IN THE COURT OF APPEALS OF IOWA

No. 6-644 / 06-0330
Filed September 7, 2006

IN THE MATTER OF THE ESTATE OF REINHARD SCHMIDT, Deceased,

LOREN MILLIGAN, Executor,
Appellee,

vs.

ILSE MUELLER, Objector,
Appellant,

AND BETHANY UNITED CHURCH OF CHRIST,
Intervenor-Appellee.

Appeal from the Iowa District Court for Jasper County, Darrell J. Goodhue, William Joy, and Gregory A. Hulse, Judges.

A residuary beneficiary appeals the district court's ruling on her objections to the executor's final report. **AFFIRMED.**

Unes Booth of Booth Law Firm, Osceola, for appellant.

Lee M. Walker of Walker, Knopf & Billingsley, Newton, for appellee executor.

Gerald B. Feuerhelm, Des Moines, for appellee Bethany United Church of Christ.

Considered by Sackett, C.J., and Vaitheswaran, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

ROBINSON, S.J.

I. Background Facts & Proceedings

Reinhard Schmidt was a member of Bethany United Church of Christ, and throughout his lifetime he made many gifts to the church. In 2003, Schmidt told the pastor, Wayne Gardner, he wanted to fund remodeling of the parsonage, the church basement, and the cemetery. No specific amount of money was mentioned. Schmidt made a new will in August 2003, but he did not include a bequest to the church.[1] The will included bequests to thirty-four relatives, including nieces, nephews, great-nieces, and great-nephews.

Schmidt informed his great-nephew, Loren Milligan, and great-niece, Barbara Carroll, of his intent to pay for the church projects. Milligan and Carroll assisted Schmidt with his finances. Milligan obtained cost estimates, and told Schmidt the combined projects would cost between $115,000 and $150,000. Milligan testified Schmidt had no reservations as to these figures. Milligan headed the church committees overseeing the remodeling. Prior to Schmidt's death, and in reliance on his agreement to finance the project, work was begun on one bathroom in the parsonage, and flooring was taken up in the church basement. Landscaping the cemetery had also been commenced.

Schmidt had a joint checking account with Carroll. On September 5, 2003, after his health began to fail, in an attempt to avoid estate taxes, he asked

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[1] In May 2003, Schmidt had created a trust, the remainder of which would go to the church upon his death. The trust agreement did not restrict the use of the funds, but in a separate letter, Schmidt stated he wished the funds would be used for an endowment, "with an emphasis on long-term stability rather than short-term expenditure." Gardner testified he interpreted the letter to mean that the trust funds should not be used to pay for the remodeling projects. The trust was worth about $330,000.

Carroll to clear out the checking account by writing checks to the beneficiaries in his will. Carroll wrote checks totaling $257,000, leaving the checking account essentially without funds. Schmidt died on September 7, 2003.

Milligan was named as the executor in the will. He chose to honor Schmidt's verbal pledge to the church, and he used $135,410 of estate funds for the remodeling projects. A final report was filed in district court on March 11, 2005. A beneficiary under the will, Ilse Mueller, filed objections to the report. An amended final report was filed on April 21, 2005, which acknowledged the initial final report "contained numerous errors." Mueller also objected to the amended final report.

After an initial hearing before Judge Darrell Goodhue, the district court determined the church should be made a party to the proceedings, and have an opportunity to be heard on the validity of the verbal pledge(s). The court also determined that in order to determine maximum fees for the executor under Iowa Code section 633.197 (2005) and the attorney under section 633.198, the amount of the checks written on September 5, 2003, should be included within the estate. The court then determined the statutory maximum fees in this case were $28,290 each.

Mueller filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), and asked Judge Goodhue to recuse himself based on her perceived impression that he was biased against her. The court reiterated its previous ruling, but corrected a citation to a statute. The judge, although under no obligation to do so, agreed to recuse himself, and Judge Gregory Hulse was assigned to decide

the merits. Mueller asked the new judge to reconsider her rule 1.904(2) motion. The request was denied.

