IN THE COURT OF APPEALS OF IOWA

No. 9-031 / 98-603
Filed March 31, 1999

IN THE MATTER OF THE TRUST UNDER THE LAST WILL AND TESTAMENT OF JAMES BAXTER, Deceased,

GREGORY and TIMOTHY SMITH,
Appellants,

vs.

FIRSTAR BANK,
Appellee.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Gregory and Timothy Smith appeal a district court ruling granting Firstar Bank's motion for summary judgment on their objections to the final trust report for their father's estate. **AFFIRMED.**

Peter C. Riley of Tom Riley Law Firm, P.C., Cedar Rapids, for appellants.

William G. Nicholson of White & Johnson, P.C., Cedar Rapids, for appellee.

Heard by Huitink, P.J., and Vogel and Zimmer, JJ.

VOGEL, J.

Gregory and Timothy Smith appeal a district court ruling granting Firstar Bank's motion for summary judgment on their objections to the final report of the trust created under their father's will. Finding their claims barred by both statute of limitations and laches, we affirm.

Background facts. The will of James S. Baxter was admitted to probate in Scott County, Iowa, following his death in 1953. The will directed that all property remaining after payments of debts and charges against the estate would be divided into two equal shares. The shares were to be placed in a trust to be administered by Baxter's surviving wife, Doris, and First Trust and Savings Bank, n/k/a Firstar Bank. Doris was to receive the income from Share Number One and could invade the principal if necessary for her own benefit. From Share Number Two, Doris was to receive the income but was not allowed to invade the principal. The Baxter's sons, Gregory and Timothy Baxter, n/k/a Gregory and Timothy Smith,[1] were remainder beneficiaries of the trust.

The James Baxter Estate was closed in 1955. In 1958, First Trust filed a petition for declaratory judgment seeking to determine the correct beginning balances of each share in the trust. Gregory and Timothy were represented in the proceedings by a guardian ad litem. A declaratory judgment was entered in 1960 and was not appealed.

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[1] Gregory and Timothy were adopted by Doris's second husband, Bert Smith.

Firstar continued to co-administer the trusts and file periodic reports. No notice of the periodic reports was served on Gregory and Timothy. In June of 1976, Gregory, then a practicing lawyer in Missouri, wrote and asked Firstar for a copy of his father's will. Gregory subsequently asked for additional information regarding the management of the trusts, and over the next few months exchanged letters and phone calls with Firstar, and attended a meeting at the bank in August of 1976. No further action was taken.

Firstar filed periodic reports in 1963, 1965, 1975, 1979, 1980, 1984, 1987, 1989, 1992, and 1995; each of which was approved by orders of the district court. The final report was filed in December of 1996, following the death of Doris (Baxter) Smith. Gregory and Timothy filed objections to the final report, challenging various actions taken during the administration of their father's estate and subsequent acts of the trustees. The district court granted Firstar's motion for summary judgment. Gregory and Timothy's motion for enlargement of findings was denied and they now appeal.

Scope of review. We review a summary judgment ruling for error. *Anderson v. Miller*, 559 N.W.2d 29, 31 (Iowa 1997). We examine the record before the district court to decide whether a genuine issue of material fact exists and whether the court correctly applied the law. *See Id.*; Iowa R. Civ. P. 237(c). In doing so, we view the facts in the light most favorable to the party opposing the motion for summary judgment. *Anderson*, 559 N.W.2d at 31.

Original funding of the trust. In their objections to the final report of the trust, Gregory and Timothy claimed that certain property was improperly excluded when the trust shares were originally funded in 1955. Gregory and Timothy contend that the district court erred in finding that this objection was barred by the statute of limitations in Iowa Code section 633.488 (1997).

Iowa Code section 633.488 provides, in relevant part:

> Whenever a final report has been approved and a final accounting has been settled in the absence of any person adversely affected and without notice to the person, the hearing on such report and accounting may be reopened at any time within five years from the entry of the order approving the same . . . .

Gregory and Timothy assert that this section is inapplicable because they did not receive notice of the closing of the estate[2] and were adversely affected. However, section 633.488 gives persons who did not receive notice, and were adversely affected, five years to apply for a reopening of the estate. As the estate was closed in 1955, Gregory and Timothy are barred from relief.

Even assuming the assets from the estate were not properly marshaled to correctly fund the trust shares, the declaratory judgment entered in 1960 conclusively established the beginning valuation of both shares. A guardian ad litem was appointed to protect the interest of both Gregory and Timothy, and no objections were

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[2] Iowa Code section 638.36 (1954) provided that notice of application for discharge of fiduciary be served upon "all persons interested as required for the commencement of a civil action . . ." Section 638.11(1954), a predecessor of the current 633.488, allowed a person who did not receive notice only three months from the closure of the estate to make application for reopening.

filed. No appeal was taken from the declaratory judgment entered. Gregory and Timothy's objections to the same are clearly barred.

Distributions in excess of net income. In their objections to the final report of the trust, Gregory and Timothy also claimed that Doris had received distributions in excess of the net income for certain years preceding 1973. They assert the district court erred in finding this objection to be barred by the doctrine of laches.

Laches is an equitable doctrine premised on unreasonable delay in asserting a right, which causes disadvantage or prejudice to another. *First Federal Sav. and Loan Ass'n of Storm Lake v. Blass*, 316 N.W.2d 411, 414 (Iowa 1982) (citation omitted). Prejudice is an essential element. *See Id.*

Gregory and Timothy became aware of the excess distribution by 1977, yet took no further action. We find clear prejudice to Firstar given the death of material witnesses, including the lawyer for the executor of the estate, a trust officer, and a co-trustee (Doris).

Gregory and Timothy contend that they had no standing to sue until the death of their mother; however, we find this argument to be without merit. Gregory and Timothy had a vested remainder interest which was sufficient to contest the actions of the trustee and protect their interests. *Compare In re Trust of Willcockson*, 368 N.W.2d 198, 203 (Iowa App. 1985) (outlining situations in which the interest of prospective beneficiaries is so contingent that they do not have standing to sue to protect their interest), *with Cox v. Cox*, 357 N.W.2d 304, 306-07 (Iowa 1984) (holding

that contingent remaindermen are entitled to guard against their interest and need not make a showing of waste to obtain an accounting). Having failed to assert any objections during the administration of the trust, and finding prejudice to Firstar, we find the doctrine of laches to be applicable.

Maladministration after 1977. Finally, Gregory and Timothy assert that the court erred in holding that their objections to the trustee's conduct after 1977 were barred by the doctrine of laches and equitable estoppel. Firstar contends, and we agree, that Gregory and Timothy have failed to preserve error on this issue. Gregory and Timothy made no specific mention of objections related to management of the trust after 1977 or post-1976 distributions in excess of income until the filing of their 179(b) motion to the court's ruling on summary judgment. We find this was not sufficient to preserve them for appeal. *See Osborne v. Iowa Natural Resources Council*, 336 N.W.2d 745, 747-78 (Iowa 1983).

Having considered all other arguments properly before us on appeal, we agree with the district court that Gregory and Timothy's claims are time barred. We hereby affirm the district court's summary judgment ruling in favor of Firstar Bank.

AFFIRMED.