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IN THE COURT OF APPEALS OF IOWA

No. 1-058 / 90-454

IN RE THE MATTER OF THE ESTATE OF LEAH PENCE, Deceased.

DOROTHY E. CARINGELLA,

Appellee/Cross-Appellant,

vs.

STEVEN C. MOORE, Temporary Administrator of the Estate of Leah Pence, Deceased,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Louisa County, Harlan W. Bainter, Judge.

Temporary administrator appeals judgment granting claim. **APPEAL AFFIRMED; CROSS-APPEAL DISMISSED.**

Steven A. Sents of Newell & Sents Law Offices, Columbus Junction, and Donald L. Carr II of Donald L. Carr II Law Firm, Cedar Rapids, for appellant.

Timothy K. Wink and Jay T. Schweitzer of Schweitzer & Wink, Columbus Junction, and William T. Matthews of Hicklin & Matthews, Wapello, for appellee.

Heard by Donielson, P.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

The temporary administrator of the estate of Leah Pence appeals a judgment rendered after a jury verdict allowing a claim by Dorothy E. Caringella against the estate. The temporary administrator challenges rulings on the issue of whether Caringella demonstrated peculiar circumstances to justify her failure to file a timely claim. The temporary administrator also challenges several rulings on evidence. Caringella cross-appeals the application of estate proceeds to payment of attorney fees of the beneficiaries. We affirm the appeal and dismiss the cross-appeal.

I. Leah A. Pence and her husband, John W. Pence Sr., executed identical mutual contractual wills in 1975 and codicils in 1985. In 1985 and 1986 both were ill, and Leah's sister, Dorothy Caringella, moved from Chicago to care for them. Caringella contends that the Pences promised to make Caringella their sole beneficiary.

John Pence Sr. died in January 1986 without having changed his will. His estate, composed primarily of joint property with rights of survivorship in Leah, went entirely to Leah. Caringella never filed a claim for her alleged services against the estate of John Pence Sr.

In June 1986 Leah Pence executed a new will by which she gave her entire estate to Caringella. Leah Pence died August 22, 1986. Apparently, the value of the estate was approximately $34,000 when this matter was tried.

Caringella presented the 1986 will for probate and was appointed executor.

On January 7, 1987, John W. Pence Jr. filed a petition seeking a declaratory judgment that the terms of the 1975 mutual will were irrevocable. He sought imposition of a trust on all estate assets. Pence Jr. named as defendants all beneficiaries under the 1975 mutual wills, which included Caringella. The petition was filed four days before the expiration of the statutory period for filing claims against the estate of Leah Pence.

In a November 18, 1988, summary judgment ruling, the district court determined that the 1975 will should control distribution and impressed a trust on the estate. The court refused to entertain Caringella's claim against the entire estate for her services. The parties do not dispute this ruling, and we consider it the law of the case.

On February 9, 1989, fifty-three and one-half months after Leah Pence's death and twenty-five months after the expiration of the claims period, but less than three months after the summary judgment, Caringella filed a claim against the estate. She alleged that she had provided cash and services to the Pences and that she was entitled to $61,824. The court appointed Steven C. Moore as temporary administrator for consideration of Caringella's claim. Meanwhile, the court determined that two attorneys who had successfully prosecuted the claim for the beneficiaries of

the 1975 will should be paid a combined $5,616.34 from the "common fund" of the estate. This remains unpaid.

The temporary administrator denied Caringella's claim. In October 1989 the temporary administrator sought summary judgment, contending Caringella's claim was barred by Iowa Code section 633.410. Under section 633.410, which was unchanged throughout the relevant period,[1] claims brought more than four months after the second publication of notice are barred. Section 633.410, however, "does not bar claims for which . . . claimants [are] entitled to equitable relief due to peculiar circumstances." The temporary administrator contended that there were no "peculiar circumstances." Caringella and her attorney, Jay T. Schweitzer, both stated in depositions that there were no peculiar circumstances.

