IN THE COURT OF APPEALS OF IOWA

No. 0-832 / 00-0740
Filed March 14, 2001

IN THE MATTER OF THE ESTATE OF MARION E. WARFIELD, Deceased,

D. RICHARD JONES and MARJORIE WARFIELD JONES,
Claimants-Appellees,

vs.

NORWEST BANK IOWA, N.A., Executor of the Estate of MARION E. WARFIELD, Deceased,
Respondent-Appellant.

FILED
MAR 14 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gau, Judge.

The executor of decedent's estate appeals a probate court order allowing the claimants' claim for repayment of alleged loans to decedent. **AFFIRMED AS MODIFIED.**

George F. Madsen and Missy J. Denton of Mayne, Marks, Madsen & Hirschbach, L.L.P., Sioux City, for appellant.

Steven R. Jensen of Crary, Huff, Inkster, Sheehan, Ringgenberg, Hartnett, Storm & Jensen, P.C., Sioux City, for appellees.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

SACKETT, C.J.

Appellant Norwest Bank Iowa, the executor of the estate of decedent Marion E. Warfield, appeals challenging the district court's allowance of a claim filed by appellees D. Richard Jones and Marjorie Warfield Jones. Appellees, the daughter and son-in-law of decedent, filed the claim seeking repayment of money they had advanced the decedent over a ten-year period preceding her death. Appellees contended decedent had made an oral agreement promising appellees they would be repaid any sums they advanced her. The executor contends the district court erred in allowing the claim in: (1) concluding the decedent had agreed to repay the funds; (2) not finding Iowa Code section 614.1(4) (1999) barred the claim; (3) ruling the Statute of Frauds did not apply; (4) not finding appellees were estopped from recovery; and (5) granting appellees' rule 179(b) motion and awarding interest and costs. We affirm as modified.

Decedent died in December of 1998. Her estate was opened and executor appointed in January of 1999. The probate inventory showed the gross estate was $166,139.92. In April of 1999 appellees filed a claim for $93,124.57 asking for repayment of money advanced to the decedent on substantially a monthly basis in the approximately ten years prior to her death.

The executor filed a notice of disallowance of the claim and appellees requested a hearing. At the hearing both appellees offered testimony. Marjorie testified in about February of 1989 she and D. Richard lived in Florida. She was visiting decedent who was yet living alone in her home in Sioux City, Iowa.

Marjorie said decedent was not comfortable with her living arrangement. Marjorie suggested that decedent's son and wife, who were caregivers by profession, come and live with decedent in her home. At the time decedent's income was about $1,500 a month and Marjorie suggested maybe D. Richard would send decedent additional money. Marjorie said she and decedent called D. Richard in Florida and discussed with him sending extra money monthly to cover decedent's expenses. Marjorie testified that decedent said to her, "that any money we gave we would get every penny of it back." No repayment date was discussed, but Marjorie was of the opinion they would be paid back when decedent died.

Appellees began sending monthly checks, and decedent's son and wife moved into her home and gave her care. Ultimately decedent went into a nursing home, and appellees continued to send monthly checks to pay those amounts the home charged over decedent's income.

D. Richard testified as to the telephone call with Marjorie and decedent. He said they had a conversation on the telephone with decedent about her need to supplement her income so she could live in her home and have caregivers. He testified nothing was put in writing but decedent said to him, "You will get your money back." He said on the basis of the telephone conversation he believed, "we would get our money back, whatever we sent." He stated he believed she intended to pay them back and that it would happen after her death. Neither appellee had any further conversation with decedent, but they religiously supplemented her income.

There were no other witnesses to the conversation appellees claimed to have had with decedent. Appellees made no claim of any further discussion they had with the decedent regarding the agreement.

Appellees introduced a series of cancelled checks evidencing that they had advanced to decedent or others in her behalf a sum in excess of $92,961.57. The district court found appellees' testimony credible and allowed the claim in the amount of $92,961.57. Appellees then filed a 179(b) motion seeking interest and costs. The district court granted the motion to the extent that the Jones were awarded interest at the rate of 8.19% per annum from April 19, 1999, the date that appellees filed their claim in the estate, together with any court costs in relation to the hearing on their claim.

Claims in probate are triable at law. *In re Estate of Voelker*, 252 N.W.2d 400, 402 (Iowa 1977). Consequently, we review for correction of errors of law. Iowa R. App. P. 4. We are bound by the trial court's findings of fact provided they are supported by substantial evidence. *In re Estate of Crabtree*, 550 N.W.2d 168, 170 (Iowa 1996); *Voelker*, 252 N.W.2d at 402.

The executor first claims that the district court's finding decedent agreed to repay the sums appellees advanced is not supported by substantial evidence.

The existence of an oral contract, as well as its terms and whether it was breached, are ordinarily questions for the trier of fact. *Audus v. Sabre Communications Corp.*, 554 N.W.2d 868, 871 (Iowa 1996); *Dallenbach v. Mapco Gas Prod., Inc.*, 459 N.W.2d 483, 486 (Iowa 1990). In order to find that an oral

contract existed, there must be sufficient evidence of its terms to ascertain the duties and conditions established. *Burke v. Hawkeye Nat'l Life Ins. Co.*, 474 N.W.2d 110, 113 (Iowa 1991). However, while courts cannot find a contract where none exists, they are reluctant to hold that a contract is too uncertain to be enforceable. *In re Estate of Ohrt*, 516 N.W.2d 896, 901 (Iowa 1994).

