IN THE COURT OF APPEALS OF IOWA

No. 2-802 / 12-0002
Filed November 15, 2012

IN THE MATTER OF THE ESTATE OF
GENEVA J. BURGER,
Deceased.

JERRY BURGER,
Intervenor-Appellant.

Appeal from the Iowa District Court for Dallas County, Darrell J. Goodhue, Judge.

A beneficiary appeals from a district court order granting objections to the executor's final report. **AFFIRMED.**

Matthew J. Hemphill of Bergkamp, Hemphill, Ogle & McClure, P.C., Adel, for appellant.

Stephen M. Terrill of Terrill, Richardson, Hostetter & Madson, Ames, and Dennis W. Parmenter of Parmenter Law Office, Huxley, for appellees Curtis and Cris Burger.

Michael L. Mock of Parker, Simons & McNeill, P.L.C., West Des Moines, for Wells Fargo Bank, N.A. executor-appellee.

Jacqueline Burger Carpenter, Fenton, Missouri, pro se.

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

VAITHESWARAN, J.

A husband and wife owned a large swath of farmland which, following their deaths, became the subject of litigation among their children. The primary issue on appeal is whether two siblings were authorized to join in a third sibling's timely objections to a final report and thereby benefit from a proposed distribution of certain trust assets.

I. Background Facts and Proceedings

Harvey Burger was a third-generation farmer. He and his wife Geneva Burger had four children: Jerry, Jacqueline, Curtis, and Cris. Before their deaths, Harvey and Geneva created revocable trusts to govern the disposition of their property.

Following Harvey's death, Geneva significantly amended her trust. In pertinent part, she included a provision requiring the trust assets to be divided equally among her four children. Because Jerry assisted with the farm operation, she afforded him the option to buy three parcels of farmland.[1] Jerry was to receive the farmland at twenty percent below the fair market value and was to pay principal and interest in monthly installments, with "a balloon payment ten (10) years after closing." The trust agreement also stated, "Amounts due and owing to the Trust shall be evidenced by a promissory note from *Jerry D*. *Burger* to the beneficiaries of the Trust (not including the optionee if optionee's share of proceeds is applied toward the purchase price by optionee's choice), secured by mortgage on real estate."

[1] It appears that around this same time, Geneva either gifted or sold two other parcels of farmland to Jerry. The trust agreement describes the transfers as a gift, while Geneva's attorney testified Geneva sold the land to Jerry.

When Geneva died, Wells Fargo Bank was appointed executor and trustee of her estate. The bank initiated probate proceedings and offered to sell Jerry the three parcels of farmland identified in the trust agreement for a total of $2.7 million. Jerry accepted the offer and executed two promissory notes totaling $2,028,000. This lower figure reflected Jerry's application of his one-quarter interest in the land towards the purchase price. Contrary to the terms of the trust document, the notes ran in favor of the bank rather than the remaining trust beneficiaries.

Meanwhile, Curtis and Cris filed a lawsuit challenging Geneva's will and trust. This lawsuit was eventually settled. Two documents memorialized the agreement. The first, captioned "Family Settlement Agreement," provided "that the distribution out of the Estate/Trust of Geneva J. Burger to Curtis and to Cris shall be increased by the sum of $105,000.00." The second, captioned "Confidential Settlement Agreement," provided more detail about the increased distribution to Curtis and Cris, stating as follows:

> Jerry and Jacqueline agree that, in consideration of the undertakings herein by Cris and Curtis, that the amount to be distributed out of the Estate/Trust of Geneva J. Burger shall in the aggregate equal to the amount distributable to both Cris and Curt under both the Estate and Trust as if no challenge to the will or trust had been undertaken, plus an additional distribution of $105,000.00 to both Cris and Curtis. The Estate/Trust shall pay the total cash distributable presently within the estate less a reserve for estate closing costs as follows: fifty percent (50%) to Cris, twenty-five percent (25%) to Curtis, and twenty-five percent (25%) to Jacqueline, within five days after the Court approves the Family Settlement, which amounts shall be credited against the amounts Cris, Curtis, and Jacqueline are otherwise entitled to receive from the Estate/Trust, and the balance of the aggregate settlement shall be paid to Cris and Curtis not later than March 5, 2010. Jerry agrees to personally fund the additional distribution to Cris and Curt

> by paying to the Estate an additional $210,000.00 so as to bring about an end to the litigation.