One of beneficiaries under the 1975 will then applied to remove Schweitzer as attorney for the estate. The beneficiary cited Schweitzer's dual representation of Caringella and the estate as a conflict of interest and the fact that he might be called as a witness. The district court removed Schweitzer, holding: "The Court concludes this poses a real or at least a possible conflict of interest." Schweitzer continued to represent Caringella in

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1. Section 633.410 was amended by the General Assembly in 1989 to provide for mailed notice in conformance with Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988). See 1989 Iowa Acts ch. 35, § 6. As she was executor for the estate, there is no argument that Caringella was not given proper notice.

her claim against the estate.

Relying on Evjen v. Brooks, 372 N.W.2d 494 (Iowa 1985), and In re Northup, 230 N.W.2d 918 (Iowa 1975), the district court overruled the temporary administrator's motion for summary judgment. The court, in its December 1989 ruling, held that Evjen required a fairness analysis in determining peculiar circumstances. The court concluded,

> Dorothy [Caringella] could not have conclusively known that she had to file a claim in the estate until the Court ruled that the will she had proffered for administration must be impressed with a constructive trust because of the prior mutual and contractual wills of Leah Pence and her husband. . . . [T]his Court . . . concludes that since the estate was not settled in that period of time, little or no delay would occur by allowing the filing of the claim and resolving the claim on its merits. . . .

The parties tried Caringella's claim to a jury in January 1990. The trial court sustained a motion in limine, precluding evidence pertaining to Leah Pence's 1986 will and services rendered to John Pence Sr. Nevertheless, Caringella's attorney, Schweitzer, referred to the will during opening arguments, and eventually, the court admitted the will in evidence.

Schweitzer took the stand to testify for Caringella. After a few general questions, the temporary administrator asked the court to excuse the jury. After voir dire examination of Schweitzer outside the presence of the jury, the temporary administrator moved to exclude Schweitzer's testimony. After extensive discussion on the record, the court commented that it believed the issue of peculiar

circumstances to be resolved. As a result, Schweitzer testified no further.

The jury returned a verdict for Caringella for $28,490.63. The temporary administrator now appeals. Specifically, the temporary administrator argues that the court erred in overruling the estate's October 1989 motion for summary judgment. The temporary administrator further argues that, if there was a material issue of fact on the issue of peculiar circumstances, it was never pleaded and proved. The temporary administrator also challenges the use of the 1986 will and Schweitzer's representation.

This case is heard in law, not equity. Evjen, 372 N.W.2d at 498. Therefore, we review for errors of law. Iowa R. App. P. 4. We are bound by the facts found in the trial court, but not its conclusions of law.

II. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c); see Farm Bureau Mut. Ins. Co. v. Miline, 242 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact, Miline, 242 N.W.2d at 423, and the evidence must be viewed in the light most favorable to the resisting party, Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). A fact issue is generated if reasonable minds can differ on how

the issue should be resolved, but if conflict consists only of legal consequences flowing from undisputed facts, entry of summary judgment is proper. Gott, 387 N.W.2d at 343; Miline, 242 N.W.2d at 423. If the motion is properly supported, the resisting party "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 237(e).

We find no error in the district court's December 1989 decision overruling the temporary administrator's motion for summary judgment. The district court overruled the motion because it found that there were, in fact, peculiar circumstances. The court in In re Northup stated:

> Peculiar circumstances entitling a claimant to equitable relief exist when "delay beyond the period fixed by statute for filing claims be so excused and explained as that, when considered in connection with the claim asserted and the condition of the estate, good conscience and fair dealing demand that a hearing on the merits be accorded the claimant."

230 N.W.2d at 922 (quoting Ball v. James, 176 Iowa 647, 649, 158 N.W. 588, 591 (1916)). This test, not the diligence analysis suggested by the temporary administrator, is the appropriate test. Evjen, 372 N.W.2d at 499. The district court applied the correct standard.

We agree with the district court's conclusion that there were peculiar circumstances. Caringella believed she would inherit the entire estate until she was served with notice of the will contest two days before the expiration of the claims period. She raised her claim throughout that

proceeding and sought to have it adjudicated at the same time. Clearly, no one was taken by surprise or prejudiced by the late claim. Moreover, the estate was open, solvent, and unsettled. Northup, 230 N.W.2d at 923.

