IN THE COURT OF APPEALS OF IOWA

No. 6-681 / 05-1599
Filed October 11, 2006

IN THE MATTER OF THE ESTATE OF ANNA BART, Deceased,

GALEN BART,
Appellant.

Appeal from the Iowa District Court for Emmet County, Frank B. Nelson, Judge.

Galen Bart appeals from a district court order denying the temporary administrator's petition for authority to sell farmland under the terms of a mediated settlement. **AFFIRMED.**

Lance D. Ehmcke, Joel D. Vos, and Jeremy J. Cross of Heidman, Redmond, Fredregill, Patterson, Plaza, Dykstra & Prahl, L.L.P., Sioux City, for appellant.

Terri L. Combs and C. Jennifer Peterson of Faegre & Benson L.L.P., Des Moines, and Paul E. Overson, Oakdale, Minnesota, for appellees Timothy Haupert and Kelly Stephenson.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.

Galen Bart appeals from a district court order denying the temporary administrator's petition for authority to sell farmland under the terms of a mediated settlement. We affirm.

I. Background Facts and Proceedings

Anna Bart died on July 9, 2002, leaving two adult surviving children, Galen Bart and Mary Lou Bart. The record reveals that probate of the estate has been contentious, at best. On May 3, 2005, after nearly three years of litigation, a mediation conference was held in an attempt to settle the estate. Participants in the mediation included the following: Mary Lou Bart and her attorney, Joseph Fitzgibbons; Timothy Haupert, Mary Lou's son, and his Minnesota attorney, Paul Overson; and Galen Bart, his children, and his attorney, Lance Ehmcke. Joining mediator David Blair as a "committee of neutrals" were James Ladegaard, temporary administrator for the estate; Max Pelzer, attorney for the temporary administrator; and Joseph Heidenreich, attorney for the trustee. Kelly Stephenson, Mary Lou's daughter, was not present, but Haupert and attorney Overson indicated they were acting for and could bind Stephenson.

After a full day of negotiation, attorney Fitzgibbons drafted a proposed agreement to present to the Galen Bart group as a "take-it-or-leave-it" offer. Mary Lou Bart, Fitzgibbons, Pelzer, and Ladegaard signed the agreement and sent it over to the Galen Bart group for approval and signature. Galen Bart, Ehmcke, and Galen Bart's children signed the agreement. Heidenreich signed the agreement later. Haupert and Overson left the mediation prior to the

preparation of the written agreement and never signed it. Stephenson never signed the agreement.

The agreement, in pertinent part, requires the liquidation of all estate assets, including certain farmland. In June 2005 temporary administrator Ladegaard filed a petition for authority to sell property, requesting that the court grant the authority to sell the farmland, pursuant to the mediated agreement. Galen Bart filed a "concurrence with executor's petition to sell property under mediated contract." Haupert and Stephenson filed an "appearance and objection to application for authority to sell property," objecting to the proposed sale of property and asserting they had not executed the mediated agreement and thus were not bound thereby.

The district court held a hearing on the petition. The sole issue before the court was whether all parties were bound by the mediated agreement. Specifically, the court addressed whether Fitzgibbons had the authority to act on the part of Haupert and Stephenson and bind them.

The court heard testimony from several parties involved in the mediation. Max Pelzer, attorney for the temporary administrator, testified that Fitzgibbons said he had the authority to bind Haupert and Stephenson. Pelzer explained that Fitzgibbons had previously filed pleadings along with attorney Overson on behalf of Haupert and Stephenson, and had never indicated he "wasn't representing everybody."[1]

[1] Overson is a Minnesota attorney not licensed to practice in Iowa. Overson did not file a motion for admission pro hac vice until *after* Galen Bart filed his notice of appeal.

Temporary administrator Ladegaard testified that negotiations between the parties were ongoing when Overson and Haupert left. As he understood the situation, Overson and Haupert would be in contact with Fitzgibbons via cell phone, and he (Fitzgibbons) represented their interests.

