FILED
AUG 30 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-129 / 89-489

IN THE MATTER OF THE ESTATE OF DUWARD D. STAPLES, DECEASED

BREED, ABBOT & MORGAN,

Appellant.

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Appeal from the Iowa District Court for Polk County, Rodney J. Ryan, Judge.

Breed, Abbot & Morgan, a New York law firm, appeal from a district court ruling dismissing its amended petition to remove Gary Staples as the estate's executor and to invalidate certain loans between the estate and Diane Roupe. **AFFIRMED.**

James S. Blackburn of Carney, Hudson, Williams, Blackburn & Grask, Des Moines, for appellant.

Dennis D. Jerde and Michael G. Kulik of Davis, Hockenberg, Wine, Brown, Koehn & Shors, Des Moines, for appellee estate.

Ronald L. Sutphin and Steven K. Gaer of Ahlers, Cooney, Dorweiller, Haynie, Smith & Allbee, Des Moines, for appellee West Des Moines State Bank.

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

OXBERGER, C.J.

Duward Staples died testate in November 1981. Staples' will provided one-third of his estate would go to his wife, Margaret, one-third to his son, Gary, and one-third in trust for his daughter, Diane Roupe. Gary Staples, a member of the board of directors of West Des Moines State Bank, was designated executor and eventual trustee of the Diane Roupe trust.

Shortly prior to her father's death, Diane became interested in establishing a quality restaurant in New York City. Diane sought financing from various sources, including the estate, West Bank, and Gary Staples and his wife in their individual capacities. Gary Staples obtained additional loans from Valley National Bank.

Although the loans from the estate to Diane were evidenced by promissory notes, the executor did not seek court approval for the loans. All the beneficiaries of the estate, however, consented to these transactions. In fact, it appears Diane's mother, Margaret, and brother, Gary, the executor, backed her restaurant venture.

Gary Staples, in his individual capacity, made loans of large amounts of his own money to Diane for her restaurant project. He also made direct loans to her from estate funds. Later, Gary would make loans to the estate. The estate would then make similar loans to Diane. Additionally, Gary personally guaranteed loans from certain

banks to the estate. Similar amounts would then be loaned to Diane from the estate. Diane kept accounts of all monies loaned.

The trust for Diane was never established. The loans from the estate apparently were viewed as an advance on the trust account.

Diane investigated setting up the restaurant quite meticulously, employed an accounting firm, and obtained a line of credit from West Des Moines State Bank. She borrowed over $600,000 by January 1983. Additional money was borrowed from Valley National Bank, both by the estate and by Gary Staples personally. Much of this money was then used to finance the restaurant project.

The New York City law firm of Breed, Abbot & Morgan (Breed) provided legal services to Diane. At least $58,000 was paid to Breed for services rendered. Thereafter, the law firm obtained promissory notes from Diane for its fees, secured by an assignment of Diane's interest in the estate. The law firm filed notice of these notes, totaling about $104,088.78, in the Staples' probate proceedings on August 12 and 15, 1985.

The restaurant never opened and Diane filed bankruptcy in 1987, listing the law firm as creditor.

The Valley National Bank has excused the loans of the estate as well as the estate debts upon which Gary Staples gave his personal guarantee in exchange for Gary signing

over personal investment property to Valley National Bank. Gary is apparently seeking to have the estate repay him for the estate loans forgiven by Valley National.

In early 1987 Breed filed its petition seeking removal of Gary as executor. In March 1987 the law firm amended its petition seeking a determination that the estate loans to and from Diane were not valid.

At the time of trial, Diane was indebted to the estate in an amount well in excess of her possible one-third distribution.

Following trial, the district court dismissed the law firm's petition. Despite the court's reservations about the actions of the executor, the court did not remove him. The court also did not invalidate the estate loans. Breed has filed this appeal.

As this action was tried by the probate court sitting in equity, our review is de novo. Iowa Code § 633.33; Iowa R. App. P. 4; see e.g., In re Estate of Johnson, 387 N.W.2d 329, 332 (Iowa 1986). Although we give deference to the trial court's findings of fact, we are not bound by them. Iowa R. App. P. 14(f)(7).

The testator in this case, Duward D. Staples, left his estate one-third each to his wife Margaret, his son Gary, and in trust to his daughter Diane. The terms of the trust were specific:

> I will, devise and bequeath one-third (1/3) of the remainder of my estate to my son, Gary S. Staples, but NEVERTHELESS IN TRUST for my

daughter, DIANE S. ROUPE, for the period and subject to the limitations and conditions next hereinafter set out, to wit:
(a) the trust period shall be for a period until my said daughter, Diane S. Roupe, reaches the age of fifty-five (55); and upon my daughter, Diane S. Roupe reaching said age of fifty-five (55), the trust shall terminate and end, and the corpus of the trust estate shall thereupon be delivered to my daughter, DIANE S. ROUPE.
(b) My said trustee shall have and is hereby clothed with authority to manage, handle and control the trust property and estate, and he is hereby clothed with full power to sell and convey, invest and reinvest as in his discretion he may deem wise. Any purchaser from the trustee is relived [sic] and exonerated from any duty to see to the application of the purchase price by the trustee received from any sale of trust property.
(c) For and during the trust period the entire income from the trust estate shall be paid to, and received by, my beloved daughter, Diane S. Roupe; and if, for her reasonable care, maintenance and support, the income therefrom is inadequate, reasonable sums from time to time may be taken from the principal of the trust estate and used by her for that purpose.
(d) The Trustee [sic] hereunder is authorized and empowered to perform all and singular duties hereunder according to his own sound discretion, without application to, or consent order from, the court.
(e) The trustee is hereby relieved and exonerated from giving an official bond as trustee.

