FILED
FEB 26 1980
CLERK SUPREME COURT

232

IN THE COURT OF APPEALS OF IOWA

IN THE ESTATE OF WILLIAM MAREK,)
DECEASED,)
EVELYN ROLFS and VIOLA K. LYON,) Filed February 26, 1980
Objectors-Appellants,)
vs.)
EMMA MAREK and LORENCE MAREK,) 275
Executors-Appellees.) 2-62701

Appeal from Washington District Court - Ira Morrison, Judge.

Objectors appeal trial court's judgment approving final report submitted by co-executors alleging trial court erred in finding (1) co-executor life tenant had unlimited power to sell decedent's real property, (2) co-executor did not violate any fiduciary duty by purchasing property from the estate, and (3) objectors had acquiesced in the sales of the real estate by the co-executors. AFFIRMED.

Michael J. McCarthy of McCarthy & Hart, Davenport, for objectors-appellants.

John E. Baldrige of Baldrige, Baldrige & Boyd, Washington, for executors-appellees.

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

PER CURIAM

Objectors, Evelyn L. Rolfs and Viola K. Lyon, appeal trial court's judgment approving final report submitted by co-executors, Emma Marek and Lorence Marek, for the estate of William F. Marek. Objectors charge trial court erred in finding (1) co-executor life tenant, Emma Marek, had unlimited power to sell decedent's real property, (2) co-executor, Lorence Marek, did not violate any fiduciary duty by purchasing property from the estate, and (3) objectors had acquiesced in the sales of the real estate by the co-executors and had thereby ratified the sales. We affirm.

William F. Marek died testate on September 6, 1955, leaving a wife, Emma Marek, a son, Lorence Marek, and two daughters, Evelyn L. Rolfs and Viola K. Lyon. At his death, William Marek owned a fee simple interest in two parcels of real estate, one commonly known as the "east eighty," the other as the "north forty." He also owned an undivided one-half interest in a third parcel of real estate, commonly known as the "home eighty." Emma Marek owned the other undivided one-half interest in the "home eighty."

Decedent's will, executed October 20, 1953, was admitted to probate September 21, 1955. In it, he nominated his wife, Emma Marek, and his son, Lorence W. Marek, as co-executors. Decedent also made the following bequests:

ITEM I.

> I devise and bequeath to my wife, Emma Marek, if she survives me a one-half of my estate and the use and income for her lifetime of the remaining one-half of my estate. It is further my will that my wife shall have the right to use such part of the principal of my estate not specifically devised to her herein as may be necessary for her maintenance and support.

ITEM II.

> I further grant to my wife the power to sell any of my personal property and any of my personal property [sic] and any of my real estate except the home eighty acres which we have in our names jointly and in making such sale she shall have full power to do so without any appraisment, order of court or approval of court.

ITEM III.

> Subject to the foregoing bequests in favor of my wife, I devise and bequeath the entire residue and remainder of my estate in equal share to my three children: Lorence W., Evelyn L. and Viola K.

The executors prepared and filed preliminary and final inheritance tax returns, federal estate tax returns, state and federal income tax returns, and paid all known

taxes and claims against the estate. They also filed an interlocutory final report in 1956. The court consequently directed the estate be omitted from the docket during Emma Marek's life tenancy.

During the summer of 1966, Emma Marek decided, under the power given her in decedent's will, she could sell the "east eighty" parcel of land. Lorence W. Marek purchased the land at $375 per acre for a total contract price of $30,000. The contract provided Lorence would pay $6,000 on or before March 1, 1967, and the balance in annual installments of $2,400 for ten years thereafter with five and one-half percent interest payable annually on all unpaid balances. By selling the land, Emma Marek hoped to make substantial distribution to her children of their respective shares in the estate which was subject to her use for life. She consequently informed Viola K. Lyon of the proposed sale and price in the fall of 1966. Evelyn L. Rolfs learned of the sale in March, 1967. Neither objected to the sale and each accepted $2,000 from Emma Marek upon Lorence's making the down payment.

