FILED
JAN 23 1995
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-501 / 93-1722

IN THE MATTER OF THE ESTATE OF LOUIS GUETZKO, Deceased,

GREGORY GUETZKO, Claimant,

Appellant,

vs.

MARGRETTE E. GUETZKO, Fiduciary of the Estate of Louis F. Guetzko,

Appellee.

Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs, Judge.

Appeal from ruling denying claim against estate. **AFFIRMED.**

Gary L. Robinson and Lorraine K. Ingels of Klinger, Robinson, McCuskey & Ford, Cedar Rapids, for appellant.

Ronald W. Wendt of Nazette, Marner, Good, Wendt & Knoll, Cedar Rapids, for appellee.

Heard by Donielson, C.J., and Sackett and Cady, JJ.

DONIELSON, C.J.

At issue in this appeal is a claim against an estate in which the appellant claims he and the deceased had an oral contract relating to the disposition of the deceased's estate. The district court found the appellant had failed to carry his burden to establish by clear, satisfactory, and convincing proof the existence of an oral contract. We affirm.

Louis Guetzko died in February 1991, leaving his entire estate to his wife, Margrette, the appellee in this action. Louis's son from a previous marriage, Gregory, filed a claim against the estate. He alleged he and Louis had an oral contract by which Gregory had agreed to give up all his right, title, and interest in his mother's estate in exchange for his father's bequest to him of the assets he had acquired during his marriage to Gregory's mother.

Gregory's mother, Elgene, died in October 1985. Her estate left assets in trust with the trust income to go to Louis for life and the principal to go to Gregory after death. At one point a declination of inheritance had been drafted for Gregory, and the attorney for the estate had drafted, and Louis had executed, an election to take against Elgene's will. Had Louis opted to take his statutory interest against the will, Gregory would have received approximately $66,000 from his mother's estate.

On April 28, 1986, Gregory and Louis executed a "Family Settlement Agreement." This document indicates the assets

of Elgene's estate were insufficient for the practical establishment of a trust and no trust would be created. The agreement further provided all of Elgene's property would become Louis's property. Gregory claims his father agreed to leave him all of the assets acquired during his marriage to Elgene in consideration for his agreement to forgo his right to an inheritance from his mother's estate and his execution of the Family Settlement Agreement. It is the existence of this alleged oral agreement which constitutes the sole issue presented on appeal.

I. SCOPE OF REVIEW

Initially we must determine our scope of review in this action. Gregory claims our review is de novo, and Margrette claims it is on error. Margrette's argument is based on the fact Iowa Code section 633.33 provides actions for the establishment of contested claims are triable as law actions. Gregory claims our review is de novo because this matter was tried in equity and in the vast majority of the district court's evidentiary rulings it received disputed evidence subject to the parties' objections.

We treat a case on appeal in the same manner as it was tried in the district court. Halsey v. Coca-Cola Bottling Co., 410 N.W.2d 250, 252 (Iowa 1987). At trial the judge stated the action was in equity and neither party objected to this characterization of the case. The failure to object waives any error as to the nature of the action.

See Iowa Code § 611.12 (1993). As a result, our review is de novo, though we give weight to the fact findings and credibility determinations of the trial court. See Iowa R. App. P. 14(f)(7).

II. ORAL CONTRACT

Gregory bore the burden to establish the existence of the alleged oral contract by a preponderance of clear, satisfactory and convincing evidence. See, In re Estate of Shinn, 207 Iowa 103, 105, 222 N.W. 569, 570 (1928). The terms of the contract must be so certain and definite as to leave nothing to conjecture or to be supplied by the court. Id. Evidence in support of the alleged contract receives our closest scrutiny since the party against whom it is to be enforced is deceased and cannot provide any evidence as to the existence or terms of the contract. See id.

Numerous aspects of this case persuade us Gregory has not met his burden to establish the existence of a certain and definite oral contract. There is a lack of specific recollections by Gregory as to the exact terms of the alleged oral agreement or any negotiations which preceded it. Gregory's vague recollections are not indicative of a certain and definite contractual arrangement by which he agreed to forgo a $60,000 interest in his mother's estate in exchange for a share of his father's future estate.

Stephen Jackson, the attorney for Elgene's estate, testified he believed a contract had been made between Gregory and Louis prior to execution of the Family Settlement Agreement. However, no reference to the contract was included in the Family Settlement Agreement. As the trial court noted, it does not logically follow the Family Settlement Agreement would contain no reference to the contract if in fact they were made contemporaneously and Gregory's execution of the Family Settlement Agreement was consideration for the contract.

Also of concern is the absence of any reference to the purported contractual arrangement in the subsequent antenuptial agreement and will Attorney Jackson prepared for Louis. While some aspects of those documents indicate Louis intended to keep separate the property acquired in his first marriage, other provisions in the documents allow him to make unrestricted gifts, transfers, and bequests of his property to Margrette.

Louis had never told Margrette he was contractually bound to leave to leave the property he had acquired as of Elgene's death to his son. Louis's transfer of assets to his new wife and the disposition of his property in his final will were not consistent with the conduct of a person who had contractually agreed to give his son the property he had acquired in his prior marriage.

Under the circumstances of this case, we find any statements Louis may have made about leaving his estate to

his son were isolated instances of a father's ruminations about the future and were not an agreement to be contractually bound to leave his estate, or a portion thereof, to Gregory. We affirm the district court's ruling.

AFFIRMED.