

FILED

SEP 20 1979 471

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROBERT McCARTHY,

)

Appellant,

)

Filed September 20, 1979

vs.

)

AGNES McCARTHY,
GERALD McCARTHY and
MARY ELIZABETH TRUMM,

)

68
2-62112

)

Appellees.

)

Appeal from Dubuque District Court - T. H. Nelson, Judge.

Plaintiff-remainderman appeals trial court's dismissal of his petition in an action for an accounting by life tenant arising from transactions between life tenant and a second remainderman. AFFIRMED.

Robert McCarthy, pro se.

Alfred E. Hughes of Dubuque, Iowa, attorney for appellees.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiff-remainderman, Robert McCarthy, appeals trial court's dismissal of his petition in an action for an accounting by life tenant, Agnes McCarthy. In his pro se brief, plaintiff asserts trial court erred in finding he was not entitled to an accounting and in ruling that certain transactions involving machinery, livestock, grain, and feed between life tenant and remainderman, Gerald McCarthy, represented good faith sales rather than gifts or waste of the assets of the estate of Joseph McCarthy. Plaintiff further asserts that he discharged his counsel, William Connery, in December, 1977, and that Attorney Connery therefore had no authority to represent plaintiff at the May 19, 1978 proceeding. We affirm.

Plaintiff is the son of defendant Agnes McCarthy and the brother of defendants Gerald McCarthy and Mary Trumm. All are beneficiaries under the will of Joseph McCarthy, who died in 1955. Joseph's will provided, in part:

All of the rest, residue and remainder of my property, personal, real and mixed of every kind and nature, I give, devise and bequeath to my wife, Agnes McCarthy, to have and to hold as her own during her natural lifetime.

I grant unto my wife the power to sell and convey any and all of the real estate that I may die seized of and my said wife is to have the use of any income from all of my property subject to the payment of the foregoing bequest, cost of administration and burial . . .

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After the death of my said wife, whatever property remains, personal, real or mixed of every kind and nature, I give, devise and bequeath in equal shares to my children, Robert McCarthy, Mary Elizabeth McCarthy and Gerald McCarthy, share and share alike.

The main asset of the estate was a farm of approximately 300 acres which, following Joseph's death, Robert leased from Agnes until 1963 when the tenancy was terminated by court order in an action initiated by Agnes. Gerald has leased the farm since 1967.¹

The present action arises from a 1967 transaction between Agnes and Gerald involving sale of certain items of farm machinery, livestock, grain, and feed which plaintiff alleged in his petition, filed July 1, 1971, constituted waste by the life tenant and for which he was entitled to an accounting and damages. Defendant's answer, filed February 2, 1972, denied any gifts were made or waste committed, and asserted that the personalty, sold to remainderman Gerald McCarthy, represented income from initial

¹ In 1967, Robert brought an action challenging Agnes's power to mortgage the farm. Trial court's dismissal of plaintiff's petition was affirmed in McCarthy v. McCarthy, 178 N.W.2d 308 (Iowa 1970).

personalty of the estate and that it was sold pursuant to an arm's length transaction. Defendants further stated facts to account for a \$15,000 condemnation award made to the farm estate by the State of Iowa.

After numerous continuances, the case was tried to the court on May 19, 1978. Plaintiff, for unknown reasons, did not attend. At the trial, counsel for plaintiff stipulated to the following facts: the farm machinery, for which Gerald paid \$138, was old; Gerald purchased an undivided one-half interest in the other personalty (livestock, grain, and feed items) for \$8,686, of which one-half has been paid; the livestock, grain, and feed represent income from the initial personalty of the estate taken over by the life tenant; the sale of the above items to Gerald was in good faith, at arm's length, and for fair and reasonable prices; plaintiff would not have any damages; in light of other facts in the record, the plaintiff would accept a photostatic copy of a certificate of deposit in satisfaction of the accounting for the \$15,000 condemnation award. Trial court ruled that following the stipulation there were no unresolved issues and dismissed the cause at plaintiff's cost.

