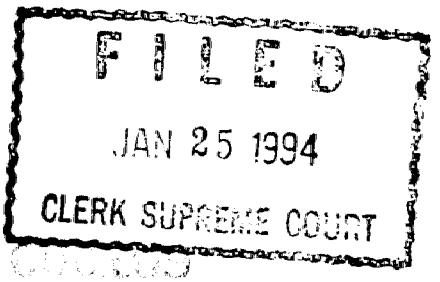
IN THE COURT OF APPEALS OF IOWA

No. 3-616 / 93-453




**UPON THE PETITION OF EDNA JUDISCH, MARDELLA BUHR, MURIEL ROQUET, FLOYD BUHR and IVA GUANITZ,**
Plaintiffs-Appellees,

**vs.**

**LEE BUHR and DOROTHY BUHR,**
Defendants-Appellees,

**and**

**WILLIAM BUHR,**
Defendant-Appellant.

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**WILLIAM BUHR,**
Defendant/Cross-Petitioner-Appellant,

**vs.**

**LEE R. BUHR and DOROTHY A. BUHR,**
Cross-Petition Defendants-Appellees.

Appeal from the Iowa District Court for Fayette County, Forest E. Eastman, Senior Judge.

William Buhr appeals a judgment of the district court restricting his power to act as fiduciary of the deceased's estate and a judgment denying his application to reopen probate on the basis of fraud. **AFFIRMED.**

Stanford J. Patterson of the Patterson Law Firm, Waterloo, and Brian J. Dowd, Waterloo, for appellant.

Donald Gloe and Robert J. Cowie, Jr. of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.C., Decorah, for appellees children.

Ron L. Van Veldhuizen, Oelwein, for appellees Lee and Dorothy Buhr.

Heard by Hayden, P.J., Sackett, J., and Keefe, S.J.*

*Senior judge from the 1st judicial district serving on this court by order of the Iowa Supreme Court.

**HAYDEN, P.J.**

William Buhr and his wife, Edna, are the parents of six children, Elda, Mardella, Muriel, Floyd, Iva, and Lee. On August 27, 1974, Lee and his wife, Dorothy, signed a contract of sale for the purchase of farmland from William and Edna. The transaction involved 160 acres in Fayette County. Edna owned the land in question, but William joined in the sale contract. The contract specified a sale price of $160,000, with $8000 to be paid annually for a period of twenty years, commencing on July 31, 1976.

On November 10, 1979, Edna executed her last will and testament. Edna bequeathed her personal property to William. William also was to inherit any of Edna's property having a value equal to the maximum marital deduction. The will provided the bequest be reduced by the amount needed to increase Edna's taxable estate so as to benefit from the unified credit. Article V of the will gave William a life estate in the residue of the property, with a remainder to the six children. The clause also provided William could invade the principal for the purpose of providing for his health and reasonable comfort.

Lee and Dorothy made sporadic payments on the 1974 contract through the time of Edna's death on February 28, 1986. After probate was opened, William declined to act as executor. Lee and Mardella were appointed co-executors. The only significant asset of Edna's estate was the interest in the contract of sale to Lee and Dorothy. In

the final report, the co-executors alleged no property was to pass to William under the marital deduction clause, but rather property would pass under the residual clause of the will giving William a life estate. The probate proceedings were closed in 1987.

Lee and Dorothy sold on contract the land purchased from William and Edna to the Steinbronns. Lee and Dorothy's interest in the contract was not assigned to William. The payments on the new contract went to Lee and Dorothy.

On February 27, 1991, Elda, Mardella, Muriel, Floyd, and Iva (hereinafter plaintiffs) filed a petition seeking an accounting, the appointment of a receiver, and other equitable relief to protect their claims in the remainder of Edna's estate. The petition named Lee, Dorothy, and William as defendants.

On March 11, 1992, Lee and Dorothy filed a motion to adjudicate law points. On March 12, 1992, plaintiffs filed an application to adjudicate law points. A hearing was held on the matter. On April 30, 1992, the district court entered its order finding all the parties had received notice of the final report. The court found none of the parties had filed an objection to the report or had appealed the order approving the final report. The district court determined William and the six children had no right to contest the correctness of the inventory. The court further concluded the plaintiffs had a vested

remainder interest in all principal payments due on the contract after Edna's death, and William had a duty to segregate principal and interest payments received on the contract following Edna's death and account to the plaintiffs for principal payments received by him.

The parties then entered into negotiations. On November 12, 1992, the parties entered a stipulation into the record. Pursuant to the court's order plaintiffs' attorney prepared an enrolled order in conformity with the stipulation.

William filed objections to the proposed order. The district court dismissed the objections and filed its order adopting the terms of the stipulation on February 16, 1993. The order provided, in part:

> William Buhr shall be not entitled to invade any of the principal of said $84,000.00, unless he obtains Court approval with notice goven [sic] to the Plaintiffs that such principal sums are necessary to maintain William Buhr in health and reasonable comfort in compliance with the provisions of the Edna Buhr will relating thereto.

William has appealed.

I. William maintains the district court erred in ordering he could invade the principal of the $84,000 only with advanced court approval. On appeal William maintains it would be more equitable to follow the statutory language of Iowa Code section 633.123 (1993), which provides a fiduciary should use the judgment of a model prudent person in making investments.

