

AUG 25 1981

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF
THE ESTATE OF

RUDY F. KAINZ,

Deceased,

IOLA PETERSEN,

Objector-Appellant.

Filed August 25, 1981

1-122
2-65405

Appeal from Clayton District Court - Peter Van Metre, Judge.

Appellant appeals from the district court ruling that the notice she gave to the trial court and appellees, alleging that the settlement agreement was void pursuant to its own terms, did not serve to cancel the stipulation approved by the court. Appellant also appeals trial court's ruling which granted the special administrator's motion in limine. REVERSED IN PART AND DISMISSED IN PART.

Angela M. Ryan and Mark T. Hamer of Meardon, Sueppel, Downer & Hayes, Iowa City, and John D. Gnagy of Ehrhardt & Gnagy, Elkader, for objector-appellant.

Kathleen Neylan of Neylan Law Firm, Elkader, for appellee estate.

Michael J. Schuster of Schuster & Mick, Guttenberg, for appellee Robert Kainz.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Appellant Iola Petersen, an heir of decedent, appeals from the district court ruling that the notice she gave to the trial court and appellees, alleging that the settlement agreement was void pursuant to its own terms, did not serve to cancel the stipulation approved by the court. Appellant claims that the trial court erred by: (1) allegedly amending or modifying the stipulation of the parties without the consent of the parties; (2) entering an order containing the terms of the settlement agreement when the court had knowledge that all the parties no longer consented to the agreement; and (3) in failing to set aside the settlement agreement on the ground of mutual mistake. Appellant also claims that the trial court erred in granting the special administrator's motion in limine. Our review of this proceeding is de novo. Iowa R. App. P. 4. We reverse the trial court's ruling on the stipulation and dismiss appellant's appeal on the motion in limine as untimely.

I.

Rudy Kainz died intestate on May 16, 1979. Robert Kainz, the only son among decedent's ten children, was initially appointed administrator. Following several discussions and his eventual written offer to purchase the decedent's farm, a special administrator was appointed. Appellant Iola Petersen, one of decedent's children and an heir to a 2/27 interest in the estate, objected to the proposed sale alleging the price was too low and that the proposed sale failed to provide her with a permanent easement to certain real estate she and her husband owned adjacent to the Rudy Kainz farm. A pre-trial conference was held and on April 10, 1980 the trial court granted the appellee's motion in limine, which held that the court had no jurisdiction to hear the issue of an easement by necessity. On April 16, 1980, after three days of trial, the parties advised the trial court that a settlement had been reached. Appellant agreed to drop her objections to the sale of the real estate as proposed by the special administrator. In return, Robert Kainz agreed to grant a permanent easement, 30 feet in width, in favor of appellant, running in a westerly direction from the western boundary of appellant's farm. For \$7,000.00 consideration, Robert Kainz also granted appellant an option to purchase 25 acres and use of the existing roadway for seven years, during which time a new road was to be constructed. The stipulation further stated: "This agreement is conditioned upon the obtaining and recording of the new easement which Robert Kainz shall obtain. And in the event that the easement is not obtained and recorded before

May 1, 1980, this agreement shall be null and void." The trial court said it would embody the agreement in a court order.

Due to unforeseen complications, Robert Kainz failed to record the new easement by May 1, 1980. On May 6, 1980 appellant sent notice to the parties that the agreement was null and void under its own terms due to Robert's failure to record an easement by May 1, 1980. The easement was subsequently recorded on May 13, 1980. The trial court held a hearing on May 21, 1980 to determine the effect of appellant's notice and entered an order on May 27, 1980 declaring the settlement stipulation of April 16, 1980 to be binding on all the parties but giving no effect to the "null and void" clause of the stipulation.

II.

Appellant argues that the trial court erred by amending or modifying the stipulation without the consent of all parties and by entering an order which embodied certain terms of the stipulation when the court had knowledge that all parties no longer consented. We agree. This case is clearly controlled by Van Donselaar v. Van Donselaar, 249 Iowa 504, 508, 87 N.W.2d 311, 313 (1958), which held that in order for a court to enter a consent judgment there must be "an existing, unrepudiated agreement at the time the consent judgment was entered . . . [and] if one of the parties refused to be bound by it, to the knowledge of the court, then the court had no right to enter a consent judgment." A consent judgment is merely the agreement of the parties, made a matter of record by the court. It is not a reasoned, deliberate decision of the court and is a question of contract between the parties until judgment is entered. Id. at 509, 87 N.W.2d at 314. In B-W Acceptance Corporation v. Saluri, 258 Iowa 489, 496, 139 N.W.2d 399, 403 (1966) it was held that "... the court may not alter a contract for the benefit of one party and to the detriment of the other . . . or by the process of interpretation, relieve one of the parties from the terms to which he voluntarily consented. . . ." By refusing to give effect to the specific language of the stipulation which made the settlement agreement null and void if the easement was not recorded by May 1, 1980, the trial court altered the contract and did not give effect to the contract to which the parties actually agreed. The trial court further erred when it entered the order enforcing the stipulation when it had notice that the appellant no longer consented to the stipulation. Van Donselaar, 249 Iowa at 509, 87 N.W.2d at 314. The trial court's order is reversed and the case is remanded for further action consistent with this opinion.

III.

The appellant also alleged the stipulation should be set aside on the ground of mutual mistake. Since we have already decided to reverse the trial court's order on other grounds it is not necessary to address this issue.

IV.

The appellant further claims that the trial court erred in granting appellee's motion in limine on April 10, 1980. This order was final pursuant to section 633.36, The Code 1981. Thus we dismiss appellant's appeal as untimely because the notice of appeal was not filed until June 23, 1980 and additionally the notice was only directed at the trial court's order upholding the settlement stipulation, not at its ruling on the motion in limine.

We reverse the trial court's ruling on the stipulation and dismiss appellant's appeal on the motion in limine as untimely.

REVERSED IN PART AND DISMISSED IN PART.