FILED
SEP 25 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE ESTATE OF EDITH OHLAND, Deceased,

MARY H. SCHUTTE, EDITH NEKOLA, PAUL OHLAND, HELEN SANDERSFELD DOROTHY YOUNG, and LLOYD E. OHLAND,

Appellants.

Filed September 25, 1986

130

6-210
85-1783

Appeal from the Iowa District Court for Poweshiek County (Probate No. 13562-41-187) - James D. Jenkins, Judge.

Six heirs appeal from an order in probate approving the executor's final report, asserting that the evidence was insufficient to support a finding that reimbursement of the executor for inheritance taxes he paid was a proper disbursement of assets of the estate. **AFFIRMED.**

James W. Affeldt and Daniel C. Way of Eells, Blackstock, Affeldt & Harms, Cedar Rapids, for appellants.

Hugh Ben McCoy of McCoy, Faulkner & Broerman, Oskaloosa, for the executor.

Charles P. Vogel of Tomasek, Vogel, Charnetski & Olson, Grinnell, for the estate.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J. 131

Six heirs appeal from an order in probate approving the executor's final report, asserting that the evidence was insufficient to support a finding that reimbursement of the executor for inheritance taxes he paid was a proper disbursement of assets of the estate. We affirm.

Decedent Edith Ohland died testate on March 18, 1983, naming defendant W. Mack Jackson executor of the estate. The gross value of the estate was $204,987.27, $73,886.53 of which was held in joint tenancy with Jackson. The bulk of the estate consisted of various shares of corporate stock which were divided among the heirs pursuant to the terms of the will. On December 15, 1983, Jackson filed the inheritance tax in the sum of $18,317.83, $7,986.33 of which represented tax on property received by Jackson as joint tenant.

Two months prior to the payment of taxes, the six heirs filed a claim against Jackson, alleging that Jackson had exercised undue influence upon the decedent while assuming control over her affairs and converted the joint tenancy property to his own use. The parties reached a settlement on the claim in December 1984. A release was given by the heirs in exchange for the payment of $63,715.00 by Jackson. The release stated that Jackson would be allowed to retain his statutory executor fees, but made no mention of reimbursement for inheritance taxes paid.

On December 21, 1984, the heirs' attorney, Roger Sunleaf, the attorney for Jackson, Hugh McCoy, and Jackson held a meeting to discuss a proposed application and order for settlement. The proposed settlement order contained a clause allowing reimbursement to Jackson of his portion of the inheritance taxes paid. Jackson read the proposed agreement out loud in front of both parties' attorneys. Jackson subsequently signed the agreement in front of both attorneys. Jackson subsequently handed over a check for $63,750.00 to Attorney Sunleaf.

Sunleaf then told Attorney McCoy to take the application and order to the courthouse to get it signed by a judge and to send a copy to the clerk of court in Montezuma, which was done by McCoy.

Jackson subsequently conferred with the attorney for the estate, Charles Vogel, concerning the amount which he could be reimbursed. Vogel arrived at a sum of $6,379.13, and Jackson subsequently wrote a check out to himself for that amount.

A final report was submitted by Jackson on August 12, 1985, and an amendment was filed on September 19, 1985. The heirs filed their objections to the final report on October 14, 1985, alleging that repayment of the Iowa inheritance tax to Jackson was not a proper disbursement. A hearing on the objections was held on November 15, 1985. At the hearing, two of the heirs, Edith Nekola and Helen Sandersfeld, testified that they had no knowledge of an agreement to reimburse Jackson and that they did not approve of such an agreement as entered into by Sunleaf on their behalf. The trial court overruled the heirs' objections and entered an order approving the final report and amended final report. The heirs subsequently have appealed that ruling.

Our scope of review is de novo. Iowa R. App. P. 4. While we accord weight to the trial court's findings of fact because the trial court has had the unique opportunity to hear and observe the witnesses firsthand, we are not bound by them. Iowa R. App. P. 14(f)(7).

Plaintiffs contend that pursuant to Iowa statutory and case law, Jackson is liable for his portion of the inheritance tax, that such liability cannot be exonerated by a settlement agreement, and that therefore it was improper for him to be reimbursed through the assets of the estate. Plaintiffs correctly cite Iowa Code section 450.5 (1985) as the governing statute allocating liability for the payment of the Iowa inheritance tax. Section 450.5 states:

> Any person becoming beneficially entitled to any property or interest in property by any method of transfer as specified in this chapter, and all personal representatives and referees of estates or transfers taxable under this chapter, are respectively liable for all taxes to be paid by them respectively.

