

IN THE COURT OF APPEALS OF IOWA

No. 7-487 / 06-1540
Filed November 15, 2007

**IN THE MATTER OF THE ESTATE OF
MARJORIE MAE KERNS, Deceased,**

MARLENE DOYLE,
Plaintiff-Appellant,

vs.

DARYL (REX) KERNS,
Defendant-Appellee.

Appeal from the Iowa District Court for Buchanan County, Stephen C. Clarke, Judge.

Appeal from the ruling in a declaratory judgment proceeding challenging certain acts of the executor of the estate. **AFFIRMED IN PART AND REVERSED IN PART.**

Peter Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellant.

D. Raymond Walton of Beecher, Field, Walker, Morris, Hoffman & Johnson, P.C., Waterloo, for appellee.

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

SACKETT, C.J.

Plaintiff-appellant Marlene Dole, one of four children of decedent Marjorie Mae Kerns and a beneficiary under her will, filed a declaratory judgment action on December 27, 2004, challenging certain actions taken by the executor of Marjorie's estate Daryl Rex Kerns, also known as Rex Kerns. Marlene contends, among other things, Daryl, as executor was self-dealing when, without serving notice and obtaining court approval, he sold to himself on contract real estate in decedent's estate and subsequently deeded a portion of the real estate to himself in partial satisfaction of the contract. The district court, after a hearing, found Daryl was engaged in self-dealing and failed to comply with the provisions of Iowa Code section 633.115 (2005), but confirmed and approved the executor's actions. We agree with the district court that Daryl was engaged in self-dealing and failed to comply with Iowa Code section 633.155. We also find that Daryl failed to comply with the notice requirement provided in decedent's will. Consequently we reverse the district court's approval and confirmation of the contract and deed.

SCOPE OF REVIEW. Our review of an action for declaratory relief is determined by the manner in which the action was tried to the district court. *Walsh v. Nelson*, 622 N.W.2d 499, 502 (Iowa 2001). The parties agree the matter was tried in equity. The question therefore is whether or not it is appropriate to grant equitable relief. As such, our review is de novo. *SDG Macerich Props., L.P. v. Stanek, Inc.*, 648 N.W.2d 581, 584 (Iowa 2002). 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). In doing so, we give weight to the district court's findings of fact, but we are not bound by these findings. *Id.*

BACKGROUND. Marjorie died testate owning substantial interests in Iowa farmland. Marjorie and her husband Leo Kerns, who predeceased her, were farmers in Buchanan County, Iowa. Leo's will gave substantial property in trust for Marjorie. This land passed through Marjorie's estate based on Marjorie's failure to exercise a power of appointment. Marjorie bequeathed her estate to her four children in equal shares. Daryl, Leo and Marjorie's youngest son, had farmed with his parents for an extended period of time. Leo and Marjorie's wills both indicated it was their hope their heirs would cooperate to ensure the estate qualified for special estate tax rates that would enable the land to stay in the family and be farmed. Marjorie's will gave Daryl, the named and acting executor, an option to buy the land on contract at the value set on the property for "Iowa Inheritance Tax purposes."

PROBATE FILE. The probate file shows the following. Marjorie died on August 9, 2003. Her will was admitted to probate and Daryl was qualified as her executor without bond on August 13, 2003. On February 4, 2004, a probate inventory was filed showing an Iowa gross estate of \$4,208,400. It listed real estate valued after a deduction for unpaid real estate taxes at \$2,896,733. The next filing in the estate occurred on November 3, 2004, when an Inheritance/Estate Tax Clearance was filed showing \$117,317 in inheritance tax had been paid in full, but that as the estate elected to specially value real estate under Iowa Code Chapter 450B, additional inheritance tax may be due if the real estate does not remain in qualified use for a period of ten years following

Marjorie's death. The next filing on December 21, 2004, was an application for compensation by the attorney for the estate seeking a maximum fee pursuant to Iowa Code Section 633.197 of \$84,288.00 and a similar application for allowance of fees by Daryl seeking fees in the same amount. On December 21, 2004, the district court approved the requested fees. Nothing further was filed until April 4, 2005, when Marlene, through her attorney, filed a request for an interlocutory report stating in part that the executor had entered into a contract with himself to purchase real estate from the estate at a below market rate of interest. An interlocutory report simply appeared to be an accounting of monies was then filed on April 29, 2005. On June 13, 2005, a federal estate tax closing letter was filed showing tax computed at \$1,080,427. On November 28, 2006, an interlocutory report was filed indicating the matter was on appeal to the Iowa Supreme Court. The district court entered an order removing it from the delinquency list. The last interlocutory report was filed January 29, 2007, including a itemization of the contract payments.