Though not spelled out in either agreement, the estate's attorney testified "the centerpiece of the settlement was that Jerry agreed to pay off the notes early, which would allow the liquidation of the estate." To verify his understanding, the attorney drafted a letter to the beneficiaries, which included "proposed distribution" schedules.

Cris responded to the letter by signing a distribution receipt stating he had "received and read a copy of the 'Distribution of Estate and Trust Assets to Geneva J. Burger Beneficiaries' per the previously approved Family Settlement Agreement in this matter herein and hereby approves and ratifies the same and the doings of the fiduciary as therein set forth." Curtis signed a similar receipt. The parties then executed warranty deeds conveying the farmland to Jerry. The deeds stated they were "given in satisfaction of the terms of the Order Approving Family Settlement agreement."

Jerry paid off the promissory notes in short order. The bank did not charge him approximately three months of interest that had accrued on the notes.

The bank filed a final report and application for discharge. The bank sent notices of the final report to each of the beneficiaries. The notice stated, "[U]nless you file written objections thereto, if any you may have, on or before May 26, 2011, you shall be forever barred from making any objections thereto." Curtis filed objections; Jacqueline and Cris did not.

Following a hearing, the probate court determined that Jacqueline and Cris could join in Curtis's objections to the report. The court specifically rejected Jerry's assertion that his siblings had waived or were equitably estopped from raising objections to the final report by virtue of their execution of distribution receipts and warranty deeds. The court then ruled that (1) "Jerry should not have received 25 percent of the payments he made on the notes," which amounted to an overpayment of $49,975.19, (2) Jerry owed eighty-seven days of interest totaling $19,328.79, which was to be paid to the three other siblings, (3) "the capital gains tax adjustment the executor made for the benefit of Jerry was not justified," and Jerry was entitled to a credit of $7632, rather than the $10,294 the executor had calculated, (4) fees of $2332 paid to a law firm were inappropriate, and (5) the court's ruling "would constitute res judicata as to the matters litigated." The court directed the bank to file a revised final report reflecting these modifications.

On appeal, Jerry asserts the probate court should not have (1) allowed Jacqueline and Cris to join in Curtis's objections to the final report, (2) denied his claims of waiver and equitable estoppel, (3) interfered with the trustee's discretionary decision to waive interest, and (4) found the ruling to be res judicata.

"Our review in appeals from rulings by the probate court on objections to an executor's final report is de novo." *Estate of Randeris v. Randeris*, 523 N.W.2d 600, 604 (Iowa Ct. App. 1994).

II. Analysis

A. Allowance of Other Beneficiaries' Objections

Jerry contends the district court should not have "allowed two of the four beneficiaries in this Estate to join in Curtis's objections long after the statutory bar date" in Iowa Code section 633.40(4) (2011). In his view, these siblings received notice of the time to object to the executor's final report, they failed to object within that time frame, or indeed at any time, and accordingly, they cannot share in the additional distribution that was an outgrowth of Curtis's objections. We disagree.

Section 633.478 states that a "personal representative shall not be discharged from further duty or responsibility upon final settlement until notice of the final report or of an application for discharge has been served upon all persons interested, in accordance with section 633.40, unless notice is waived." Section 633.40(4), in turn, states:

> [T]he notice may direct each interested party to file the party's objections thereto in writing, if any, on or before a date certain, to be set out in the notice and to be not less than twenty days after the day the notice is served upon the party and that unless the party does so file objections in writing that the party will be forever barred from making any objections thereto.

Section 633.40(4) bars an interested party who fails to make a timely objection from later lodging an objection. Contrary to Jerry's assertion, the provision does not govern the distribution of trust assets.

That distribution is governed by the trust agreement as well as, in this case, the family settlement agreements. *See* Iowa Code § 633A.4201(1) (requiring the trustee to administer the trust according to its terms); *Gustafson v.*

Fogleman, 551 N.W.2d 312, 314 (Iowa 1996) (stating family settlement agreements are favored in law). The executor had a fiduciary obligation to implement these agreements and, in doing so, to treat the beneficiaries fairly and impartially. *See In re Estate of Rutter*, 633 N.W.2d 740, 750 (Iowa 2001) ("[T]he executor has an obligation to treat the beneficiaries of a trust or estate impartially."); *In re Work Family Trust*, 151 N.W.2d 490, 493 (Iowa 1967) ("It is presumed that the trustees will treat each of the beneficiaries fairly."); *see also* 90A C.J.S. *Trusts* § 548 ("The provisions of the trust instrument . . . must be followed by the trustee in executing the trust, and distributing the trust property or fund. . . ." (footnote omitted)); Restatement (Third) of Trusts § 49 (stating the interests of beneficiaries are determined by the settlor).