It has been well established that an inheritance tax is a charge, not on the property left by a decedent, but rather on the privilege to receive the same by will or intestate succession. Matter of Estate of Bliven, 236 N.W.2d 366, 371 (Iowa 1975). Thus, under section 450.5, the amount of inheritance tax to be paid is set at the time of the decedent's death, when the right to receive property under the will accrues.

In support of their contention that Jackson's reimbursement of inheritance taxes was improper, plaintiffs cite to Matter of Estate of Bliven, 236 N.W.2d 366 (Iowa 1975). In Bliven, the Iowa Supreme Court considered the question of where heirs at law and charitable organizations enter into a court approved will contest avoidance agreement for distribution of an intestate's estate to such heirs and charities in designated proportions, is the share accordingly conveyed to the charities exempt from inheritance tax? 236 N.W.2d at 369. The Bliven court held that despite the fact the heirs had renounced their right to 50% of the decedent's estate, the decedent's property had passed automatically to the heirs and that, because the charities had received such property through assignment, such property was still subject to inheritance tax. Id. at 371.

We do not believe that the holding in Bliven is applicable to the present case. The question in Bliven concerned the effects of the laws of descent and distribution. In the present case, we are concerned with whether an executor may be reimbursed for inheritance taxes paid on his portion of the property received under a will by a settlement agreement with the heirs. Defendant Jackson has not raised a claim that no taxes were due on his portion of the

estate. In fact, Jackson has already paid his portion of the Iowa inheritance tax to the State pursuant to Iowa Code section 450.5.

The gravamen of plaintiffs' claim appears to be that the reimbursement of inheritance taxes is not a proper subject of a settlement agreement and that even if such reimbursement could be provided for in a settlement agreement, there was no agreement to reimburse Jackson in the present case. We disagree.

It has long been established that the law favors the adjustment and settlement of controversies without resorting to judicial action. Dyer v. National By-Products, Inc., 380 N.W.2d 732, 733 (Iowa 1986). Concerning the settlement of controversies surrounding a will, in Bakke v. Bakke, 242 Iowa 612, 618-19, 47 N.W.2d 813, 817 (1951), the Iowa Supreme Court, in refusing to cancel a settlement of a will contest, opined:

> It is a well established rule that voluntary settlement of doubts and disputes between parties is to be encouraged and especially family controversies, and will not be disturbed for any ordinary mistake, either of law or of fact, since their very object is to settle disputes without judicial controversy. In the absence of fraud, misrepresentations, concealments, or other misleading incidents, a voluntary compromise must stand.

Because the courts have long favored settlements concerning contests of wills, it has generally been held that beneficiaries who are also heirs may agree to disregard the provisions of the will and disburse the assets of the estate in any manner they see proper. Seeley v. Seeley, 242 Iowa 220, 224, 45 N.W.2d 881, 884 (1951); In re Swanson's Estate, 239 Iowa 294, 300, 31 N.W.2d 385, 389 (1948). Between devisees under a will and the decedent's heirs, once a will has been admitted to probate, the devisees are proper parties to effect a settlement with the heirs and, so long as the devisees and heirs are in agreement, any disposition of the estate among them is proper. S. Kurtz, Kurtz on Iowa Estates § 4.49 (1981). Such settlements are generally entered into by the inter-

ested parties for a variety of reasons such as to promote peace and avoid protracted, costly litigation. In re Swanson's Estate, 239 Iowa at 301, 31 N.W.2d at 389-90. Such compromise agreements, fairly entered into, are difficult to set aside. See In re Estate of Dayton, 246 Iowa 1209, 71 N.W.2d 429 (1955); Bakke, 242 Iowa at 618-19, 47 N.W.2d at 817.

Under common law, an executor or administrator also had the power to settle or compromise claims for or against an estate and, like those settlements between interested parties under a will, a court would set aside those settlements only upon a showing of fraud, duress, mutual mistake, bad faith, or contrary to public policy. 31 Am. Jur. 2d Executors and Administrators § 259 (1967). Iowa law follows this common law rule. Iowa Code §§ 633.114-.115 (1985); In re Fleming's Estate, 228 Iowa 1137, 1149, 293 N.W. 511, 515-16 (1940); Jensen v. Murphy, 199 Iowa 524, 529, 702 N.W. 232, 234 (1925). Such settlements, however, must be approved by the probate court. Iowa Code §§ 633.114-.115 (1985).