I. Scope of review. Since the action was brought in equity, our review is de novo. Iowa R. App. P. 4; Mead v. City National Bank, 232 Iowa 1276, 1279, 8 N.W.2d 417, 419 (1943).

II. Discharge of Counsel. In his pro se brief, plaintiff contends he discharged his attorney, William Connery, prior to the May 19, 1978 trial. He asserts that in December, 1977, he notified Mr. Connery of this discharge, both verbally and in writing, after first notifying trial court through the court administrator. Although plaintiff cites no authority for his position, his basic argument is that fairness requires this court to reverse trial court's judgment and remand the case to that court for consideration of plaintiff's claim in a hearing wherein he is represented by competent counsel. To resolve the factual issues, this court requested the following supplemental record pursuant to Iowa R. App. P. 10(d).

RESPONSE TO DIRECTIVE

In response to the Directive of the Chief Judge filed June 7, 1979, the undersigned trial court of the above-entitled matter states the following in answer to the questions submitted under paragraph A of said order:

1. Did the trial court (through the court administrator), at any time during the pending [sic] of the action and prior to May 19, 1978, receive notice of Plaintiff's intent to discharge his attorney, William T. Connery?

A. This Judge has no personal recollection of the trial or of any communications received prior thereto. Under practice existing at that time, any communications addressed to this Judge or the Court Administrator would have been filed with the Clerk. No such notice appears either in the file or in the Clerk's docket nor in any of the loose papers in the envelope containing the official file. As previously stated, this Judge has no personal recollection at all. However, there is in the file a transcript of proceedings had May 19, 1978 which includes the following:

"THE COURT: Well, what is the position of the Plaintiff?

MR CONNERY: Well, Your Honor, the Plaintiff isn't here. I've notified him about it and he isn't here. And this matter has been continued several times.

THE COURT: It certainly has.

MR. CONNERY: And I'd like to proceed."

Mr. Connery then proceeded to dictate a stipulation into the record. The Court made no express ruling permitting the matter to continue in the absence of the Plaintiff but he would not have considered permitting the matter to go forward in the absence of the Plaintiff if there was any question in his mind about the authority in Mr. Connery to appear on behalf of the Plaintiff and commit the Plaintiff to a stipulation of facts.

2. To the best of this Court's recollection, and based on an examination of relevant records, it does not appear possible that any such notice was received.

3. There is no trial court docket or calendar entry showing any intent on the part of Plaintiff to discharge Mr. Connery subsequent to July 1, 1971, the date of the filing of the Petition and prior to May 19, 1978.

Dated this 8th day of June, 1979.

/s/ T. H. Nelson
Judge
1st Judicial District of Iowa

RESPONSE TO DIRECTIVE

In response to the Directive of the Chief Judge filed 7 June, 1979, the undersigned attorney-at-law of the above entitled matter states the following in answer to the questions submitted under Paragraph B. of said Order:

QUESTION 1. Did you at all times during the pendency of this action represent plaintiff, Robert J. McCarthy?

ANSWER: Yes, to the best of my knowledge I did.

QUESTION 2. Did you represent plaintiff in this action on May 19, 1978?

ANSWER: Yes.

QUESTION 3. Did you ever receive notice, either orally, written or both, from plaintiff that you were discharged from such representation?

ANSWER: No.

QUESTION 4. If the answer to question no. 3 is yes, when and in what manner was such notice received?

ANSWER: No answer required.

In further answer to the above questions, the undersigned attaches copies of correspondence between Robert J. McCarthy and the undersigned, from 04-02-77 through 05-16-78.

Dated this 16th day of June 1979, one day after the Iowa State Bar Convention.

/s/ William T. Connery

AFFIDAVIT OF ADDITIONAL INFORMATION

In reference to questions 1 and 2 of section A, of the June 7, 1979 ORDER by THE IOWA COURT OF APPEALS, the Plaintiff Appellant does hereby state that, on or about October 19, 1977 the Plaintiff Appellant did inform Mr. Gilloon, the court administrator, of his intent to discharge Mr. Connery, and Mr. Gilloon did relay this information to Judge Karl Kenline, while the Plaintiff waited in the hall immediately outside the Court Chambers.