Attorney Overson testified an "agreement in principle" was discussed prior to his and Haupert's departure from the mediation, and attorney Fitzgibbons was to call with any changes. On cross-examination, Overson testified he did not give Fitzgibbons authority to bind Haupert and Stephenson to the mediated agreement. Specifically, he testified his clients never agreed to a provision in the agreement providing that Galen Bart "shall be paid the sum of $50,000 as part of the estate expenses to satisfy the contract regarding the bins."[2]

Attorney Fitzgibbons testified there was no deal between the parties when Overson and Haupert left the mediation. In particular, he testified the grain bins had not been discussed prior to Overson's and Haupert's departure. Fitzgibbons agreed to be in contact with them by cell phone. He had no recollection of a conversation in which he said he could bind Haupert or Stephenson, and no recollection of being asked if he had the authority to bind them. He explained he would not have included signature lines for Haupert, Stephenson, and Overson in the agreement if he had been given the authority to bind them.

The district court concluded the mediated agreement was not binding on all parties, and therefore the court could not approve it. Accordingly, the court

[2] Galen owned grain bins located on the farmland he rented from his mother. The lease agreement provided that upon termination of the lease he had the right to sell his grain bins to the estate for $50,000. In an interim report filed in May 2004, and approved by the court, the temporary administrator indicated the grain bin agreement was enforceable.

denied the petition for authority to sell property. Galen appeals, arguing attorney Fitzgibbons had either actual or apparent authority to bind Haupert and Stephenson to the mediated agreement.

II. Scope of Review

The parties dispute the scope of review. Galen contends our review is de novo because with the exception of certain actions not applicable here, probate matters are generally tried in equity. *See* Iowa Code § 633.33 (2005); Iowa R. App. P. 6.4. Haupert and Stephenson contend our review is for errors at law because the sole issue on appeal relates to the enforceability of an alleged settlement agreement, citing *Strong v. Rothamel*, 523 N.W.2d 597, 600 (Iowa Ct. App. 1994) (reviewing the district court's ruling on a motion to enforce settlement for errors at law).

To determine the appropriate scope of review, we look to the nature of the trial proceedings. *Crawley v. Price*, 692 N.W.2d 44, 48 (Iowa Ct. App. 2004). The petition for authority to sell property asked the court to enter an order approving the mediated contract as a binding obligation on all parties. Haupert's and Stephenson's objection to the application for authority to sell property requested that the court refuse to grant the request for authority to sell the property. Thus, the parties' pleadings impliedly asked the court to use its equitable powers. Although the district court ruled on evidentiary objections, normally the indication of a proceeding at law, the objections were minor and did not have a significant effect on the proceedings. *See Passehl Estate v. Passehl*, 712 N.W.2d 408, 414 n.6 (Iowa 2006). Moreover, the parties do not argue that

evidence was improperly excluded; therefore, the court's ruling on objections does not prevent a de novo review. *See id.*

We conclude the matter was tried in equity; therefore, our review is de novo. Iowa R. App. P. 6.4; *see also Linn County v. Kindred*, 373 N.W.2d 147, 149 (Iowa Ct. App. 1985) (reviewing de novo a "case tried in equity to enforce a settlement agreement"). We give weight to the district court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

III. Discussion

A. Applicable Law.

"A basic element of agency law is that whatever an agent does within the scope of the agent's actual authority binds the agent's principal." *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 493 (Iowa 2000).

> Actual authority to act is created when a principal intentionally confers authority on the agent either by writing or through other conduct which, reasonably interpreted, allows the agent to believe that he has the power to act. Actual authority includes both express and implied authority. Express authority is derived from specific instructions by the principal in setting out duties, while implied authority is actual authority circumstantially proved.

Id. (quoting *Dillon v. City of Davenport*, 366 N.W.2d 918, 924 (Iowa 1985) (citations omitted)).

> Apparent authority
>
> is authority which, although not actually granted, has been knowingly permitted by the principal or which the principal holds the agent out as possessing. Apparent authority must be determined by what the principal does, rather than by any acts of the agent.