From the foregoing analysis, we conclude that all interested parties under a will may agree to reimburse a party pursuant to a settlement agreement for inheritance taxes paid by that party on his or her portion of the decedent's property received under a will. Such agreements will be upheld by a court absent a finding of fraud, misrepresentation, concealment, or other misleading incidents and where such agreements are supported by adequate consideration. Helms v. Helten, 290 N.W.2d 876, 882 (Iowa 1980); White v. Flood, 252 Iowa 402, 409, 138 N.W.2d 863, 867 (1965). We do note, however, that payments to avoid a contest of a will are generally neither deductible from the estate as a debt nor as an administration expense. In re Estate of Wells, 142 Iowa 255, 259-60, 120 N.W. 713, 715 (1909).

Having determined that a party may be reimbursed from an estate for inheritance taxes paid on his or her property received under a will pursuant to a settlement agreement, we next must determine whether such a valid agreement existed between Jackson and the heirs.

The heirs contend that there was no agreement that Jackson would be reimbursed for the inheritance taxes paid on his portion of decedent's property. Edith Nekola and Helen Sandersfeld, two of the six heirs involved in the present suit, testified that they signed a release of all claims against Jackson in consideration for Jackson paying to the heirs the sum of $63,750.00. Edith and Helen testified that the releases they signed allowed payment to Jackson his statutory executor fees, but did not provide for reimbursement and that it was their understanding at the time they signed the releases that Jackson would not be reimbursed. The heirs further contend that their attorney, Roger Sunleaf, had no authority to enter into the agreement filed December 24, 1984, providing for reimbursement and further that they never received any notice of such agreement. Therefore, the heirs argue, the December 24, 1984, agreement is void. We disagree.

A release is a contract, and its validity is governed by the usual rules relating to a contract. Stetzel v. Dickenson, 174 N.W.2d 438, 439 (Iowa 1970). A release must be construed according to its terms. Rich v. Dyna Technology, Inc., 204 N.W.2d 867, 870 (Iowa 1973). When construing a release, we must keep in mind that the ultimate test for conclusiveness of the terms of a contract is the manifest intent of the parties, not the particular language used. Chariton Feed and Grain, Inc. v. Harder, 369 N.W.2d 777, 785 (Iowa 1985). In interpreting the meaning of a written instrument, courts will seek to give effect to intention of the parties in conformity with a reasonable application of the circumstances

under which the instrument was executed. First National Bank in Creston v. Smith, 331 N.W.2d 120, 122 (Iowa 1983).

Turning to the release signed by the heirs, the release provides that each of the six heirs discharges Jackson from any and all liability whatsoever on the charge of undue influence and conversion, provided Jackson pay to them the sum of $63,750.00. As a further condition of such payment, the following sentences were typed onto the release:

> 5. I consent to the payment of the statutory executors fee to W. Mack Jackson in the Edith Ohland Estate. Further the claim in the estate will be dismissed.
>
> 6. This release is one of six given by all the heirs and beneficiaries of the Edith Ohland Estate and should be construed together.

There is no mention of reimbursement of inheritance taxes paid by Jackson on his portion of the estate. Taking the release by itself, it would appear that reimbursement was not part of the release agreement.

We believe, however, that upon consideration of all the actions of the parties surrounding the signing of the release, the order filed and approved by the court on December 24, 1984, was the actual final settlement approved by the parties. We initially note that the releases signed by the heirs were never filed with the court. Jackson testified that on December 21, 1984, he was called into the office of his attorney, Hugh McCoy, to review a proposed settlement order with McCoy and Sunleaf, the heirs' attorney. At that time, Jackson testified, Sunleaf stated that he had the releases in his files, but never produced them for review. Jackson testified that he was prepared to pay the $63,750.00 by check to Sunleaf on condition that he be reimbursed for his portion of the inheritance tax. Jackson stated that in the presence of both his attorney and Sunleaf, he read aloud the proposed settlement order, including the provision providing for reimbursement. Jackson then signed the agreement in front of

Sunleaf and handed over to Sunleaf the check, at which point, according to Jackson, Sunleaf instructed McCoy to take the order to the courthouse and have it approved by the court. The order was subsequently signed by a judge that day and was filed on December 24, 1984.

