IN THE COURT OF APPEALS OF IOWA

No. 9-315 / 98-426
Filed December 13, 2000

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CLERK SUPREME COURT

IN THE MATTER OF THE ESTATE OF PAUL FELTON, Deceased,

MARY KARDELL and the ESTATE OF PAULINE NEEDHAM,
Plaintiffs-Appellants/Cross-Appellees,

vs.

DONALD FELTON,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, James M. Richardson, Judge.

Mary Kardell and the Estate of Pauline Needham appeal, and Donald Felton cross-appeals, from a district court order on plaintiffs' action for accounting and objections to the final report filed by the executor of the deceased's estate. **AFFIRMED AS MODIFIED AND REMANDED.**

James D. Sulhoff of Hanson & Sulhoff, Avoca, for appellant Kardell.

Jacob J. Peters of Peters Law Firm, P.C., Council Bluffs, for appellant Needham estate.

Robert Kohorst of Kohorst Law Firm, Harlan, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

I. Background Facts and Proceedings.

For nearly thirty years before his death on February 8, 1991, Paul Felton farmed in partnership with his son, Donald. Felton Farms raised crops and livestock on land owned by Paul and a testamentary trust established by Paul's wife, Greta. Under the terms of their agreement, Paul furnished the farmland, and Donald contributed his labor and managed the partnership. All income and expenses were divided equally.

Paul's will admitted to probate on February 26, 1991, named Donald and Mary Kardell as co-executors of his estate. Under the terms of the will, Paul left his estate to this three children, Donald, Mary Kardell, and Pauline, in equal shares.

Article IX of Paul's will provided:

> Without the necessity of notice to or approval of any court or person, the Executors and Trustees shall have the power and authority to perform any act reasonably necessary or advisable to the administration and distribution of my estate and any trust created by this Will. Without limiting in any way the foregoing, the Executors and Trustees shall have the following powers:
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> 1. To acquire, invest, reinvest, exchange, retain, sell, mortgage, lease or otherwise manage or dispose of assets, real or personal, for terms within or extending beyond the term of my estate, or any trust, exercising the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds considering the probable income as well as the probable safety of their capital. Within the limitations of that standard, the Executors and Trustees are authorized to acquire, retain, and dispose of every kind of property, including but not limited to real estate, bonds, debentures, and other corporate obligations, common or preferred stocks, and common trust funds which men of prudence, discretion and intelligence acquire, retain or dispose of for their own account.

2. To pay my debts and funeral expenses (including the expenses of last illness) as soon as the convenience of my estate will permit and to pay or deliver any legacy without waiting the time prescribed by law.

. . . .

4. To borrow money for any purpose for the use and benefit of my estate and any trust and to secure the loan by a pledge or mortgage of the assets of my estate and any trusts, and from time to time, to renew such loans and give additional security.

. . . .

9. To delegate, without liability for such delegation, among themselves or to any one of them any of the powers granted in this Will except that the Executors and Trustees may not delegate any previously granted authority to make discretionary distributions of income and principal.

. . . .

13. To continue the operation of any farm property which is being held in my estate or any trust through arrangements with hired labor, tenants or sharecroppers, or other agents; to purchase or rent farm machinery, equipment, and livestock; to construct, repair and improve farm buildings; to make or obtain loans for farm operations or improvements; to employ and utilize approved soil conservation practices; to ditch, tile, and drain damp or wet areas of the farm; to engage in livestock production and, in general, to employ such methods of farming as the Executors or Trustees deem advisable.

14. My Trustees are excused from the duty to render to any court annual or other periodic accounts, whether required by statute or otherwise. My Trustees shall take such action for the settlement or approval of their accounts at such times and places and before such courts or without such court proceedings as they shall in their sole discretion determine. Settlement of the Trust before the court need only be made upon termination of any Trust created herein.

