IN THE COURT OF APPEALS OF IOWA

No. 8-064 / 96-1941

000131

IN THE MATTER OF THE ESTATE OF ESTHER GROSVENOR, Deceased,

MARK N. GROSVENOR,

Plaintiff-Appellant,

vs.

RUTH KEIPP, DON GROSVENOR, TIM CAMPBELL, and LEE WALKER,

Defendant-Appellees.

Appeal from the Iowa District Court for Jasper County, Richard D. Morr, Judge.

The plaintiff appeals a district court ruling closing the decedent's estate. **AFFIRMED AS MODIFIED.**

Mark N. Grosvenor, Colfax, pro se, appellant.

Lee M. Walker of Walker, Knopf & Billingsley, Newton, for appellees.

Considered by Cady, C.J., and Huitink, and Mahan, JJ. Streit, J. takes no part.

PER CURIAM

This is an appeal by a beneficiary claiming the district court should not have closed a probate estate. We affirm as modified by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Esther Grosvenor died on January 18, 1994. Her will left her estate to her children, Mark Grosvenor and Ruth Keipp, in equal shares. Esther's husband, Donald Grosvenor, elected to take against the will.

In April 1994, Mark filed a petition to set aside the will because he believed it was a forgery. He alleged Esther had actually left her estate to the children as joint tenants. The district court dismissed Mark's petition on the ground the controversy was moot. Even if the will gave Mark and Ruth the property in joint tenancy, the tenancy could be destroyed by the unilateral act of one party. Mark appealed the district court decision. In July 1996, the supreme court dismissed the appeal for lack of prosecution.

In June 1996, the district court approved the request of the executor and attorney for the estate, Lee Walker, for attorney fees of $7000 to defend against Mark's suit. In August 1996, Walker filed a final report. He requested Mark be surcharged $7000 for the estate's legal fees. The court approved the final report. Mark was assessed a surcharge of $5000 against his share of the estate. Ruth and Donald were each assessed a surcharge of $1000. Walker received extraordinary fees of $3000, plus his statutory executor and attorney fees. Court costs were assessed to Mark. Mark has appealed.

I. This action is equitable in nature. Iowa Code §633.33 (1995). Accordingly, our review is de novo. *In re Estate of Petersen,* 570 N.W.2d 463, 465 (Iowa App. 1997).

II. Mark believes he could revive his prior appeal to the supreme court by curing his default under Iowa Rule of Appellate Procedure 19(a). He claims it is premature to close the estate because he has not received a final decision on his appeal. Mark has not yet filed a request to cure his default. Mark's appeal was dismissed in July 1996. At this late date, we do not believe his prior appeal could be revived under rule 19(a). The issues which were raised in the prior appeal may not now be relitigated.

III. Mark also claims it was improper to close the estate because the Attorney General's office was investigating irregularities in the estate. The Attorney General's office closed its file by September 1996, which was before the estate was closed in October 1996. We determine it was proper to close the estate.

IV. Mark claims the court improperly assessed the estate's legal fees and court costs against him. Iowa Code section 633.314 gives courts authority to tax costs in actions taken to contest or set aside a will. Generally, a district court has considerable discretion in allowing attorney fees under this section. *In re Estate of Ohrt*, 516 N.W.2d 896, 902 (Iowa 1994).

When a person acts in good faith in bringing an action in probate to contest or set aside a will, he or she should not be penalized by carrying the entire burden of the associated costs. *In re Estate of Wulf*, 526 N.W.2d 154, 158 (Iowa 1994). In the present case, the district court did not make any finding Mark challenged the will in bad faith or with the intent of leveraging his settlement position. *See id.* We also note the request in the final report for a surcharge against Mark did not allege he acted in bad faith. In the absence of a finding of bad faith, we determine the court should not have assessed the surcharge of $5000 against Mark or made him solely responsible for court costs. We modify the district court decision to eliminate these charges against Mark. The attorney fees and court costs should be a charge against the estate, and thus assessed equally against Mark, Ruth, and Donald.

V. Mark contends he should have been awarded attorney fees under section 633.315, which provides:

> When any person is designated as executor in a will, or has been appointed as executor, and defends or prosecutes any proceedings in good faith and with just cause, whether successful or not, that person shall be allowed out of the estate necessary expenses and disbursement, including reasonable attorney fees in such proceedings.

Mark was nominated an executor in the will, but was never appointed as executor. He has proceeded throughout these matters pro se. Because Mark was not the executor, not an attorney, and did not hire an attorney, we find he is not entitled to reimbursement for expenses or attorney fees.

VI. Mark claims the executor, Walker, should not have been released from his bond. He again alleges the estate should not have been closed. We have already found the estate was properly closed. We determine the district court correctly released Walker from his bond.

We affirm the decision of the district court on all issues, whether discussed within this opinion or not, except we have modified the surcharge of $5000 against Mark and the assessment of all court costs against him. Costs of this appeal are assessed one-third each against Mark, Ruth, and Donald.

AFFIRMED AS MODIFIED.