The only interest Diane had in her father's estate was through the trust. In this case the trust was never set up. The loans were made to her directly out of estate assets. The only interest Diane could assign was her interest in the nonexistent trust.

The trial court considered this issue in its Ruling #4:

> 4. Breed, Abbott did not have a perfected security interest in the estate or its assets at the time of the filing of Diane's bankruptcy petition, because a security interest could not attach until Diane Roupe had an interest in the collateral. The trust, not having been funded,

Diane Roupe had no interest to which a security interest could attach, or become perfected.

The trust remained unfunded when Breed filed this present action. Apparently, the trust has not yet been set up. The trial court found Diane Roupe owes the estate more than the value of the trust. The record supports the trial court's finding in this matter.

An assignee can be in no better position than the legatee, regardless of notice of the indebtedness. In re Trust of Lunt, 235 Iowa 62, 77-78, 16 N.W.2d 25, 33 (1944); 31 Am. Jur. 2d, Executors and Administrators § 1036 (1989). Before any security interest can attach, the debtor must have rights in the collateral. Iowa Code § 554.9203(1)(c). Since the trustee of the trust had discretion when to fund the trust and in expending sums from the principal of the trust estate, Diane had no title to the property and no interest in the principal of the trust. See Roorda v. Roorda, 230 Iowa 1103, 1105-06, 300 N.W. 294, 295 (1941); Frunk v. Grulk, 204 Iowa 314, 317-18, 213 N.W. 608, 609 (1927).

The assignor can only make an assignment for the benefit of creditors to the extent of its interest in the property assigned. 6A C.J.S. Assignment for Benefit of Creditors § 70 (1975); Roorda v. Roorda, 230 Iowa at 1105-06, 300 N.W. at 295. In this case, Diane's only interest in the estate extends to the trust. The trust had not yet been funded at the time of the filing of this

action. The trust apparently remains nonexistent. Therefore, Diane's assignment of beneficial interest to the Breed law firm could only attach the trust, and not to the estate assets. No trust having been formed, Diane had no rights in the collateral to which the interest of Breed could attach. In re Estate of Tone, 240 Iowa 1315, 1325, 39 N.W.2d 401, 407 (1949).

Diane has no interest in the estate as such. Thus, Breed has no interest in the estate as such. Its interest can rise no higher than the interest of the assignor, Diane. In re Estate of Tone, 240 Iowa at 1325, 39 N.W.2d at 407; Roorda v. Roorda, 230 Iowa at 1105-06, 300 N.W. at 295. As Breed has no interest in the estate, it is not entitled to object or except to the administration of the estate. See In re Willcockson, 368 N.W.2d 198, 202 (Iowa App. 1985); 31 A. Jur. 2d Executors and Administrators § 297 (1989). It cannot seek removal of the executor or invalidation of the loans.

Breed was or should have been aware of the financial arrangements of its client, Diane. It received financial statements. It was or should have been aware of the source of much of Diane's money. No evidence has been brought to the attention of this court that Breed was unaware of the will and trust provisions. In fact, the assignments of beneficial interest executed by Diane in favor of Breed specifically mentioned the trust.

Any action by Breed to force the formation and funding of a trust in Diane's favor is dependent on Diane's right to do the same. In re Trust of Lunt, 235 Iowa at 77-78, 16 N.W.2d at 33; 31 Am. Jur. 2d Executors and Administrators § 1036 (1989). Diane approved, acquiesced, and actively participated in the dispersal of the estate funds as loans as to her for the restaurant venture. By her actions, Diane has waived any complaint she may have for the nonfunding of the trust. In re Estate of Jackman, 255 Iowa 410, 420-21, 122 N.W.2d 910, 916 (1963); see 3 Scott, The Law of Trusts, § 216 (1988); 76 Am. Jur. 2d Trusts §§ 336, 341, 586 (1975); 90 C.J.S. Trust § 254 (1955).

Diane consented to the acts which Breed now complains of before Breed had a beneficial interest. Breed is bound by Diane's acts of confirmation and ratification which occurred before its notices were filed. Because Diane can not challenge the transactions, neither can her assignee.

We affirm the trial court's dismissal of Breed's petition. Breed lacked any interest in the estate upon which to base an action. Breed only has an interest as an assignee of a nonexistent trust. That interest cannot attach until the collateral comes into existence.

The assignor, Diane, was to be the beneficiary of the trust. However, she has ratified and participated in the dispersal of the estate funds. Therefore, she is estopped from objecting to the nonfunding of the trust. Breed, as

her assignee, stands in her place. Consequently, it is also estopped from objecting to the nonfunding of the trust.

We affirm the trial court.

Each party is to pay its own costs on appeal.

AFFIRMED.