By agreement of the three heirs, Donald continued to operate Felton Farms for crop year 1991. During this time period Felton Farms purchased and sold livestock, borrowed money for its operations, and paid the partnership's operating

expenses. By the end of calendar year 1991, most of the partnership's cattle had been liquidated. Donald purchased the partnership's unused grain by issuing a personal check to the estate for one-half of its appraised value. The cattle remaining unsold were carried over for finishing and eventual sale in 1992. The partnership's last receipt for the livestock sold was in September 1992.

The probate inventory filed November 12, 1991, valued Paul's gross estate at $554,871.91, including $295,095.99, for one-half the value of Felton Farms assets. The amount of mortgages and estimated debts claimed was $87,025.54, including $77,044.83 for one-half of Felton Farms' debt to the Farmers and Merchants Bank. The value placed on Paul's share of partnership cattle, $267,561.99, was based on actual sales prices and the estimated sales prices of cattle remaining unsold as of the inventory date. Paul's share of partnership machinery and grain was valued at $10,747 and $11,787 respectively.

Donald purchased two farms from the estate during the course of administration. He bought the "South Farm" for $135,994.25 pursuant to an option under Paul's will. Donald purchased the "North Farm" for $170,000 at public auction.

The post-1991 record in Paul's estate includes a series of motions, hearings, reports, and orders reflective of the parties' escalating hostilities. In April 1992 Mary sought Donald's removal as executor, alleging conflicts of interest and his failure to liquidate partnership property. In July 1992 the executors' attorney withdrew citing the parties' refusal to respond to his efforts to distribute and close Paul's estate.

On May 16, 1995, the court appointed attorney Joseph McGinn as temporary administrator to prepare a final report in Paul's estate. McGinn filed a final report on November 17, 1995. On January 12, 1996, the court entered a "Final Order" approving McGinn's report including directions to the parties' concerning distribution and closing the estate. A hearing on the order was set for February 1996. It was continued indefinitely. On December 3, 1996, Donald was ordered to file a "full accounting of all estate transactions since February 8, 1991, through January 17, 1997, the due date of the accounting." Donald filed the requested accounting on January 21, 1997. Pauline's executor subsequently filed a motion to compel and for sanctions against Donald citing the inadequacy of the accounting. In a February 27, 1997, order, any hearing on this motion was continued pending a settlement conference set for April 2, 1997. Hearing on Pauline's pending motion for sanctions was continued several times and was never submitted for ruling. On June 11, 1997, the court set the matter for trial on September 30, 1997, and ordered McGinn to file a report and recommendation by September 20, 1997.

McGinn filed a report as ordered on September 29, 1997. In this report McGinn noted the parties' irreconcilable differences concerning the sufficiency of Donald's January 21, 1997, accounting and proposed distributions. He also reported:

> That there appears to be a violation as to self dealing in the estate proceedings due to that fact that no Applications and Orders were presented to the Court for continuing the partnership business nor were any Applications filed by all of the executors pertaining to the sale of both real and personal property of the estate and further that there were no filings to continue the partnership in order to wind up the affairs of the Felton Farms partnership.

McGinn concluded this report by recommending submission of all pending disputes to mediation and an equal division of the net estate as determined in those proceedings.

McGinn's final report, the court's final order on that report, and McGinn's supplemental final report were reached for trial on September 30, 1997. The fighting issues at this hearing included Donald's failure to wind up the business of Felton Farms promptly and account for partnership assets, expenses related to winding up the partnership, and allegations of self-dealing by Donald in the administration of Paul's estate.

The district court found virtually all of McGinn's final report to be true and accurate except for the paragraphs concerning fees paid to the original attorney for the executors and concerning self-dealing. The court determined the initial attorney for the estate had performed his duties and was properly awarded fees. It also determined the parties had agreed in March 1991 to continued operation of the partnership to finish off the cattle so as to achieve the best price for them when sold. The court ordered Donald to file a report showing the other two heirs received proper payment for the real estate he purchased from the estate. It also ordered that all necessary documents be executed and tax forms be filed so that the estate could be closed. Finally, the court ordered the remaining net assets of the estate divided equally among the heirs.