III. The temporary administrator contends the court erred in admitting the 1986 will into evidence. The court has discretion in admitting evidence, and we review for abuse of discretion. To show an abuse of discretion one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 132 Vt. 603, 326 A.2d 138, 140 (1974)).

We find no abuse of discretion. The court could properly admit the 1986 will for the purpose of demonstrating the contract between the decedent and Caringella. A will made in conformity with the contract may be proof of the agreement. Davis v. Davis, 261 Iowa 992, 999, 156 N.W.2d 870, 875 (1968). Moreover, it appears that the temporary administrator opened the door to its admission by making reference to it.

IV. The temporary administrator contends that it was error for the court not to remove Schweitzer from representing any party in the action. The trial court has discretion in determining whether the disqualification of counsel is warranted. See Meat Price Investigators Ass'n v. Spencer Foods, Inc., 572 F.2d 163, 165 (8th Cir. 1978).

As we have noted, such an abuse is characterized as being "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Blackwell, 238 N.W.2d at 138 (quoting Burnor, 326 A.2d at 140).

Again, we find no abuse of discretion. The client has an interest in having chosen representation to be balanced against the opposing party's interest in a trial free of prejudice and society's interest in fair and scrupulous administration of justice. See Spencer Foods, 572 F.2d at 165. Although Schweitzer had represented the estate, he was removed and continued to represent Caringella. Caringella's interests were generally adverse to those of the other beneficiaries under the 1975 will. Once the 1986 will was essentially struck down, the parties basically switched sides in the courtroom, but the teams remained the same. There appear to be no problems of disclosure of confidences or failure to pursue client interests. We fail to see how appellant was prejudiced by Schweitzer's continued representation of Caringella.

V. Caringella challenges payment of attorney fees from the estate. Presumably she asserts standing as a beneficiary under the 1975 will. Counsel made two sets of applications for attorney fees. The court granted the first application on March 24, 1989, after counsel successfully defeated the 1986 will. Counsel made a second application after trial, but on March 15, 1990, Judge John C. Miller refused to rule on the application, deferring

instead to the trial court, Judge Harlan W. Bainter. Neither ruling has otherwise been appealed.

Concerning the March 24, 1989, order, we hold that it was final. Appeal of a final order must be made within thirty days or is lost. Iowa R. App. P. 5; see Rowen v. LeMars Mut. Ins. Co., 357 N.W.2d 579, 581 (Iowa 1984); Crowe v. DeSoto Consolidated Sch. Dist., 246 Iowa 38, 40, 66 N.W.2d 859, 860 (1954). The order conclusively adjudicated the rights of the parties. See Rowen, 357 N.W.2d at 581; Crowe, 246 Iowa at 40, 66 N.W.2d at 860. After the order was entered, the court could not place the parties in their original position. See Rowen, 357 N.W.2d at 581; Crowe, 246 Iowa at 40, 66 N.W.2d at 860. Nothing remained to be done, and the order could be enforced by execution or other means. Crowe, 246 Iowa at 40, 66 N.W.2d at 860. We have no jurisdiction to consider an untimely appeal.

Concerning the March 15, 1990, order, we hold that the appeal is not ripe for our consideration. Because there has been no specific ruling on the matter, we have nothing to review. While it appears that we may review fee rulings, the issue is not triable de novo. In re Robinson, 233 Iowa 613, 619, 10 N.W.2d 43, 46-47 (1943). We have no jurisdiction to consider an unripe appeal. Crowe, 246 Iowa at 39, 66 N.W.2d at 860. Consequently, we must dismiss the cross-appeal.

VI. We hold the district court did not err in finding peculiar circumstances. We also hold that it did not err in admitting the 1986 will into evidence and in refusing to remove counsel from the case. We affirm the appeal. We hold that we have no jurisdiction to consider the cross-appeal and dismiss the cross appeal. Costs shall be taxed one-half to each party.

APPEAL AFFIRMED; CROSS-APPEAL DISMISSED.