Curtis objected to the final report on the ground that the executor failed to treat the beneficiaries equally. He pointed out the executor afforded Jerry preferential treatment by paying him a portion of the note proceeds, waiving interest payments, and improperly distributing the capital gains tax credit.

The district court agreed. The court specifically found the bank did not comply with the terms of the trust agreement when it failed to have Jerry execute the notes in favor of the other beneficiaries and when it failed to collect certain interest on the notes. The court concluded the bank impermissibly distributed to Jerry note proceeds of $49,978.19 and impermissibly waived interest payments of $19,328.19 that two of the other beneficiaries testified they would have insisted on receiving had they been named in the notes.[2]

[2] As discussed, the district court also modified the amount of the capital gains tax credit to which Jerry was entitled and eliminated a law firm fee. Jerry does not seriously

We conclude the court's findings and conclusions necessarily inured to the benefit of Cris and Jacqueline, regardless of who initially brought the issues to the court's attention. To hold otherwise would be to ignore the clear provisions of the trust and family settlement agreements. *See* Iowa Code § 633A.4201(1); *City of Dubuque v*. *Iowa Trust*, 587 N.W.2d 216, 223 (Iowa 1998) ("[A] court has no authority to rewrite the terms of the settlement agreement based on its perception of the merits of the settlement terms, and cannot modify the terms of the settlement agreement. . . ." (internal citation omitted)); Martin D. Begleiter, *In the Code We Trust—Some Trust Law for Iowa at Last*, 49 Drake L. Rev. 165, 201–02 & n.204 (2001) (observing the Iowa Trust Code does not allow a court to modify "dispositive provisions" of a trust agreement, that is, to take what the trust gave to one beneficiary and give to another). The court's decision to divide the payments equally among Curtis, Cris, and Jacqueline flowed directly from the trust and settlement agreements and was mandated by them.

Notably, Jerry does not dispute that the contested actions benefitted him over the other beneficiaries. He also does not take issue with the district court's calculations of the preferential payments. He rationalizes these payments on the ground they were just recompense for his speedy payoff of the promissory notes. However, neither Geneva's trust agreement nor the family settlement agreements authorized this recompense. Accordingly, the district court acted

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contest either of these modifications, although he asserts the fee issue was not raised in Curtis's objections. We conclude the district court acted well within its equitable authority in making these modifications. *See In re Estate of Thompson*, 512 N.W.2d 560, 565 (Iowa 1994) ("A court of equity has the flexibility to balance the equities between the parties.").

equitably in modifying the final report to reduce or eliminate these credits to Jerry.

In reaching this conclusion, we do not rely on section 633.122, cited by Curtis and Cris. That provision states, "The acts of the fiduciary without prior approval of court after notice may be contested by any interested person at or before the entry of the order discharging the fiduciary." While section 633.122 allows interested persons to contest the acts of a fiduciary for a far longer period than the period prescribed in section 633.40(4), the provision only applies where persons do not receive notice and the executor does not seek court approval for its actions. Neither is true here; Cris and Jacqueline received notice of the final report and the executor sought approval of that report.

In sum, we agree with the district court that Cris and Jacqueline could share in the additional distribution ordered by the district court notwithstanding their failure to lodge objections to the final report.

B. Waiver and Equitable Estoppel

Jerry next argues the court should not have denied his claims of waiver and equitable estoppel based on the distribution receipts, warranty deeds, and family settlement agreements.

1. Waiver. Waiver is the intentional relinquishment of a known right. *Scheetz v. IMT Ins. Co.*, 324 N.W.2d 302, 304 (Iowa 1982). Jerry contends Curtis and Cris's execution and delivery of distribution receipts amounted to a waiver. While this argument is appealing at first blush, it ignores the fact that the letter sent by the estate's attorney referred to proposed rather than final distribution schedules. Curtis made this clear in his testimony:

> Q. . . . In January you got eventually the Schedule A that was attached to Mr. McCarthy's letter that he sent out to the attorneys in January; right? A. Yes, Schedules A and B.
>
> Q. And prior to that time, had you received other possible projected distributions from the estate? A. Yes.
>
> Q. More than one? A. More than one. Half a dozen maybe.
>
> Q. Did you consider any of those proposed distributions that you got to be the final end-all, do-all, this is it? A. None until the final report.