Donald filed a rule 179(b) motion to enlarge the court's findings. The court issued a ruling in February 1998 concerning the estate tax forms, Donald's report concerning the real estate, and Donald's rule 179(b) motion. The court overruled

the 179(b) motion. The court approved Donald's report concerning the real estate transactions except for an adjustment for taxes of $4893. Mary Kardell and the Estate of Pauline Needham appealed. Donald cross-appealed.

After careful and thorough review of the record on appeal, we concluded it was insufficient to resolve the issues raised by the parties. In January 2000 we remanded the case to the district court for a determination of the value of the partnership at the time of Paul Felton's death and a determination of the terms of the relevant real estate transactions and the timeliness of the distribution of sale proceeds. The district court appointed a certified public accountant to prepare a report on the matters in question. A hearing on the accountant's report was held in late September, and the expanded record was sent to this court in October.

II. Appellate Claims.

Appellants raise two claims on appeal: that Donald engaged in self dealing and that certain adjustments need to be made to the calculation of the assets of the estate for proper distribution. On cross appeal, Donald asserts the court should have resolved claims concerning an ASCS payment, one tractor, and partnership expenses in his favor.

Under Iowa Code section 633.33, a hearing on the final report is an equitable proceeding. Our review is de novo. Iowa R. App. P. 4; *In re Estate of Snapp*, 502 N.W.2d 29, 32 (Iowa App. 1993). Although we give deference to the district court's findings, especially concerning the credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

A. Self-dealing.

1. Real estate transactions. The overriding issue on appeal is whether or not Donald's actions in winding up the partnership and in how he purchased land from the estate constitute self-dealing and warrant payment of restitution or penalties to the estate. Self-dealing involves transactions between a fiduciary and the estate in which the fiduciary personally profits. *In re Estate of Snapp*, 502 N.W.2d at 33. Iowa Code section 633.155 generally prohibits self-dealing by a fiduciary such as an executor except on order from a court. The express provisions of a will may override the general statutory prohibition and allow some self-dealing transactions. *See, e.g., Coster v. Crookham*, 468 N.W.2d 802, 810 (1991); *Harvey v. Leonard*, 268 N.W.2d 504, 512-13 (Iowa 1978).

A 1984 codicil to Paul's will gave Donald the option to purchase several parcels of land collectively known as the "South Farm" at their appraised price but delayed possession and payment until March 1, at least one year following the appraisal. The parcels were appraised in April 1991. Donald sought to tender payment and take possession in early 1992 but was refused. He paid cash rent for the land in 1992. The estate issued a court officer deed on March 1, 1993. Donald tendered payment to his attorney's trust account on June 25, 1993, and the funds were transferred to the estate on July 1 and 2. We find Donald should pay interest on the amount due from March 1 to July 1, 1993, at five percent per annum. Iowa Code § 535.2(1). We set that amount at $1,511.[1]

[1] The interest is calculated by taking the amount due the estate for the two heirs for the "South Farm" times the daily factor for five percent annual interest times the sum of days from March 1 through June 30 ($135.994.25 x 2/3 = $90,662.83 x 0.0001366120 x 122 days = $1,511.0469, rounded to $1,511).

Donald purchased the "North Farm" from the estate in a private sale requested by the co-executors and approved by the court on May 17, 1993. The sale provided for a downpayment of $25,500 with the balance due and payable upon "presentation of merchantable abstract of title free and clear of all liens and encumbrances." Part of the payment made by Donald on June 25 related to this purchase. Donald paid the balance of the amount owed for the real estate purchases between December 22, 1997, and March 4, 1998.