In early February 1976, Evelyn Rolfs urged her mother to consider estate planning methods which would decrease the tax liabilities and allow for annual distributions. Taking this advice, Emma Marek, in May 1976, offered to sell her grandson, Larry Marek, the "north forty" acres for $700 per acre for a total purchase price of $28,000. Viola K. Lyon indicated by letter to her mother this was a good price and, since no one objected, the land was sold to Larry Marek, Inc. Upon receipt of the purchase price, Emma Marek immediately gave each of her three children $8,000.

After receipt of the money, however, Evelyn Rolfs and Viola Lyon refused to sign the deed of the "north forty" to Larry Marek, Inc. When the final installment on the "east eighty" was made by Lorence Marek in June, 1976, they also refused to sign the deed granting title to him.

On June 13, 1977, the co-executors of William Marek's estate, Emma and Lorence Marek, submitted their final report indicating sales of the two parcels of land, the distribution of proceeds from the sales, accounting for the balance of funds remaining in the estate turned over to decedent's widow, Emma Marek, and requesting court approval. Evelyn Rolfs and Viola Lyon objected alleging (1) Emma Marek did not have the absolute right to sell any real estate not specifically devised to her, (2) they at no time knew they had an interest as remaindermen in the real estate, (3) Lorence Marek

breached his fiduciary duties as an executor, (4) sale of the real estate was not necessary for the support or maintenance of Emma Marek, and (5) the sale prices did not represent a fair market value for the real estate. They therefore requested the sales be set aside, the executors be surcharged for their lack of prudence in administering the estate, and the executors be made to account for any distributions made as a result of the sale of estate property.

Following a hearing on September 21, 1978, trial court found: the will granted Emma Marek the unlimited power to dispose of all assets of the estate, except the "home eighty" acres; Evelyn Rolfs and Viola Lyon knew of their interest in the realty shortly after their father's death; Lorence Marek did not breach any fiduciary duty nor engage in self-dealing; proceeds from the sales of the realty were properly distributed among the remaindermen; the tracts of land were sold for fair market value; the objectors' acquiesced to the sales; and the deeds conveyed to Lorence and Larry K. Marek, Inc. the entire fee simple title to the respective tracts of land. Trial court ordered certificates of transfer be issued by the estate of William F. Marek for the property and decreed neither Evelyn L. Rolfs nor Viola K. Lyon had any rights or claims against Emma Marek, Lorence Marek, the estate of William F. Marek, or any rights to proceeds from the sale of land sold by Emma Marek under the powers of the will. Objectors appeal from trial court's judgment.

I. Power to Sell Realty. Objectors contend trial court erred in finding the will granted Emma Marek an unlimited power of sale. They argue, on the contrary, the will only provided Emma Marek authority to sell the property not specifically devised to her in the event it was needed for her support or maintenance. Objectors therefore allege trial court erred in upholding the sales since there was no showing the sales were needed for Emma Marek's support or maintenance.

The will giving the residue of testator's estate to Emma Marek for life, with full power to sell the same, (or as much thereof, as might be needed for her support and maintenance) with remainder after her death to revert to the children, clearly created a life estate in Emma Marek. Hamilton v. Hamilton, 140 Iowa 282, 283, 115 N.W. 1012, 1013 (1908). In many such cases, the life tenant's power to dispose of assets not specifically devised has been limited to sales to provide for his or her own "care and support." See e.g., Tiemann v. Kampmeier, 252 Iowa 587, 592, 107 N.W.2d 689, 692 (1961); Watkins v.