The heirs argue that throughout the negotiations leading up to the settlement it was their understanding that Jackson would not be reimbursed and that there was thus no mutual assent to the order filed. Under Iowa law, whether there has been mutual assent to a contract depends upon the intentions of the parties as objectively determined from their words and actions viewed within the context of the surrounding circumstances. Fairway Center Corp. v. U.I.P. Corp., 502 F.2d 1135, 1141 (8th Cir. 1974). In the present case, both Jackson and the heirs received advice from competent counsel. The heirs' attorney, Sunleaf, had reviewed the proposed settlement order, witnessed its signing, and urged that the order be approved by the court that day. Furthermore, Edith Nekola, one of the heirs, testified at the final report hearing that she had received communication from Sunleaf "as to what was going on." From this we must conclude that the order filed on December 24, 1984, providing for reimbursement was intended by the parties to be the final written contract covering the terms of the settlement and that all prior negotiations, including the releases, were thereby merged into the December 24, 1984, order. Our holding is supported by South Texas Land Co. v. Sorensen, 199 Iowa 699, 703, 202 N.W. 552, 553 (1925), in which the Iowa Supreme Court opined:

> When a subsequent contract completely covering the same subject-matter is made by the same parties to an earlier agreement, and the terms thereof are inconsistent with the earlier agreement, and intended to be substituted for it, a merger results; and the later contract becomes the final and only agreement between the parties on the subject.

See also Commercial Trust & Sav. Bank v. Toy Nat. Bank, 373 N.W.2d 521, 523 (Iowa Ct. App. 1985).

The heirs additionally contend that their attorney, Sunleaf, had no authority to enter into the agreement filed on December 24, 1984. The relationship between an attorney and client is predicated on the doctrine of principal and agent. Dillon v. City of Davenport, 366 N.W.2d 918, 923 (Iowa 1985). While an attorney is presumed to act with authority, this presumption is not conclusive and may be rebutted. Id.; Dragstra v. Northwestern State Bank, 192 N.W.2d 786, 790 (Iowa 1971). Though an attorney cannot settle or compromise a case without authority, Dragstra, 192 N.W.2d at 791, a settlement made with authority is binding on the client. Iowa Code § 602.10114 (1985); Dillon, 366 N.W.2d at 924.

A principal is bound by whatever an agent does within the scope of his authority. Grismore v. Consolidated Products Co., 232 Iowa 328, 335, 5 N.W.2d 646, 651 (1942). "Actual authority to act is created when a principal intentionally confers authority on the agent either by writing or through other conduct which, reasonably interpreted, allows the agent to believe he has the power to act." Dillon, 366 N.W.2d at 924. Actual authority includes both express and implied authority. Id. Express authority is that authority specifically set out by the principal in describing duties, while implied authority includes all such incidental authority as is necessary, usual, and proper to effectuate the main authority expressly conferred. Newberry v. Barth, Inc., 252 N.W.2d 711, 714 (Iowa 1977).

We believe that the heirs' attorney, Sunleaf, had actual authority to enter into the settlement agreement filed with the court. The heirs specifically employed Sunleaf to represent them throughout the settlement negotiations, and therefore Sunleaf, in order to obtain the most favorable settlement, was empowered to do all that was necessary and proper to reach a favorable settle-

ment. At the final report hearing neither of the heirs who testified denied the authority of Sunleaf to enter into a settlement. The heirs only testified that they were under the impression that Jackson would not be reimbursed. Additionally, Edith Nekola testified that at the time the final settlement order was entered into, she received communication from Sunleaf as to what was going on. She therefore had notice that such negotiations had taken place, but failed to inquire further as to the details of the settlement, despite the fact that she had earlier testified it was her understanding that the release was the final agreement. A client is presumed to hold such knowledge of negotiations as is possessed by his or her attorney. Emmons v. Ingebretson, 279 F. Supp. 558, 571 (N.D. Iowa 1968). Sunleaf was therefore reasonable in assuming that it was within his power as the heirs' attorney to enter into the December 24, 1984, settlement agreement.

Finally, the heirs contend that they never received notice of the settlement agreement until just prior to the final report and that therefore the court's order approving the settlement is void. The heirs additionally contend that because the heirs or the heirs' attorney was not present when the order was signed by the judge, such proceeding was ex parte and therefore subject to review. We disagree.

The attorney for the heirs, Sunleaf, was present when Jackson read out loud the settlement agreement, witnessed the signing of the settlement agreement, and urged Jackson's attorney to file the order that same day. Because Sunleaf believed that all matters were final and that nothing more remained to be done except for the filing of the order, Sunleaf, acting within his authority, urged McCoy to simply have the order signed by a judge and file it with the clerk of court. We do not believe the mere fact that Sunleaf did not actually witness the judge sign the order turned the proceeding into an ex parte pro-

ceeding. An ex parte hearing is "[a] judicial proceeding . . . taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." Black's Law Dictionary 517 (5th ed. 1979). The hearing on December 24, 1984, was therefore not ex parte.