June 16, 1979.

/s/ Robert J. McCarthy

SUPPLEMENTAL RESPONSE TO DIRECTIVE

This is supplemental to the response filed by the undersigned Judge of the District Court of Iowa in and for Dubuque County, dated June 8, 1979.

Since the receipt of said response of June 8, the undersigned has received a letter from one Robert J. McCarthy stating:

"In reference to the Order of June 7, 1979 by Judge Leo Oxberger pertaining to McCarthy v. McCarthy, 262112, questions to the trial court, the administrator referred to was Mr. Gillon, [sic] who, on October 19, 1977, did relay to Judge Karl Kenline, the intention of the Plaintiff to discharge his attorney, William Connery."

In the period from approximately July, 1977 to December, 1977, Thomas Gilloon (who was at that time a State Representative) filled the position of Bailiff attached to this court and, since he helped me in

supervising the trial calendar for the County, sometimes referred to himself as court administrator. At that time the nature and function of a court administrator was not well defined and no objection was made to his assuming the title. Mr. Gilloon was, at last report, a law student in the state of California. The undersigned does not speak for Judge Kenline.

Dated this 18th day of June, 1979.

/s/ T. H. Nelson
Judge
1st Judicial District of Iowa

RESPONSE TO DIRECTIVE

In response to the Directive of the Chief Judge filed June 21, 1979, the undersigned judge of the above-entitled matter states the following in answer to the questions submitted:

1. Were you, at any time prior to May 19, 1978, through communication with one Mr. Thomas Gillon, [sic] then Bailiff for the District Court in Dubuque County, informed of Plaintiff Robert McCarthy's intent to discharge his attorney, William T. Connery?

A. No. I checked with the Court Administrator at Waterloo, Iowa and learned that the undersigned Judge was on court duty, Black Hawk County, Waterloo, Iowa, as chief criminal judge for the week of October 17th through 21st, 1977.

2. If the answer to Question No. 1 is "yes," what was the nature of that communication? When and where did it occur?

A. N/A

3. If the answer to Question No. 1 is "yes," what was the nature of that communication? When and where did it occur?

A. N/A.

4. If the answer to Question No. 1 is "yes," what subsequent action, if any, did you take with regard to this communication?

A. N/A.

5. Do you know the current whereabouts of Mr. Thomas Gillon [sic] ?

A. No.

6. If the answer to Question No. 5 is "yes," what is his address?

A. N/A.

Dated this 27th day of June, 1979.

/s/ Karl Kenline
Judge
FIRST JUDICIAL DISTRICT OF IOWA

This record sufficiently establishes, for this court, that plaintiff was represented by counsel of his choice at the May 19, 1978, hearing.

III. Dismissal of Plaintiff's Petition. When the parties stipulated that the sale of old, nearly valueless, farm equipment was done in good faith by life tenant to remainderman, Gerald McCarthy, plaintiff's claim that the sale was a sham was negated by plaintiff's own agreement. The stipulation also stated that the livestock, grain, and feed represented income from the initial personalty of the estate taken over by the life tenant. Absent limitation or restriction, increase of stock and income from the property of the estate inures to the benefit and becomes individual property of life tenant, not that of the remainderman. Milner v. Brokhausen, 153 Iowa 560, 564, 133 N.W. 1068, 1070 (1912). See also Whitehill v. Whitehill, 211 Iowa 475, 476, 233 N.W. 748, 748 (1930). The unrestricted terms of Joseph McCarthy's will gave his wife the right to the use of and the income from all of his property during her life. Likewise, on this issue plaintiff's right to relief is negated by his own agreement.

The record reveals insufficient evidence to support a complaint of gift or waste regarding Mary Elizabeth Trumm; sufficient evidence is presented to show proper handling of a land condemnation award by the state.

We affirm trial court's dismissal of plaintiff's petition. Costs of this appeal shall be assessed to plaintiff.

AFFIRMED.