FILED
MAY 25 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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IN THE MATTER OF THE ESTATE OF AGNES M. PIRKEY, DECEASED,	)	Filed May 25, 1982
DOUGLAS C. SCHROEDER, MARK A. SCHROEDER, SCOTT M. SCHROEDER, TAMARA L. SCHROEDER, DAN M. SCHROEDER, DAVID B. SCHROEDER, CARROLL L. WHITMER, HAROLD WHITMER, SHARON TIEMEIER, ESTHER NORTON, LOUISA K. DUNCAN, CARLEEN WIECK, VELMA SCHROEDER, PHYLLIS J. DICKERSON, PEARL CRISPIN and MILDRED FIGGE,	)	
Plaintiffs-Appellants,	)	
vs.	)	
AGNES M. PIRKEY ESTATE, ROBERT C. SCHROEDER, Executor of the Estate of Agnes M. Pirkey, Deceased, and ROBERT C. SCHROEDER, Individually, WALLACE H. SCHROEDER, BERTHA SINGER WILSON and WANDA L. PRICE,	)	2-98 2-66719
Defendants-Appellees,	)	
ROLLAND C. BOCKWOLDT and GLORIA V. BOCKWOLDT,	)	
Intervenors-Appellees.	)	

Appeal from Muscatine District Court, R. K. Stohr, Judge.

Plaintiffs appeal from trial court ruling, which denied their request to set aside the court's order approving the sale of real property to intervenors. Plaintiffs contend the trial court erred by (a) failing to direct the defendant-executor to comply with sections 633.388 and 633.389, The Code 1979, regarding

the sale of real property (b) denying plaintiff's motion to enlarge or amend the court's findings and conclusions, and (c) failing to specifically rule on the issue of whether all interested parties were duly notified of the hearing held for the sale of the real property, as required by section 633.389, The Code 1979.

William B. Norton and Donald Clark of Norton and Freese, Lowden, for plaintiffs-appellants.

David L. Schieszinski, Wilton, for defendants-appellees.

Mark R. Gillett of Allbee, Gillett, Nelson, Conway & Allison, Wilton, for intervenors-appellees.

Heard en banc.

PER CURIAM

Plaintiffs appeal from trial court ruling, which denied their request to set aside the court's order approving the sale of real property to intervenors. Plaintiffs contend the trial court erred by (a) failing to direct the defendant-executor to comply with sections 633.388 and 633.389, The Code 1979, regarding the sale of real property; (b) denying plaintiff's motion to enlarge or amend the court's findings and conclusions, and (c) failing to specifically rule on the issue of whether all interested parties were duly notified of the hearing held for the sale of the real property, as required by section 633.389, The Code 1979.

On January 8, 1963, Agnes M. Pirkey and William H. Pirkey executed a joint will which was found to be contractual in probate proceedings involving William's estate. In one clause of that will, Agnes directed the executor to sell her real estate "under order of the probate court."

After William's death, Agnes executed another will providing that "my executor shall in his discretion, but not later than 3 years after my death, sell and convert all of the real estate... to cash for the purposes of distribution." The second will did not provide that the executor sell her real estate under order of the probate court.

On July 18, 1980, Agnes died owning farm property. Her second will was admitted into probate and defendant, Robert C. Schroeder, was appointed as executor. On September 19, 1980, the executor signed an offer to sell the tract for $255,000 to Rolland and Gloria Bockwoldt. The transaction was entered without prior order of the probate court.

On January 23, 1981, the plaintiffs, beneficiaries under the first will, filed a petition for declaratory judgment, requesting the court to set aside the sale of the

real estate on the ground the contract was not entered into pursuant to the 1963 contractual will. On February 11, 1981, the executor and the other defendants filed an answer alleging that the contract to sell was entered into pursuant to the executor's authority under the second will. The defendants requested the court to dismiss plaintiffs' petition and, after notice and hearing, to approve the sale.

The court entered an order setting a hearing on the application to approve the sale. On February 20, 1981, the plaintiffs filed an application for review of the order setting a hearing, alleging that the matter was not properly before the court. No ruling was entered on plaintiffs' application.

On February 20, 1981, the Bockwoldts filed a petition of intervention.

On February 23, 1981, a hearing was held. On March 4, 1981, the trial court filed its findings of fact and ruling. The court concluded the appointment of the executor was at the most voidable; there was no fraud in this case; the plaintiffs had not diligently prosecuted the fraud portion of their case; the intervenors had acted in good faith; and there was no competent evidence that the sale price was unfair. The court approved the sale of the real estate.