Pursuant to Iowa Code section 633.36 (1985), "[a]ll orders and decrees of the court sitting in equity are final decrees as to the parties having notice and those who have appeared without notice." The purpose of this statute is to allow prompt appeals from orders and rulings on probate matters during administration of the estate rather than at the time of the final report. Matter of Troesters, 331 N.W.2d 123, 126 (Iowa 1983). The order filed December 24, 1984, was thus a final order pursuant to section 633.36.

Iowa Rule of Appellate Procedure 5(a) provides that appeals to the Iowa Supreme Court from the entry of an order, judgment, or decree must be taken within thirty (30) days. The heirs filed no notice of appeal of the order. The heirs, however, claim that no notice of the order was ever sent to them by the clerk of court. Iowa Rule of Civil Procedure 82(f) provides that "lack of such notice of the entry by the clerk does not affect the time for appeal . . . ." In construing rule 82(f), the Iowa Supreme Court in Uchtorff v. Dahlin, 363 N.W.2d 264, 267 (Iowa 1985), held:

> The final sentence of Iowa Rule of Civil Procedure 82(f) states:
>
> > Lack of notice of the entry by the clerk does not affect the time to appeal . . . .
>
> Estate of Young, 273 N.W.2d 388, 390-91 (Iowa 1978), held that where, through negligence of the clerk, parties are notified of the entry of an order beyond the appeal time, a petition under rules 252 and 253 will renew the time for appeal. See also Robco Transp. v. Ritter, 356 N.W.2d 497, 498-99 (Iowa 1984). A direct appeal, taken at the time notice of the order is received but outside

> the thirty-day period, is doomed to failure by Iowa Rule of Civil Procedure 82(f). Young, 273 N.W.2d at 391.

Thus, the heirs failed to properly appeal the order, even though they discovered the existence of the order within the one-year time limit of rules 252 and 253.

Nor did the heirs file a motion for enlargement of time to appeal under Iowa Rule of Appellate Procedure 20(b). Rule 20(b) provides that the supreme court or justice thereof may extend the time for filing a notice of appeal if the court or justice determines that the failure to file a timely appeal was due to the failure of the trial court clerk to notify the prospective appellant of the entry of the final judgment or decision. Such motion, however, must be served not later than sixty days after the expiration of the time prescribed by rule 5(a). Iowa R. App. P. 20(b). Thus, the heirs failed to properly preserve their right to appeal.

In conclusion, we hold that the trial court was correct in accepting the final report submitted by Jackson and overruling the heirs' objections, and we therefore affirm the trial court's ruling.

AFFIRMED.

Schlegel, J., concurs; Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

I would affirm the trial court's order that Jackson be refunded the inheritance tax he personally paid on that portion of the joint tenancy account ultimately returned to the heirs. Like the majority, I determine Bleven is not applicable to this situation. In Bleven, the heirs agreed and the court determined decedent died intestate. The court therefore held the estate passed by intestate succession directly to her heirs at law. The court also rejected a claim that a percentage of the estate the heir at law agreed to give to charities was not subject to Iowa Inheritance Tax because of the charitable exemption. The court also held the exemption for property which passes in any manner to charitable entities was limited to property which passed by will or intestate succession.

Here, we are not dealing with property inherited by will or intestate succession. Instead we are dealing with property held by decedent in joint tenancy with Jackson. The survivor of a joint tenancy account has the right to take the whole property if the survivorship language is clear and unequivocal and the signature card is conclusive as to the parties' intent to establish a joint account. However, if the survivor is in a confidential relationship with decedent, the burden of proving the account arrangement was voluntarily established shifts to the survivor. See In the Matter of the Estate of Clark, 357 N.W.2d 34, 36-37 (Iowa Ct. App. 1984).

Jackson, the surviving joint tenant and executor, took the money from the joint tenancy account. When he filed the Iowa Inheritance Tax return he determined the joint tenancy property was his and paid the tax thereon. There was never a legal determination nor an agreement by the heirs that Jackson was entitled to the money. Ultimately by agreement it was determined the heirs were entitled to $63,750 of the money and they receipted to Jackson individually and as executor for that account. When Jackson no longer exercised

his right to claim the money as surviving joint tenant, the property passed under decedent's will. At that point the heirs, not Jackson, became liable for the inheritance tax thereon. The trial court was correct in approving the refund of the inheritance tax to Jackson.