This claim arises from the district court's order entered in February 1993 pursuant to the parties' stipulation. The action was tried in equity. Our review is de novo. Iowa R. App. P. 4.

In an order filed on February 16, 1993, pursuant to the parties' stipulation, the district court stated William needed court approval to invade the principal. The trial court entered this order as a result of a settlement of the parties. The parties' agreement had been dictated into the record as a stipulation on November 12, 1992. The rights of William to invade the principal, as set forth in the court's February 16 order, are the same as those agreed upon and dictated into the record. All parties agreed to the settlement.

The general rule is "a litigant cannot complain of error which he has invited or to which he has assented." Knudsen v. Merle Hay Plaza, Inc., 160 N.W.2d 279, 285 (Iowa 1978) (citing Hackman v. Beckwith, 245 Iowa 791, 800, 64 N.W.2d 275, 281 (1954)). In addition our courts favor agreements of settlement where they are shown to be valid. Bergman v. Bergman, 247 Iowa 98, 103, 73 N.W.2d 92, 95 (1955) (citation omitted). The settlement of family controversies, as involved in this case, is encouraged and will not be disturbed for any ordinary mistake either of law or fact. Id. (citation omitted).

The district court did not err in setting forth William's rights to invade the principal. This aspect of

the order was specifically agreed to by all parties and entered into the record on November 12, 1992. We affirm the decision of the district court on this issue.

II. William also claims the probate court should have granted his application to reopen Edna's estate. He filed the application on November 4, 1991. The basis of his application was he was not properly advised of his right to elect against the will, not fully apprised of the proper accounting of the estate, did not knowingly decline to be executor, and funds were due and owing to him. On November 27, 1991, the probate court denied William's application to reopen on the basis the application was not timely filed. William did not appeal the November 1991 decision within the time prescribed by our rules of appellate procedure. Iowa R. App. P. 5(a). He attempts to raise this issue now.

This issue was not raised in the equity action before the probate court in November 1992. The general rule is we will not consider an issue raised for the first time on appeal. Federal Land Bank v. Recker, 460 N.W.2d 480, 482 (Iowa App. 1990) (citation omitted). An issue must ordinarily be presented to and passed upon by the trial court before it can be raised and decided on appeal. Johnston Equip. Corp. v. Industrial Indem., 489 N.W.2d 13, 16 (Iowa 1992) (citation omitted). This issue was not properly preserved for appeal. We do not address this issue.

III. William next contends the probate court should have determined his interest in Edna's estate was a fee simple absolute rather than a life estate. This claim is not a challenge to the district court's 1993 order in the equity action, but a challenge to the distribution of Edna's estate under her will.

William's interest in the estate was conclusively determined in July 1987, at which time the probate court entered an order approving the final report. The 1987 order stated:

> That for the purpose of making distribution in this estate the Executors have assigned the decedent's vendor's interest in the Real Estate Contract described in Paragraph 11 of the Final Report, to the residuary distributees under the Will of the decedent, Ella Judisch, Mardella Buhr, Muriel Roquet, Floyd Buhr, Iva Gaunitz, and Lee Buhr, subject to the life estate of William H. Buhr, with the right to use of the principal such portion thereof as may be necessary to maintain him in health and reasonable comfort. (Emphasis added.)

This order adjudicated William's interest in the property. William did not appeal this order. He attempts to challenge the distribution in this appeal.

We apply Iowa Code section 633.487, which provides:

> No person, having been served with notice of the hearing upon the final report and accounting of a personal representative or having waived such notice, shall, after the entry of the final order approving same and discharging the said personal representative, have any right to contest, in any proceeding, other than by appeal, the correctness of the legality of the inventory, the accounting, distribution, or other acts of the personal representative, or the list of heirs set forth in the final report of the personal representative, provided, however, that nothing contained in this section shall prohibit any action against the

> personal representative and the personal representative's surety under the provisions of Section 633.186 on account of any fraud committed by the personal representative.

In its order approving the final report, the court found William had notice of the hearing on the final report and filed no objections.

This 1987 order was a final order pursuant Iowa Code section 633.36. The section provides:

> All orders and decrees of Court sitting in probate are final decrees as to the parties having notice and those who have appeared without notice.

Iowa Code § 633.36 (1993). William's challenge to the distribution cannot be raised in this appeal. We find no error on behalf of the district court.

IV. Finally, William contends the failure to make a complete accounting of the monies received from the farm contract lies with Lee. William claims Lee took advantage of their confidential relationship and he relied on Lee's advice with respect to the probate actions.

The general rule is we will not consider an issue raised for the first time on appeal. Federal Land Bank, 460 N.W.2d at 482 (citation omitted). An issue must ordinarily be presented to and passed upon by the trial court before it can be raised and decided on appeal. Johnston Equip. Corp., 489 N.W.2d at 16 (citation omitted).

William failed to raise or preserve this issue at the trial court level. He failed to object when terms of stipulation and order approving stipulation were entered in

trial court on November 12, 1992, and February 16, 1992, respectively. We do not address this issue on appeal.

Costs of this appeal are assessed to William Buhr.

**AFFIRMED.**