Because the schedules were not final, the siblings' ratification of those schedules did not preclude them from later contesting the executor's final distribution scheme.

Significantly, although Curtis and Cris executed distribution receipts, both testified they voiced objections to the proposed distribution schedules. The district court found their testimony credible. We defer to this credibility finding. *See Randeris*, 523 N.W.2d at 604 (giving weight to court's credibility findings).

As the district court also found, the proposed distribution schedules did not clearly disclose the issues that became bones of contention at the hearing on the final report. No mention was made of Jerry's nonpayment of interest or his receipt of a portion of his own note payments, and there was no indication that Jerry would benefit from the capital gain tax credit listed in the proposal or the title-search fee. In the absence of clear disclosures, the signed distribution receipts did not amount to a knowing waiver of these issues.

The same holds true for the deeds executed by the beneficiaries and the siblings' ratification of the settlement agreements. When the beneficiaries executed those documents they did not know, nor could they have known, about the issues that ultimately arose in the executor's final report.

2. Equitable Estoppel. Equitable estoppel rests on misleading conduct. *See In re Property Seized from Sykes*, 497 N.W.2d 829, 832 (Iowa 1993). Jerry does not claim that Curtis, Cris, or Jacqueline made false representations or concealed material facts. Therefore, this doctrine is inapplicable.

C. Trustee's Discretion

Jerry next contends the probate court interfered with the trustee's discretion to waive interest payments in consideration for Jerry's early repayment of the promissory notes. We disagree.

Assuming the bank was exercising a discretionary power in waiving the interest, it was nevertheless required to act "in accordance with applicable fiduciary principles and the terms of the trust." Iowa Code § 633A.4214(1). As already discussed, the proposed distribution letter said nothing about a waiver of interest payments, and the trust and settlement agreements were also silent on this issue. Additionally, the notes should have been made payable to the beneficiaries, not the trust itself. Finally, "volunteer distributions, even those made in good faith, without court order are made at the representative's own peril." *Shivvers v. Mueller*, 340 N.W.2d 586, 589 (Iowa 1983). For these reasons, we conclude the district court did not inappropriately interfere with the trustee's discretion.

D. Claim Preclusion

Finally, Jerry claims the probate court was wrong in stating that res judicata would preclude him from objecting to an amended final report. While the

court may be correct, *see* Iowa Code § 633.36,[3] its statement is dicta, as the amended final report had yet to be proffered. *See Westinghouse Credit Corp*. *v*. *Crotts*, 98 N.W.2d 843, 848 (Iowa 1959) (describing statements in opinion which were not necessary to a determination of the case as "mere dicta and not authority to be followed"). Accordingly, we decline to accept Jerry's argument on this point. *See*, *e*.*g*., *City of Des Moines v*. *Iowa State Commerce Comm'n*, 285 N.W.2d 12, 16 (Iowa 1979) (denying party's cross-appeal where "the district court's statement amounted to dicta and was not part of the ruling").

E. Appellate Attorney Fees

Curtis and Cris seek an award of appellate attorney fees in the amount of $9330.75. Subject to a rare exception not urged here, a party may not recover fees in the absence of a statute or agreement authorizing them. *See Hockenberg Equip*. *Co*. *v*. *Hockenberg's Equip*. *& Supply Co*., 510 N.W.2d 153, 158 (Iowa 1993). Curtis and Cris have not cited any statute authorizing such an award. Nor do they point to any provision in the trust document or their settlement agreements allowing recovery of attorney fees. Accordingly, we deny their claim.

VI. Disposition

We affirm the district court's order granting the objections to the executor's final report and ordering the distribution of the additional trust assets to the non-

[3] This statute provides that "[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 Ritz v. Selma United Methodist Church*, 467 N.W.2d 266, 270 n.2 (Iowa 1991) ("Adversely affected persons who have been given notice and opportunity to be heard on the final report are bound by the provisions of the final settlement order to the same extent as any other final judgment.").

objecting siblings, as well as Curtis. We deny the request for appellate attorney fees.

AFFIRMED.