. She did not recast the claim until three weeks after the trial was held. In its ruling, the court allowed the counterclaim and entered judgment against Deborah and Brett in the amount of $9097.73.

Amendments may be allowed at any time before the case is finally decided, even after completion of the evidence. *Ackerman v. Lauver*, 242 N.W.2d 342, 345 (Iowa 1976). However, they should not be allowed after a responsive pleading has been filed, if they substantially change the issues. *Id.* A ruling on amendments lies in the discretion of the district court, and we will reverse only on a clear abuse of that discretion. *Whalen v. Connelly,* 545 N.W.2d 284, 293 (Iowa 1996).

Deborah and Brett argue it was error for the district court to allow the counterclaim because it changed the issues in the case. They claim they would have presented several defenses had the counterclaim been recast before trial. However, Deborah and Brett knew of the counterclaim prior to trial and had the ability to defend against it at trial. Evidence was presented on this issue. We conclude the court did not abuse its discretion in allowing the counterclaim.

VI. Attorney Fees. The plaintiffs next contend the district court erred in declining to award them attorney fees.

We review the district court's award of attorney fees for an abuse of discretion. *Great America Leasing Corp. v. Cool Comfort Air Conditioning & Refrigeration*, 691 N.W.2d 730, 732 (Iowa 2005). Reversal is warranted only

when the court rests its discretionary ruling on grounds that are clearly unreasonable or untenable. *Id*.

A party generally has no claim for attorney fees as damages in the absence of a statutory or written contractual provision allowing such an award. *Hockenber Equip. Co. v. Hockenberg Equip. & Supply Co.*, 510 N.W.2d 153, 158 (Iowa 1993). Courts have recognized a rare exception to this general rule, however, when the losing party "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id*. A plaintiff seeking common law attorney fees must prove that the culpability of the defendant's conduct exceeds the "willful and wanton disregard for the rights of another"; such conduct must rise to the level of oppression or connivance to harass or injure another. *Id*. at 159-60.

We conclude the plaintiffs have not met their burden of showing the defendants' conduct rises to the level necessary to justify an award of attorney fees. The district court did not abuse its discretion in denying their request.

VII. Costs. Finally, Deborah and Brett contend the district court erred when it assessed seventy-five percent of the court costs to Delores and twenty-five percent of the court costs to them. We review the court's assessment of court costs for an abuse of discretion. *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 238 (Iowa 1996). We conclude the court did not abuse its discretion in assessing twenty-five percent of the court costs to Deborah and Brett.

VIII. Conclusion. We affirm the district court's order in all respects.

AFFIRMED.