IN THE COURT OF APPEALS OF IOWA

No. 1-583 / 91-970

618

IN THE MATTER OF THE ESTATE OF EDITH FAYE LINCOLN-DEN ADEL, Deceased.

M. LYNNE CARLSON and **WARREN L. LINCOLN,**
Co-Executors-Appellants,

LARRY J. HANDLEY,
Appellee.

FILED
APR 28 1992
CLERK SUPREME COURT

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

Co-executors appeal the probate referee's report awarding attorney's fees to two attorneys. We dismiss for lack of jurisdiction. **APPEAL DISMISSED.**

James R. Maggert of Maggert & Gray, Ankeny, for appellants.

Larry J. Handley of Handley & Block, Ankeny, for appellees.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

The co-executors of the estate of Edith Faye Lincoln-Den Adel appeal a decision of the probate referee awarding attorney's fees to both Larry Handley of the law firm of Handley & Berry and James Maggert, an individual formerly "of counsel" with Handley & Berry. We dismiss the appeal for lack of jurisdiction.

FACTS

Lynne Carlson and Warren Lincoln, co-executors of a decedent's estate, retained counsel to act for the estate. There is a dispute whether they retained the law firm of Handley & Berry, with which attorney James Maggert was associated, or whether they retained Maggert individually. At any rate, Maggert performed most of the legal services for the estate. The co-executors assert he was the only attorney who performed any legal services for the estate.

While the decedent's estate was still open, attorney Maggert terminated his association with the firm of Handley & Berry. A disagreement arose between Maggert and the firm over fees generated by clients for whom Maggert had worked.

As the decedent's estate was drawing to a close, co-executors Carlson and Lincoln filed a claim for fees to be paid to attorney Maggert individually. At the same time, Larry Handley of the firm of Handley & Berry filed an

"affidavit of compensation" which was treated by the probate referee as a claim for attorney's fees.

On May 20, 1991, the probate referee filed an order awarding attorney's fees to both Maggert and Handley. On the same date, the court entered its order approving the final report of the executors.

On June 21, 1991, the co-executors (represented by Maggert) filed an appeal with the Iowa Supreme Court from that part of the referee's order which awarded attorney's fees to Handley. The co-executors did not appeal or seek review by the district court.

The co-executors argue that Handley's "affidavit of compensation" was not a claim for fees and was not a sufficient document to authorize a fee award to Handley. The co-executors also argue that the fee award to Handley was an abuse of discretion because Handley had performed no services for the estate.

Appellee seeks to dismiss the co-executor's appeal claiming they failed to timely object to the referee's report pursuant to Iowa Rule of Civil Procedure 214.

JURISDICTION

We note at the inception that appellants did not file their notice of appeal until June 21, 1991. Rule 5 of the appellate rules provides, in part:

> (a) Except as provided by rule 20"b", rules of appellate procedure, appeals to the supreme court must be taken within, and not after, thirty days from the entry of the order, judgment or

> decree, unless a motion for new trial or judgment notwithstanding the verdict as provided in R.C.P. 247, or a motion as provided in R.C.P. 179"b", is filed, and then within thirty days after the entry of the ruling on such motion . . . .

We assume appellants are taking an appeal from the May 20, 1991, order of court that approved the final report of the executors. (The order carried a date of May 20, 1990.) Under rule 5, (if none of the exceptions apply and if an extension has not been granted) an appeal "must be taken within, and not after, thirty days from the entry of the order, judgment or decree . . . ." Here, more than thirty days elapsed from the date of the entry of the order affirming the final report to the date of the filing of the notice of appeal. Thus, we do not have jurisdiction to hear this appeal.

As the Supreme Court stated in Doland v. Boone County, 376 N.W.2d 870, 871 (Iowa 1985), "It is our duty to refuse, on our own motion, to entertain an appeal not authorized by rule." Id. A timely appeal is jurisdictional. Robco Transp. v. Ritter, 356 N.W.2d 497 (Iowa 1984). Jurisdiction cannot be conferred by consent, much less silence. Id.

We conclude we are without jurisdiction and accordingly dismiss this appeal without considering its merit.

We do make one additional observation. If the appellants intended to appeal separately the order entered by the referee fixing attorney fees, we are of the opinion

that In re Estate of Willis, 418 N.W.2d 857, 858 (Iowa 1988) governs and once again we would be without jurisdiction. That report of the referee is not a final decision from which an appeal can be taken. Id. at 860.

APPEAL DISMISSED.