On March 13, 1981, the plaintiffs filed a motion for new trial and a motion to enlarge or amend the findings and conclusions. In the motion to enlarge, the plaintiffs requested the court to find whether the first will was contractual; whether the statutory sale provisions of sections 663.388 and 633.389 were required to be followed and whether they were followed; whether the application for approval of sale was properly before the court; whether all interested parties were notified of the hearing; whether the executor was acting under the first will or the second one; and whether the executor was duly appointed under the first will.

Plaintiffs base their right to recover on the provisions of the 1963 will, contended to be contractual in nature, which provided the assets of the estate were to be sold "under order of probate court." There was no similar provision in

the second will, executed by Agnes in 1967. The premise of plaintiffs' argument is the statutory sale procedures have to be followed in all cases unless section 633.383, The Code 1979, is applicable. Section 633.383, The Code 1979, provides an exception to the statutory sale procedures when the personal representative is authorized in the will to sell estate assets. Plaintiffs contend since the first will vested the power to sell the estate property exclusively with the probate court, section 633.383, The Code 1979, does not apply. Consequently, they argue, defendant's sale of the property was in violation of the statutory sale procedures and must be set aside.

Even assuming the 1963 will was contractual, that will did not prohibit an execution of a subsequent will. In re Estate of Chapman, 239 N.W.2d 869, 872-73 (Iowa 1976). Until death, a will may always be revoked. Id. The testator always has the power, but not necessarily the right, to revoke a will. In other words, the testator may revoke the prior will but may not escape any contractual obligations established under the prior will. Id. Plaintiffs' remedy lies in an action for damages for breach of contract or suit for specific performance. Id.; see also In re Farley's Estate, 237 Iowa 1069, 1077, 24 N.W.2d 453, 458 (Iowa 1946).

The second will was properly probated. Id. That will permitted the executor to dispose of the property without restriction. By virtue of section 633.383, The Code 1979, the sale procedures are not mandatory since the executor was empowered to dispose of the estate assets. We hold plaintiff's argument, that the sale be set aside because it did not comport with the prescribed sale procedure of sections 633.388 and 633.389, The Code 1979, is without merit.

Since we have concluded the statutory procedure for the sale of estate assets is not applicable, plaintiffs' contention that the court failed to rule on the issue of notice to all interested persons under section 633.389, The Code 1979, is of no consequence. The notice provisions of section 633.389, The Code 1979, are

not applicable to the facts of this case. Furthermore, we note plainiffs were notified of, and participated in, the hearing for court approval of the sale. They were not prejudiced by the court's failure to require defendant's to prove notice had been provided to all interested persons. Error cannot be predicated on an erroneous ruling prejudicial to others but not prejudicial to appellant. See Hagenson v. United Telephone Company of Iowa, 209 N.W.2d 76, 81 (Iowa 1973); In re Pierce's Estate, 245 Iowa 22, 32, 60 N.W.2d 894, 901 (Iowa 1953); Ross v. Hayne, 3 Greene 211, 214 (Iowa 1851).

Plaintiffs also contend the court erred by denying their motion to enlarge or amend its findings and conclusions under Iowa R. Civ. P. 179(b). As stated in Recker v. Gustafson, 271 N.W.2d 738, 739 (Iowa 1978), in reference to a motion under Iowa R. Civ. P. 179(b);

> In Iowa a ruling on a motion to reconsider or set aside a previous order is not appealable. Erro, if any, is upon the previous ruling. But the rule does not apply where, as here, timely application under rule 179(b) is filed on a material matter. When a rule 179(b) application is pending prior to the taking of an appeal, the decree to which it is addressed becomes in effect interlocutory until the trial court rules upon the application. Defendants here were without authority to file their notice of appeal because there was no final order to appeal from.
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> We should point out that a dismissal is required only when an appeal is attempted by the nonmoving party. We deem application for post-trial relief, such as applications under rule 179(b), to be waived and abandoned when the moving party files a notice of appeal.

(emphasis added, footnotes and citations omitted.) We interpret Recker to hold a party's motion for enlargement is subsumed by the filing of a notice of appeal. Once a ruling is made on the motion to enlarge, and appeal effected, the order appealed is the original order rather than the denial of the party's motion for enlargement.

The question then becomes whether the court's findings are sufficient to support its conclusions. Giving plaintiffs' the benefit of doubt by construing their

appeal on this issue as questioning the sufficiency of the findings to sustain the trial court's order, we conclude the findings were sufficient. There is no reversible error on this issue.

Additionally, we find the trial court did not abuse its discretion in denying plaintiffs' request for a new trial. See Thomas Truck & Caster Co. v. Buffalo Caster & Wheel Corp., 210 N.W.2d 532, 536 (Iowa 1973).

AFFIRMED.