Id. (citations omitted). For apparent authority to exist, "the principal must have acted in such a manner as to lead persons dealing with the agent to believe the agent has authority." *Waukon Auto Supply v. Farmers & Merchs. Sav. Bank*, 440 N.W.2d 844, 847 (Iowa 1989) (citation omitted). This determination is a fact question. *Id.* "[T]he burden of showing that an agent acted within the scope of the agent's actual or apparent authority is on the party claiming that such authority existed." *Id.*

B. Actual Authority.

In the case before us, neither Overson nor Haupert[3] conferred authority on Fitzgibbons by writing. Therefore, the question is whether Overson or Haupert, through their conduct and statements, led Fitzgibbons to reasonably believe he had the authority to bind Haupert and Stephenson to the mediated agreement. *See Gabelmann v. NFO, Inc.*, 571 N.W.2d 476, 481 (Iowa 1997). On our de novo review of the evidence before the district court, we conclude they did not.

Galen argues Overson's admission that Fitzgibbons had limited authority to present a take-it-or-leave-it settlement offer to the Galen Bart group proves actual authority. Overson, however, testified unequivocally on cross-examination that he had not given Fitzgibbons authority to bind Haupert and Stephenson to the mediated agreement.[4] Fitzgibbons's testimony confirmed Overson's testimony. Moreover, the details of the settlement had not been worked out

[3] Based on the testimony that Overson and Haupert had the authority to bind Stephenson, any references to Overson and Haupert impliedly include Stephenson.

[4] Neither Haupert nor Stephenson appeared or testified at the hearing on the petition for authority to sell property.

between the parties when Overson and Haupert left the mediation. The mediated agreement was drafted only after their departure. Fitzgibbons explained that at the end of the day on May 3, 2005, he "knew that they [Haupert, Stephenson, and Overson] would have to sign the agreement." He further testified that "because this had been such a difficult estate, . . . quite frankly I knew we didn't have a settlement until the court approved the same."

We conclude Fitzgibbons did not have actual authority to bind Haupert and Stephenson to the mediated agreement.

C. Apparent Authority.

Galen argues that "[w]here, as here, a party leaves a mediation designating an attorney as a representative to offer a final deal, that party has given the attorney apparent authority and should be bound by the settlement that is reached." He contends the acts of Overson and Haupert created any confusion over the scope of Fitzgibbons's authority, and therefore the risks of the outcome must be allocated to them.

In order to establish Fitzgibbons's apparent authority, Galen must show that Overson and Haupert acted in a manner that led the others in attendance at the mediation to believe Fitzgibbons had the authority to act on behalf of Overson and Haupert. We focus our attention on the actions of Overson and Haupert; therefore, any representations made by Fitzgibbons are immaterial to the issue of apparent authority. *Waukon Auto Supply*, 440 N.W.2d at 847.

Our review of the record leads to the conclusion that Overson's and Haupert's actions allegedly conferring authority upon Fitzgibbons were ambiguous, at best, and unconfirmed by those in attendance at the mediation.

Overson and Haupert left the mediation without instructions to the mediator or the others acting as the "committee of neutrals." Overson and Haupert were in contact with Fitzgibbons via cell phone, but the full extent of those conversations is unclear from the record. Fitzgibbons had previously filed pleadings along with attorney Overson on behalf of Haupert and Stephenson, thereby undoubtedly creating some confusion among the parties. However, Overson had appeared on behalf of Haupert and Stephenson at a hearing on several pending motions in June 2004, at which the parties participating in the mediation were present. Moreover, the signature page of the mediated agreement, with signature lines for Overson, Haupert, and Stephenson, should have given the parties some indication that Fitzgibbons had no authority to bind those three to the agreement.

IV. Conclusion

Galen has failed to prove that attorney Fitzgibbons had either actual or apparent authority to bind Haupert and Stephenson to the mediated agreement. Accordingly, we affirm the district court's denial of the temporary administrator's petition for authority to sell property. Any other issues raised by the parties on appeal are either adequately addressed herein, waived, or without merit.

AFFIRMED.