Donald's method of calculating his payment for the real estate purchases has caused confusion and dispute. Instead of paying the entire purchase price into the estate for distribution equally to the three heirs, he withheld the one-third that would have been distributed back to him and paid two-thirds of the purchase price, which was to be divided equally by the other two heirs. The district court found this to be unfair because it insulated Donald's one-third from any debts of the estate. Had there been insufficient funds in the estate to pay all its debts, this would be an issue. However, the court ordered Donald to provide an accounting that demonstrates the other two heirs received the proper amount from the estate distribution of the payments.

We find an error in the accounting provided by Donald. The final payments made in 1997 and 1998 were paid out by the estate equally to all three heirs. Donald had not paid in his share, so he should not have been included in the distribution. He should return the distribution of $14,472.32 to be divided between the other two heirs. We also agree there should not have been any offset for taxes.

They were Donald's responsibility. He should refund the offset for taxes as ordered by the district court.

Appellants claim Donald's payments and the distribution of the payments from the estate were untimely and therefore they deserve interest. Donald argues he was unable to complete the resale of some of the land because the other two heirs would not execute quit-claim deeds for their interest in the property. This delayed his receipt of a portion of the proceeds of the resale. The district court determined the problems with Donald's subsequent sale of some of the property were outside the estate administration. Although we agree with the district court the resale of some parcels of land is separate from the estate administration, the problems Donald had in providing merchantable title to the purchaser reveal Donald had not received merchantable title from the estate. The sale approved by the court required payment upon receipt of merchantable title. We find, therefore, that Donald was not obligated to pay the balance due for the "North Farm" until the other two heirs had executed and delivered the necessary documents to provide Donald with merchantable title. The district ordered that done in December 1997. Donald paid the balance in December 1997. We find no delay in payment for the "North Farm" and no interest due.

Concerning the claim for interest because of untimely distribution from the estate, we find the claim without merit. The funds in the estate were in an interest-bearing account. Donald was not solely responsible for administering the estate. The funds were distributed when the final report was approved by the court. The delay in approving the final report is attributable to the disagreements and bickering

between the heirs necessitating appointment of a temporary executor and generation of voluminous accountings and reports. We find no evidence Donald refused to distribute funds prior to the temporary executor's appointment. After that appointment, the distribution of the estate was the responsibility of the temporary executor, subject to the approval of the district court.

2. Felton Farm partnership. When violations of fiduciary duty are the subject of controversy, the burden of persuasion shifts to the fiduciary to establish that he properly discharged his obligation if there is some indication of self-dealing by the fiduciary or when the fiduciary is sued for accounting of entrusted funds. *In re Estate of Snapp*, 502 N.W.2d at 33. In *Snapp*, "some indication" of self-dealing was demonstrated by the son paying himself an excessive salary as president of his father's corporation and by paying himself executor and attorney fees in excess of the statutory amount allowable. The court in *Snapp* applied a two-part inquiry: did the language of the will permit the action? and, was there some indication of self dealing?

We find the language of the will quoted above to be broad enough to permit Donald to continue operation of the Felton Farm partnership as he did. In addition, we find the record supports the conclusion the heirs discussed and agreed to such action in March 1991. We next evaluate Donald's actions as a fiduciary of the estate in his operation of the partnership to its conclusion to see if there is some indication of self-dealing.

In 1988, after Paul's wife's death, Paul and Donald memorialized the terms of their partnership agreement. The agreement provided that Paul contributed all the

land and buildings. Donald provided his expertise and reputation in the black angus industry and his full-time work for the partnership. The contribution of each partner of equipment was to be reflected on each partner's depreciation schedules. The agreement also provided, in pertinent part:

> 6) SALARIES. No partner has received any salary for services rendered in the Partnership.
>
> 7) PROFITS AND LOSSES. The net profits and surplus of the Partnership have been divided equally between the partners and the net losses have been borne equally by them. The parties agree that all expenses, including hired labor, repair for equipment, insurance, replacement of equipment used for feeding cattle as reflected on each partner's depreciation schedule are shared equally by the parties.
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> . . .
>
> 10) ACCOUNTING BASIS. The books of account have been kept on a cash basis.

