

IN THE COURT OF APPEALS OF IOWA

No. 2-364 / 91-1982

FILED

SEP 29 1992

CLERK SUPREME COURT

IN THE MATTER OF THE ESTATE OF MAGDALENE C. ALLEMAN,
Deceased,

1

W. MILTON ALLEMAN,

Appellant.

Appeal from the Iowa District Court for Polk County,
Michael J. Streit, Judge.

Milton Alleman, son of Magdalene, appeals a district court order affirming the probate referee's determination that the successor executor correctly decided not to pursue a claim against Marion Reinertson, daughter of the deceased. **AFFIRMED.**

James A. Benzoni and Frank Murray Smith of Smith & Harms Law Offices, Des Moines, for appellant.

Robert R. Rydell, Des Moines, for appellee Robert R. Rydell, executor of the estate of Magdalene Alleman.

Ralph R. Brown of McDonald, Brown, Kimple & Fagen, Dallas Center, for appellee Marion Reinertson.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

PER CURIAM.

W. Milton Alleman, the son of decedent Magdalene C. Alleman and a beneficiary under her will, appeals an order approving the final report in decedent's estate. Milton contends the final report should not have been approved. Milton contends we should reverse the order approving the final report and remand to the district court to direct the executor to investigate an alleged claim against his sister, Marion, decedent's daughter and also a beneficiary under her will, and we should direct the executor to take action to enforce the alleged claim. We affirm.

Decedent died October 26, 1988. Her will that was admitted to probate is dated March 8, 1983. The will gives any interest the decedent had in one parcel of land to W. Milton and any interest the decedent had in a second parcel of land to Marion. The residue of the estate is then divided between W. Milton and Marion. The farm devised to W. Milton had been conveyed to him prior to decedent's death. The property devised to Marion was owned by decedent when she died. There was little other property in the decedent's estate.

After the estate was opened, W. Milton filed what he captioned a Claim in Probate. Milton sought to establish that Marion was indebted to the decedent. Milton filed further requests to have the executors seek to recover the money from Marion and to require the executors to investigate the alleged claim. There were two executors.

One executor was a child of Marion and the second executor was a child of W. Milton. The executors disagreed on whether Marion was indebted to decedent. The court appointed an executor who was not a family member to consider the claim. The executor investigated and determined no claim against Marion should be filed. A final report based on the executor's recommendation was filed and W. Milton objected to the report. The probate referee found the final report should be approved and the district court agreed.

W. Milton has appealed contending the executor failed to properly investigate the claim and proceed against Marion and he had established a right of retainer.

Our review is de novo. An appeal from a trial court ruling on an objection to an executor's report is de novo. See In re Estate of Wiese, 257 N.W.2d 1, 3 (Iowa 1977); In re Estate of Kruse, 250 N.W.2d 432, 433 (Iowa 1977); Iowa Code § 633.33.

An executor is generally expected to use the degree of prudence a person of ordinary judgment would be expected to use in handling his or her affairs under similar circumstances. See Wiese, 257 N.W.2d at 6. One of the duties of the executor is to investigate possible debts or claims that may be due the decedent or the estate and make provision to collect the debts it is prudent to do so. See Iowa Code § 633.366.

The sums Milton claims Marion owed her mother were allegedly incurred in the period of 1956 to 1981. Decedent died in 1988, some seven years after the last claimed amount. There are no notes, letters, ledger or other written evidence that Marion owed decedent money. The fact decedent gave Marion money does not support a finding a loan was made.

Every gratuitous inter vivos transfer is presumed to be an absolute gift and not an advancement. Iowa Code § 633.224 (1991). An inter vivos gift takes place by mutual consent of the giver, who divests himself or herself of the thing given in order to transmit title to the donee, and the donee accepts and acquires legal title to it. The gift takes place during the donor's lifetime, immediately and irrevocably. See Varvaris v. Varvaris, 255 Iowa 800, 803, 124 N.W.2d 163, 165 (1963).

W. Milton does not advance there is evidence to support the estate's claim against Marion. Rather, W. Milton advances that the executor was required to employ discovery and gather the evidence to pursue a claim against Marion. Because the balance of the estate was the farm which Marion was specifically given, the expenses of such if born by the estate would be paid from the farm given to Marion. In In re Estate of Roggentien, 445 N.W.2d 388 (Iowa App. 1989), we addressed the issue of an executor's or administrator's decision to legally obligate an estate to pay expenses and attorney fees to pursue a claim. For fees or expenses to

be paid by the estate in pursuing a matter it is generally necessary to show a benefit to the estate and a just cause for pursuing the matter. Roggentien, 445 N.W.2d at 390; see also In re Estate of Cory, 184 N.W.2d 693, 698-99 (Iowa 1971). There is inequity in allowing an executor to justify the depletion by an estate by attorneys fees to support the interests of heirs as against a claimant or claimants. Roggentien, 445 N.W.2d at 390.

The executor was correct in carefully investigating the claim and in assessing the nature of the proceedings and any course of action that need be taken. Our de novo review of the facts in this record causes us to agree that there is no reasonable basis to support a claim against Marion. There are no written documents to support the claim. The last alleged charge occurred seven years before decedent's death. Decedent executed her will two years after the last of the alleged charges and made no mention of any obligation of Marion.

W. Milton contends the right of retainer is an appropriate remedy. For the right of retainer to exist, the distributee must be indebted to the estate. See Iowa Code § 633.471 (1991). There being no basis to support a finding that Marion is indebted to the estate, there is no right of retainer. We affirm.

AFFIRMED.