The church was added as a party, and the case was submitted on the record previously made. The final decision was rendered by Judge Gregory Hulse. The court determined it could not reconsider those issues ruled upon by the previous judge on the rule 1.904(2) motion because a court cannot consider successive or repetitive 1.904(2) motions. *See Boughton v. McAllister*, 576 N.W.2d 94, 95 (Iowa 1998). The court further determined Schmidt made an enforceable oral pledge to the church, which the church accepted prior to his death. Finally, the court determined the statutory maximum fees were actually $21,088. The court awarded the executor fees of $10,000, and the attorney for the executor fees of $21,088. The objector's request for attorney fees was denied. Mueller now appeals.

II. Standard of Review

A hearing on objections to a fiduciary's final report is an equitable proceeding. Iowa Code § 633.33 (2003); *In re Estate of Roehlke*, 231 N.W.2d 26, 27 (Iowa 1975). In equitable actions our review is de novo. Iowa R. App. P. 6.4. "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. 6.14(6)(*g*).

III. Charitable Subscription

A charitable subscription is an oral or written promise to do certain acts or to give real or personal property to a charity, or for a charitable purpose. *King v. Trustees of Boston Univ.*, 647 N.E.2d 1196, 1199 (Mass. 1995). Charitable

subscriptions are considered under contract principles. *Pappas v. Hauser*, 197 N.W.2d 607, 611 (Iowa 1972). Thus, there must be an offer or promise. *See Pappas v. Bever*, 219 N.W.2d 720, 721 (Iowa 1974) (noting there must be a promise to a charitable organization, and not a mere statement of intent); *Hauser*, 197 N.W.2d at 613 ("[M]ere declarations of intention, no matter how clearly proven, would not give rise to binding obligations."). There must also be acceptance by the promisee. *Davis v. Campbell*, 93 Iowa 524, 532, 61 N.W. 1053, 1055 (1895) (noting a charitable subscription may not be revoked after it is accepted by the promisee).

In Iowa, however, there is no requirement to show consideration or detrimental reliance. *Salsbury v. Northwestern Bell Tel. Co.*, 221 N.W.2d 609, 613 (Iowa 1974). "[C]haritable subscriptions are binding without proof of action or forbearance." *P.H.C.C., Inc. v. Johnston*, 340 N.W.2d 774, 776 (Iowa 1983). This is because "[c]haritable subscriptions often serve the public interest by making possible projects which otherwise could never come about." *Salsbury*, 221 N.W.2d at 613. The supreme court has stated, "[W]here a subscription is unequivocal the pledgor should be made to keep his word." *Id.*

Mueller disputes that an *oral* charitable subscription should be enforceable without consideration or detrimental reliance. We first note that while *Salsbury*, 221 N.W.2d at 610, and *P.H.C.C.*, 340 N.W.2d at 775, dealt with written pledges, the cases do not restrict application only to written pledges. Generally, a subscription may be oral unless it falls within the provisions of the statute of frauds. 73 Am. Jur. 2d *Subscriptions* §4, 619 (2001); 83 C.J.S. *Subscriptions* § 7, 677 (2000); *see also King*, 647 N.E.2d at 1199 ("A charitable subscription is an

oral or written promise . . . ."). There is no allegation in the present case that the statute of frauds should apply. We conclude oral subscriptions are enforceable in the same manner as written subscriptions.

Mueller also claims Schmidt's promise was too vague to be enforceable. The district court considered the testimony of Gardner, Milligan, and Carroll, and found they were credible in their testimony that Schmidt committed to pay for the improvements to the church facilities. The court determined, "This uncontradicted testimony convinces this court that the decedent pledged to pay for improvements to the church, parsonage, and cemetery." The court concluded Schmidt was aware of the amount to be spent, between $115,000 to $155,000, and "the pledge was specific enough to be enforceable." We concur with the court's conclusion that there was clear and convincing evidence in the record to show Schmidt made an enforceable oral subscription to the church.

"The death of the subscriber before the acceptance of the subscription terminates the offer, and the estate of the subscriber will not be liable on the subscription." 73 Am. Jur. 2d *Subscriptions* § 7, 621 (2001); *see also* 83 C.J.S. *Subscriptions* § 25, 702 (2000) ("A subscription lapses by the death of the subscriber, if that event occurs before there is an acceptance . . . ."). The district court found, and we agree, the evidence clearly shows the church accepted Schmidt's offer prior to his death. Before Schmidt died, the church had started the remodeling work. As the court noted, "These projects would not have been undertaken by a small rural congregation without having accepted the generous pledge of one of its members to pay for the improvements."