Donald continued to operate the partnership as the parties agreed to finish off the livestock and crops and sell the partnership assets. *See* Iowa Code § 486.30. This includes time to finish old business, collect and pay debts, and to distribute remaining assets to the partners. *Gibson v. Deuth*, 270 N.W.2d 632, 635 (Iowa 1978). Paul's one-half interest in the profits and surplus was to be paid to his estate for distribution to the three heirs. During his operation of the partnership, Donald began making equal distributions of profits and excess to the estate and himself, as was proper. He incurred expenses in caring for the livestock and selling them. He repaired and maintained partnership property and equipment. After thorough examination of the record before us, both before and after remand, we find Donald has provided various accountings of the partnership operation that show normal, prudent business operation using regular practices in the trade. From the

values for Paul's interest in the partnership provided in the estate inventory form 706 and the estimate of the value at the time of his death provided by the CPA on remand compared with the detailed accountings and summaries provided by Donald, we find Donald operated the partnership to its termination in a reasonable, prudent fashion and did not engage is self-dealing. *See* Iowa Code § 486A.803(3); *In re Ring's Estate*, 132 Iowa 216, 222, 109 N.W. 710, 713 (1906) (stating in general an administrator who acts with ordinary care and prudence is not liable for any loss or depreciation absent a showing of bad faith or negligence). We therefore affirm the district court's acceptance of the temporary executor's final report, except as modified in this opinion.

B. Cross-appeal issues.

Donald claims the district court erred in disallowing his 1992 expenses incurred in winding down the partnership. He states, "the dollar values for these expenses were furnished by the County Extension Director and the Area Extension Specialist." His claim also includes wages for Rick Felton and wages and management fees for himself. The partnership agreement does not allow wages and management fees to Donald. His full-time services are his contribution to the partnership. The accounting of the partnership account for 1992 reveals payment of veterinary charges and expenses associated with selling the remaining livestock. It also reveals payment of wages to Rick Felton. We do not find any evidence in the record showing Donald paying the claimed expenses out-of-pocket. Certainly, the expenses incurred in caring for estate property, such as raising crops or livestock to maturity, can be allowed as part of the cost of administration. *See Elliot v. Des*

Moines Nat'l Bank, 209 Iowa 1258, 1263, 228 N.W. 274, 276 (1929). To the extent Donald has provided documentation he actually paid such costs himself out-of-pocket, instead of projecting the costs based on information from experts, we allow them. *See Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639, 657 (Iowa 1979) (allowing actual and reasonable costs). The remainder of the claim for expenses is denied.

The parties dispute whether the partnership owned the IH 1086 tractor listed in the estate inventory. The partnership agreement provided ownership of equipment was shown by the depreciation schedules. The CPA's report prepared on remand clearly demonstrates Donald, not Paul or the partnership, listed the tractor on his personal depreciation schedule. We find Donald to be the owner of the IH 1086 tractor, which was mistakenly listed in the inventory of partnership equipment. The tractor shall be removed from the value of the equipment in distributing the assets of the estate.

Donald claims the district court erred in not finding Mary Kardell responsible for the loss of the ASCS benefit on the property he rented from the estate in 1992. He alleges she did not provide the required forms in time for him to obtain the benefit. We do not find evidence in the record the loss of the ASCS benefit is attributable to Mary's actions. We affirm the district court on this issue.

Donald also raises a variety of claims such as balancing the accounts of the partnership for withdrawals in past years, reimbursement for repairs to property, rent for use of his land for partnership livestock, and others. We deny them all as either

not raised before the district court as a claim against the estate or as being without merit.

III. Summary.

We affirm the orders of the district court except as modified in this opinion and remand this case for entry of judgment and final distribution of the assets of the estate consistent with this opinion.

AFFIRMED AS MODIFIED AND REMANDED.