CHALLENGED TRANSACTIONS. What the probate file does not show is that on June 21, 2004, some ten months after Marjorie's death, before the inheritance tax clearance was filed Daryl Rex Kerns, as executor of the Marjorie Kerns estate executed two real estate contracts selling land to Rex Kerns.¹ One contract sold eleven parcels of real estate for a total purchase price of \$336,974 with a down payment of \$84,243.50. Possession was given on July 1, 2004. Interest at seven percent per annum was payable on December 1, 2004, and a payment of all interest plus two percent principal due on December 1, 2005, and

¹ Daryl Rex Kerns is one and the same as Rex Kerns.

a payment of all interest due plus two percent principal due on each December 1 until December 1, 2019, when the balance was to be paid. The contract further shows that "Buyer has the option to make prepayment on this contract." This apparently is the land that came to Marjorie through her late husband's trust.

The second real estate contract was for the sale of eighteen parcels of land from Daryl Rex Kerns, executor, to Rex Kerns for \$1,609,170 with \$402,294 down. The terms mirrored those of the first contract except that the interest rate was 3.15 percent per annum. This appears to be the property was to pass to the four heirs under Marjorie's will.

The third transaction was a September 14, 2004 court officer's deed whereby Daryl Rex Kerns as executor of Marjorie' Kerns estate transferred a parcel of land to Rex Kerns.

DECLARATORY JUDGMENT ACTION. Marlene filed this declaratory judgment action on December 27, 2004, naming Daryl as defendant. Daryl answered the petition. The other heirs were not made parties to the suit. The petition was subsequently amended and the district court granted a leave to amend on April 5, 2005. The amended petition requests, among other things, that the court invalidate the June 21, 2004 contract and the September 14, 2004 deed.

SELF-DEALING. Marlene contends, among other things, that in executing the contract selling the second parcel of land and in executing the deed Daryl breached his fiduciary duty and he was self-dealing. Daryl does not refute Marlene's claim he engaged in self-dealing. He argues rather that there was no fraud or bad faith and he was following the intent of his mother's will.

The district court found, and we agree, that Daryl was self-dealing in executing these documents in that as executor of the estate he was contracting to sell and selling real estate to himself. We also agree with the district court that, while decedent's will anticipated self-dealing, Daryl was not relieved of the limitations on fiduciaries who engage in self-dealing.

A duly-appointed executor is a fiduciary and is frequently referred to as a trustee for all interested parties. *In re Estate of Wiese*, 257 N.W.2d 1, 3 (Iowa 1977); *In re Estate of Phoenix*, 493 N.W.2d 79, 81 (Iowa Ct. App. 1992).

Under Iowa law self-dealing by fiduciaries is permissible if approved by the court after a finding that there is an adequate reason for the transaction. Iowa Code section 633.155, addressing self-dealing by fiduciary provides:

No fiduciary shall in any manner engage in self-dealing, *except on order of court after notice to all interested persons, and shall derive no profit other than the fiduciary's distributive share in the estate from the sale or liquidation of any property belonging to the estate.* Every application of a fiduciary seeking an order under the provisions of this section shall specify in detail the reasons for such application and the facts justifying the requested order. The notice shall have a copy of the application attached, or, if published, it shall contain a detailed statement of the reasons and facts justifying the requested order.

(Emphasis supplied).

Marjorie's will did not excuse Daryl from obtaining court approval before executing a sales contract or deed with himself. Rather, the will specifically provided for written notice to the other heirs:

if my son, Daryl Kerns, is acting as executor at the time he is to elect whether or not to exercise said option, then and in that event he shall give notice, in writing, to the other beneficiaries in my estate, to the extent that same is practicable.

Marlene did not consent to the contracts and deeds. Daryl did not file an application to approve them or give notice to Marlene that he was seeking approval to execute them. Furthermore, he failed to provide Marlene with a notice within four months of Marjorie's death that he elected to exercise the option, as required by the provisions of Marjorie's will. There is no order in the estate file approving the contracts or the deed. Consequently, they are not binding on Marlene and the district court erred in approving and confirming them.² See *In re Guardianship and Conservatorship of Jordan*, 616 N.W.2d 553, 559 (Iowa 2000). The granting of court approval requires notice and an opportunity to be heard on the part of all interested persons. *Id.* When an order authorizing fiduciary self-dealing is entered in the absence of notice to persons entitled thereto, those persons entitled to notice may seek review of the order at any time prior to the approval of the fiduciary's final report. Iowa Code § 633.37.

It clearly appears Daryl was self-dealing without following the proper procedure and he failed to give notice to Marlene of the election of his option as required by Marjorie's will. Consequently, we grant Marlene's request that, as to her interests, the June 21, 2004 contract and the September 14, 2004 deed be invalidated. Having so decided we need not address the other claims she raises on appeal.

AFFIRMED IN PART AND REVERSED IN PART.

² The question of whether they are binding on the other heirs is not before us, nor was it before the district court in the declaratory judgment action as the other heirs were not parties to nor served with notice of the declaratory judgment action.