The executor contends that the agreement was that the decedent would make provisions for the appellees to be paid back in decedent's will and that the only agreement that appellees had with decedent was a contract to make a will. We disagree. The only reference to the record made by the executor to support this claim was the testimony where Marjorie was asked if she could tell the court generally the basis for the claim, and she responded, "Well, when mother died we found that she hadn't put anything in the will." Marjorie then indicated she and R. Richard had their cancelled checks and she gave them to the person then the executor. It could be inferred from this testimony appellees thought they might be repaid by a provision in decedent's will. However, this statement alone does not support a finding that appellees' agreement for repayment with decedent was limited only to a provision for repayment in her will.

The district court chose to believe the testimony of appellees. Their testimony as to the promise of repayment is sufficient evidence to support the district court's finding the money was not a gift but would be repaid. We affirm on this issue.

The executor next advances that Iowa Code section 614.1(4) bars the claim.[1] The district court refused to apply the five-year statute of limitations, reasoning the contract for support of decedent during her lifetime was not completed until she died and therefore the statute does not apply.

When there is a continuous, open, current account, the cause of action shall be deemed to have accrued on the date of the last item therein, as proved at trial. *Audus v. Sabre Communications Corp.*, 554 N.W.2d 868, 874 (Iowa 1996); *see also Patterson v. Patterson's Estate*, 189 N.W.2d 601, 605 (Iowa 1971); *Bankers Trust Co. v. Economy Coal Co.,* 224 Iowa 36, 40, 276 N.W. 16, 19 (1937); *Wertz v. Ryan*, 192 Iowa 517, 519-20, 184 N.W. 1032, 1033 (1921).

The last claimed advance was made on September 12, 1998. The claim in probate was filed on April 19, 1999. Less than a year passed between the last advance and the filing of the claim. Appellees' claim is not barred by Iowa Code section 614.5. We affirm on this issue.

The executor next contends the contract was barred by the statute of frauds because it was not performed within one year and it was not in writing. The district court reasoned it could be performed in one year because the time of decedent's death was not known. The appellees argue even if this is not the case the statute is not applicable because the contract was partially performed.

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[1] 614.1. Period

Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

. . . 4. Unwritten contracts--injuries to property--fraud--other actions. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years, . . . except as provided by subsection 8 and 10.

Full or partial performance of a contract by one party can take it out of the statute of frauds. *See Glass v. Minn. Protective Life Ins. Co.*, 314 N.W.2d 393, 395-96 (Iowa 1982). We affirm on this issue.

The executor contends that appellees should be estopped from performance. They reason waiting until decedent's death to make a claim prejudiced decedent's other heirs.

For the doctrine of equitable estoppel to apply, the estate must furnish proof that (1) appellees misrepresented or concealed material facts; (2) decedent lacked knowledge of the true facts; (3) appellees intended decedent to act on the basis of the misrepresentation; and (4) decedent detrimentally relied thereon. *See Benton v. Slater*, 605 N.W.2d 3, 5 (Iowa 2000); *Folkers v. Britt*, 457 N.W.2d 578, 580 (Iowa 1990).

There is no evidence that the appellees misrepresented or concealed facts. Nor is there evidence of detrimental reliance. By virtue of the money appellees advanced the decedent was able to have help in her home and keep from depleting her assets at the time she entered a nursing home. The executor contends that the agreement was unfair to the heirs of the estate. We note in addressing this claim that the money was advanced for needs of the decedent. The only interest asked for on the money was interest after the claim was filed following decedent's death. With these facts it is difficult to ascertain why the heirs would argue their inheritance was diminished by the agreement.

The executor contends that the Jones should not have been given interest from the date of the establishment of the claim and court costs. The district court awarded interest from April 19, 1999, the date the claim was filed.

Iowa Code § 535.3 (1999) provides in applicable part:

> 1. Interest shall be allowed on all money due on judgments and decrees of courts at a rate calculated according to section 668.13.[2]

The executor contends that the order allowing the claim in the estate is not a judgment or decree. A judgment is defined as "[e]very final adjudication of any of the rights of the parties in an action." Iowa R. Civ. P. 219; *Hughes v. Burlington Northern R. Co.*, 545 N.W.2d 318, 320 (Iowa 1996). The order allowing the claim was a final adjudication of the parties' rights. The award of interest is mandatory and should be awarded even when interest has not been requested. *Hughes*, 545 N.W.2d at 321; *In re Marriage of Baculis*, 430 N.W.2d 399, 401 (Iowa 1988). Iowa Code section 535.3 is obligatory on the district court. *Baculis*, 430 N.W.2d at 401; *Iowa State Commerce Comm'n v. Manilla Grain Terminal, Inc.*, 362 N.W.2d 562, 565 (Iowa 1985).

We affirm the award of interest but modify it to commence on March 20, 2000, the date of the filing of the order allowing the claim.

AFFIRMED AS MODIFIED.

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[2] 535.3 previously also included the language, "The interest shall accrue from the date of the commencement of the action, except as otherwise provided in subsection 3." This language was omitted in an amendment. Acts 1997 (77GA) Ch. 197