FILED
AUG 23 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-279 / 88-1167

**IN THE MATTER OF THE ESTATE OF CHARLES E. PARKER.**

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**SANDRA S. PARKER,**

Appellee,

vs.

**HAROLD F. PARKER, fiduciary of the Estate of Charles E. Parker, Deceased,**

Appellant.

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Appeal from the Iowa District Court for Polk County, Ruth B. Klotz, Referee in Probate, and Arthur Gamble, Judge.

The executor of the estate of Charles E. Parker appeals a decision of the referee in probate allowing Sandra Parker's claim for continued alimony payments as a charge against the estate of Charles Parker. **APPEAL DISMISSED.**

Philip F. Miller, Des Moines, for appellant.

Roger J. Kuhle and Steven C. Despotovich of Kuhle & Sanders, Des Moines, for appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

**SCHLEGEL, J.**

The executor of the estate of Charles Parker appeals a decision of the referee in probate allowing Sandra Parker's claim for continued alimony payments as a charge against the estate of Charles Parker. We dismiss the appeal.

Sandra argues that the appeal is not proper and should be dismissed. The executor contends the referee erred in not terminating the alimony obligation on the death of Charles Parker, and that the parties consented to allowing direct appeal from the referee's decision.

Charles and Sandra Parker were divorced in April 1984. Pursuant to the divorce decree, Charles was ordered to pay alimony which "shall continue until such time as (Sandra) dies or remarries." Charles died on January 9, 1988, leaving his estate to his five children. In February 1988, Sandra filed a claim in probate arguing that the estate was responsible for continued alimony payments.

On July 15, 1988, the referee in probate filed her findings of fact and conclusions allowing Sandra's claim. On August 3, 1988, the district court entered judgment approving the claim of Sandra Parker. Later that same day, the executor filed a notice of appeal from the findings of the probate referee. On August 19, the executor filed a supplemental notice of appeal.

Sandra seeks to dismiss the executor's appeal claiming that the executor failed to timely object to the referee's

report pursuant to Iowa Rule of Civil Procedure 214. Rule 214 grants a party ten days in which to file objections to the referee's findings with the district court. In Matter of Estate of Willis, 418 N.W.2d 857, 860 (Iowa 1988), the Iowa Supreme Court held that failure to object within the ten-day limit required dismissal. "The rule is clear. A party who desires to challenge the report must file written objections to it within ten days after the clerk's notice is mailed." Id. at 858. The executor's notice of appeal was filed thirty days after the referee's findings.

The jurisdiction of the appellate court is from final decisions of the district court. Iowa R. App. P. 1. The report of the probate referee is not a final decision. Id. at 859. The court in Willis also held, "[A] direct appeal to this court does not lie from a probate referee's report." Id. at 860. In this case the parties did not bypass the district court as in Willis, but merely failed to object. However, the failure to preserve error occurs whether a party fails to object to the report in the district court or fails to object because the party bypasses the district court and appeals directly to this court. Id. The holding in Willis requires us to dismiss the appeal. The executor did not make any objections to the report within ten days and therefore we lack jurisdiction to decide the issues.

Appellant also contends that the parties agreed to treat the probate referee as a district court judge and therefore a direct appeal should lie. The parties to an action cannot agree to invoke the subject matter jurisdiction of this court. The Iowa Supreme Court has held:

> Jurisdiction is conferred upon this court only in the manner provided by statute, and where there is failure to comply with the statute providing for perfecting of appeal, no jurisdiction is conferred. It is the settled rule in this state, through all if its history, that parties to litigation cannot, by agreement, confer jurisdiction upon this court.

Carmichael v. State Highway Commission, 156 N.W.2d 332, 337 (Iowa 1968).

The appellant also argues that the appellee is estopped from denying jurisdiction due to the agreement. The court specifically held in Carmichael that jurisdiction not conferred by law cannot be conferred by estoppel. Id. The appellant did not comply with the statute conferring jurisdiction and jurisdiction cannot be saved by agreement, therefore the appeal must be dismissed.

**APPEAL DISMISSED.**

Sackett, J., concurs; Donielson, P.J., specially concurs.

**DONIELSON, P.J.** (specially concurring)

I agree with the majority relative to appellant's failure to timely file notice of objections to the referee's report. I wish, however, to make it clear that I do not concur with the decision rendered by the probate referee and adopted by the district court. I particularly do not concur with that portion of the decision which reads as follows:

> The dissolution decree entered in the Parker matter stated that the alimony of $750.00 per month "shall continue thereafter until such time as respondent dies or remarries." This is not substantially different from the language in the Robert's decree which stated the payment of alimony was "to continue during the lifetime of the plaintiff and while she remains unmarried," nor the language used in Yoss in which the stipulation provided that the payments were to continue "for the lifetime of the wife." Thus, it is concluded that in determining the question raised by the claim in the Parker Estate the Court is not bound by the general proposition cited in a number of cases but, instead, must do as the court did in these cases and look to the circumstances as to the intent of the decree and the other factors involved in the total dissolution.

I see nothing in the wording of the Parker dissolution decree which overcomes the presumption of termination of alimony at the death of the deceased. There is testimony by the attorney for the deceased that in the dissolution proceedings they never intended to bind the estate.