We conclude the evidence shows Schmidt made a charitable subscription to the church, which was enforceable after his death using funds from his estate.

IV. Executor & Attorney Fees

Mueller contends Milligan and his attorney were awarded excessive fees. Under section 633.197, an executor may be allowed fees based on a percentage of "the gross assets of the estate listed in the probate inventory for Iowa inheritance tax purposes . . . ." The attorney for the estate should be allowed a reasonable fee, "not in excess of the schedule of fees herein provided for personal representatives." Iowa Code § 633.198. Mueller argues the checks for $257,000 on Schmidt's checking account before his death should not have been included within the gross assets of the estate for purposes of calculating the statutory maximum fees.

In determining the gross assets of the estate, the supreme court has stated that for purposes of section 633.197, "the gross estate listed in the probate inventory for Iowa inheritance-tax purposes include[s] all property passing under the methods of transfer set forth in section 450.3 without regard to whether the included property is subject to the inheritance tax." *In re Estate of Martin*, 710 N.W.2d 536, 541 (Iowa 2006). Section 450.3 lists property which should be included in the probate inventory for calculating inheritance tax.

The district court relied upon *In re Estate of Bolton*, 444 N.W.2d 482 (Iowa 1989), in finding the checks written by Carroll just prior to Schmidt's death should be included in the gross assets of the estate. In *Bolton*, the court concluded that to be effective, a gift in the form of a bank check must be accepted and honored by the drawee bank prior to the death of the donor. *Bolton*, 444 N.W.2d at 483.

Although the checks were signed by Carroll, they were clearly gifts from Schmidt. Here, the checks were written on September 5, 2003, and there is no evidence they cleared through Schmidt's bank prior to this death on September 7, 2003.[2]

A related issue arises because Schmidt held the bank account in a joint tenancy with Carroll. Iowa Rule of Probate Procedure 7.2(2) provides:

> In determining the value of gross assets of the estate for purposes of Iowa Code section 633.197, the court shall not include the value of joint tenancy property excluded from the taxable estate pursuant to Iowa Code section 450.3(5) or the value of life insurance payable to a designated beneficiary.

See also In re Estate of Lynch, 491 N.W.2d 157, 159 (Iowa 1992) (noting that in determining the gross assets of an estate the court should not include the value of joint tenancy property which is excludable from the taxable estate).

Under section 450.3(5), property held in joint tenancy is included within the property which should be listed in the probate inventory. Joint tenancy property in a bank or other institution is taxable "except such part as may be proven to have belonged to the survivor . . . ." Iowa Code § 450.3(5).[3] Here, all the evidence proves the money in the joint account belonged to Schmidt. Carroll testified the final authority to write checks rested with Schmidt, and she only wrote checks as directed by him. Because there is no evidence the bank account should be excluded from tax under section 450.3(5), we conclude the value of the account was properly included in the gross assets of the estate.

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[2] The evidence in the case shows the bank apparently honored the checks after Schmidt's death. This may have been because the checks were made from Schmidt's joint account with Carroll, and had been signed by her.

[3] In addition, some portions of joint tenancy property held by a decedent and surviving spouse may not be subject to taxation, but these provisions are not applicable here. *See* Iowa Code § 450.3(5).

Considerable discretion is given to probate courts in the award of attorney fees or executor fees. *See In re Estate of Bass*, 196 N.W.2d 433, 435 (Iowa 1972). We find no abuse of discretion under the facts of this case.

V. Attorney Fees for Objector

Mueller asserts the estate should pay her attorney fees for bringing this action. Generally, an award of attorney fees is not allowed unless authorized by statute. *W.P. Barber Lumber Co. v. Celania*, 674 N.W.2d 62, 66 (Iowa 2003). There is no statutory authority for the award of attorney fees to Mueller. We also find no basis for awarding common law attorney fees as discussed in *Williams v. Van Sickel*, 659 N.W.2d 572, 579-80 (Iowa 2003). We determine Mueller is not entitled to attorney fees paid by the estate.

We affirm the decision of the district court.

AFFIRMED.