

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RAY DIEDRICH and
EMMA DIEDRICH,

Claimants-Appellees,

vs.

J. E. GOODENOW, Executor of the
Estate of Paul Milder, Deceased,

Defendant-Appellant.

Filed September 20, 1979

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2-62640

Appeal from Jackson District Court - Lowell D. Phelps, Judge.

Defendant-executor appeals from allowance of claim in probate for services
furnished to decedent by claimants. Reversed and remanded.

James J. Machowski, of Goodenow & Wright, Maquoketa, for appellant.

Corliss C. Baty, of Baty & Keeley, Maquoketa, for appellee.

Submitted to Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Defendant-executor, J. E. Goodenow, appeals from trial court's allowance of a claim in probate for room, board, and services furnished to decedent by claimants, Ray and Emma Diedrich. On appeal, defendant asserts claimant Emma Diedrich should not have been allowed to testify in support of her claim against decedent because of section 622.4, The Code 1977, commonly referred to as the "dead man statute." We reverse and remand for a proceeding in accordance with our decision.

On appeal from an action at law tried to the court as a matter in probate, section 633.33, The Code 1977, review in this court is only on errors assigned, not *de novo*. Under this limited review, the fact-findings of the trial court have the effect of a special verdict and are equivalent to a jury verdict. If supported by substantial evidence and justified as a matter of law, they are binding on us and the judgment will not be disturbed on appeal. We are, however, not precluded from inquiry into whether the trial court erred in ruling on evidence materially affecting its decision. Keith v. Community School Dist. of Wilton, 262 N.W.2d 249, 255 (Iowa 1978); Solbrack v. Fosselman, 204 N.W.2d 891, 893 (Iowa 1973); Patterson v. Estate of Patterson, 189 N.W.2d 601, 602 (Iowa 1971); Iowa R. App. P. 14(f)(1).

I. The issue facing us is whether the trial court erred in allowing Emma Diedrich to testify concerning services she furnished decedent over defendant's objection under section 622.4, The Code 1977. This section provides in relevant part that "[n]o party to any transaction or proceeding . . . shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased . . . against the executor . . . of such deceased person" Section 622.4, The Code 1977. After an examination of the record, we conclude that much of the testimony of Emma Diedrich was incompetent under section 622.4 and should not have been admitted.

The basis for relief of claimant's action was a claim for services furnished decedent. It is well settled that a claimant seeking to recover against an executor for work or services performed for the decedent is an incompetent witness to testify to the service performed or to any fact that tends to establish an express or implied contract between the claimant and the deceased. In re Estate of Fili, 241 Iowa 61, 67, 40 N.W.2d

286, 288-89 (1949); Maasdam v. Estate of Maasdam, 237 Iowa 877, 893, 24 N.W.2d 316, 321 (1946); In re Estate of Docius, 215 Iowa 1193, 1194, 247 N.W. 796, 797 (1933); In re Estate of Kahl, 210 Iowa 903, 911, 232 N.W. 133, 136 (1930); Hayes v. Snader, 182 Iowa 443, 446, 165 N.W. 1041, 1043 (1918); Sheldon v. Thornburg, 153 Iowa 622, 626, 133 N.W. 1076, 1077-78 (1912). The testimony of Mrs. Diedrich that decedent told the claimants he would take care of them is incompetent as a communication in violation of section 622.4. The testimony of Mrs. Diedrich concerning their understanding with decedent is also incompetent as a transaction with the decedent. Johnson v. Foshacht, 245 Iowa 1251, 1253, 65 N.W.2d 446, 447 (1954). Cf. Allison v. Horn, 249 Iowa 1351, 1355, 92 N.W.2d 645, 647-48 (1958) (construes "understanding" as meaning mutual agreement). Claimants' reliance on In re Estate of Allen, 251 Iowa 177, 100 N.W.2d 10 (1960) for support of their argument is misplaced. The holding of Allen permits a claimant to testify to his or her understanding of a marital relationship with the decedent, not to any contractual arrangement. *Id.* at 179-180, 100 N.W.2d at 11. See In re Estate of Wittich, 164 Iowa 485, 489, 145 N.W. 913, 915 (1914); In re Estate of Boyington, 157 Iowa 467, 475, 137 N.W. 949, 952 (1912).

Section 622.4 does not render an interested witness incompetent to testify to observations and facts independent of a personal transaction with the deceased from which an inference of preceding personal transactions may be drawn. Patterson v. Estate of Patterson, 189 N.W.2d 601, 604 (Iowa 1971); In re Estate of Fili, 241 Iowa 61, 68, 40 N.W.2d 286, 288-89 (1949); O'Dell v. O'Dell, 238 Iowa 434, 436, 26 N.W.2d 401, 407-08 (1947); Graham v. McKinney, 147 Iowa 164, 167, 125 N.W. 840, 840-41 (1910). A witness, however, may not be allowed to testify or do by indirection that which the law says may not be done directly. In re Estate of Kahl, 210 N.W.2d 903, 912, 232 N.W. 133, 136 (1930). Where the question leaves nothing to inference, the elicited testimony is incompetent. Hart v. Hart, 181 Iowa 527, 531, 164 N.W. 849, 850 (1917). It could be directly inferred from the questions and answers of Mrs. Diedrich concerning the services furnished the decedent there existed an implied or express agreement between them to compensate the claimants for their efforts. This being the issue in dispute, the testimony was incompetent and improperly admitted. In re Estate of Kerndt, 251 Iowa 963, 967-68, 103 N.W.2d 733, 735-36 (1960) (witness permitted to testify to duration of stay, but not to

services performed); Graham v. McKinney, 147 Iowa 164, 166-67, 125 N.W. 840, 840-41 (1910) (witness permitted to testify that decedent roomed at her home, but not to amount of board or care required); Wise v. Outtrim, 139 Iowa 192, 203, 117 N.W. 264, 268 (1908) (witness permitted to testify only to kind and amount of work required in caring for decedent's household and wife).

II. Claimants contend there is substantial, uncontroverted evidence in the record, even if Mrs. Diedrich's testimony is found to be incompetent and improperly admitted, to support the trial court's findings and judgment. In an action at law tried to the court where evidence was admitted over objection, it will be presumed on appeal the court considered such evidence. Solbrack v. Fosselman, 204 N.W.2d 891, 895 (Iowa 1973) (quoting In re Estate of Fili, 241 Iowa 61, 68, 40 N.W.2d 286, 290 (1949)). If the evidence is incompetent and the evidence as a whole is conflicting, the judgment will be reversed. In re Conner's Estate, 240 Iowa 479, 492, 36 N.W.2d 833, 841 (1949). After excising the incompetent testimony of Mrs. Diedrich, our examination of the record fails to uncover substantial, uncontroverted evidence supporting the trial court's findings and judgment; the presumption of prejudice created by the admission of the incompetent testimony is not overcome. In re Estate of Kerndt, 251 Iowa 963, 966, 103 N.W.2d 733, 735-36 (1960); Roth v. Headlee, 238 Iowa 1340, 1348, 29 N.W.2d 923, 924-25 (1948); In re Estate of Kahl, 210 Iowa 903, 912, 232 N.W. 133, 136-37 (1930). See Estate of Martin, 261 Iowa 630, 640, 155 N.W.2d 401, 406-07 (1968). In a case of this nature, we must require facts establishing the alleged implied contract with a person since deceased be well established with nothing left to mere conjecture. Bartholomew v. Adams, 143 Iowa 354, 358, 121 N.W. 1026, 1027 (1909). We remand this action to the trial court for a new trial in accordance with this decision.

REVERSED AND REMANDED.