Dean, 243 Iowa 599, 604, 52 N.W.2d 498, 500 (1952); Brown v. Brown, 213 Iowa 998, 1001, 240 N.W. 910, 912 (1932); Hamilton, 140 Iowa at 285, 115 N.W. at 1013. These cases have been distinguished, however, where the will granted the surviving spouse an absolute power of sale, see Voltz v. Kaemmerle, 211 Iowa 995, 997-98, 234 N.W. 805, 806 (1931), In re Cooksey's Estate, 203 Iowa 754, 762, 208 N.W. 337, 340 (1926), or where the surviving spouse disposed of the property in good faith. See McCarthy v. McCarthy, 168 N.W.2d 308, 312 (Iowa 1970); In re Worman's Estate, 231 Iowa 1351, 1353, 4 N.W.2d 373, 374 (1942). We conclude, as did trial court, William Marek's will, by its clear language, gave Emma Marek the power of alienation without regard to her needs for support or maintenance.

II. Acquiescence to the Sale. Objectors also contend trial court erred in finding they acquiesced to the sales of the real estate by the executors. We cannot agree. The defense of acquiescence, a form of equitable estoppel, is applied where a person knows or ought to know he or she is entitled to enforce a right or to impeach a transaction, and neglects to do so for such a length of time as would imply he or she intended to waive or abandon the right. Davidson v. Van Lengen, 266 N.W.2d 436, 438 (Iowa 1978); Anthony v. Anthony, 204 N.W.2d 829, 834 (Iowa 1973); Humboldt Livestock Auction, Inc. v. B & H Cattle Co., 261 Iowa 419, 432, 155 N.W.2d 478, 487 (1967). The doctrine is designed to prevent fraud and injustice. DeWall v. Prentice, 244 N.W.2d 428, 431 (Iowa 1974). It is based on the premise one who has made certain representations should not at a later date be allowed to change that position and prejudice another who has relied thereon. Colthurst v. Colthurst, 265 N.W.2d 590, 598 (Iowa 1978); In re McAllister's Estate, 214 N.W.2d 142, 146 (Iowa 1974). The burden of proving estoppel is on the party asserting the defense; all essential elements must be shown by clear, convincing and satisfactory proof.[1] Dierking v. Bellas Hess Superstore, Inc., 258 N.W.2d 312, 315 (Iowa 1977). The essential elements are: (1) a false representation of material facts; (2) a lack of knowledge of true facts on the part of the actor; and (3) intention by the one making the representation that it be acted upon. Merrifield v. Troutner, 269 N.W.2d 136, 137 (Iowa 1978).

---

[1] Other cases have required all elements be shown by strict proof. See Colthurst, 265 N.W.2d at 598; Pillsbury Co. v. Ward, 250 N.W.2d 35, 39 (Iowa 1977). We, however, are unable to distinguish application of this language from the standard of clear, convincing and satisfactory.

Applying these standards to the facts of this case, we find executors met their burden of proof. The record discloses both objectors were aware of the provisions of their father's will within a year after his death and knew, or should have known, of their interest in his estate. When their mother proposed the sale of the "east eighty" to Lorence in 1976, they were both informed of the selling price and the terms of the sale. One of the objectors, in fact, was concerned Lorence was paying too much for the land. Both accepted $2,000 from Emma Marek upon her receipt of the downpayment. On urging of one of the objectors to distribute as much of the estate as possible to avoid inheritance taxes, Emma Marek decided to sell the "north forty" to her grandson in May 1976. The objectors knew of this proposed sale also. One of them indicated the $700 per acre selling price was fair and each objector accepted $8,000 as her share of the proceeds.

By these actions, objectors represented to Emma Marek she had the power to dispose of the property or, in the alternative, they agreed with her decisions. Objectors clearly intended their representations be acted on by Emma Marek. They cannot now change their positions to the prejudice of one who reasonably relied thereon.

III. Fiduciary Responsibility. Objectors finally claim trial court erred in finding Lorence Marek did not violate any fiduciary duty by purchasing property from the estate. Where, as here, objectors had prior knowledge of this sale, were afforded an opportunity to object, voiced no objection, there was no loss occasioned to the estate, and no indication of prejudice resulting to objectors from any claimed self-dealing, we cannot hold Lorence Marek violated any fiduciary duty by purchasing land from the estate. In re Estate of Klein, 229 N.W.2d 753, 755 (Iowa 1975).

Judgment of trial court is affirmed.

AFFIRMED.