IN THE COURT OF APPEALS OF IOWA

No. 2-022 / 91-580

FILED
JUN 25 1992
CLERK SUPREME COURT

IN RE THE ESTATE OF JOSEPH L. SULLIVAN, Deceased.

REBECCA WESTRA,

Appellant,

vs.

ESTATE OF JOSEPH L. SULLIVAN, STEVEN SULLIVAN and SEAN SULLIVAN, EXECUTORS,

Appellees.

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Appeal from the Iowa District Court for Polk County, Richard A. Strickler, Judge.

Dr. Westra appeals the district court's affirmance of (1) a declaratory judgment action brought against her by the estate of her partner in dentistry, and (2) the probate referee's ruling denying her claims against the estate. **AFFIRMED AS MODIFIED; REMANDED.**

William W. Garretson, West Des Moines, for appellant.

Christopher R. Pose and Michael W. O'Malley of Connolly, O'Malley, Lillis, Hansen & Olson, Des Moines, for appellee.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ., but decided en banc.

SCHLEGEL, J.

Dr. Rebecca Westra, the former partner of Dr. Joseph L. Sullivan in the practice of dentistry, filed claims against Sullivan's estate, claiming the sum of $5000 plus interest for money loaned and claiming further amounts for disability insurance benefits and premiums claimed by her to be assets of the dental practice. The estate denied those claims and filed counterclaims seeking an accounting of the dental practice and the delivery of certain items to the executor. In addition, the estate filed an action for declaratory judgment to determine the ownership of stock in the building in which the dental practice was located and of certain promissory notes given by the corporation that owned the building.

The probate referee determined the stock and promissory notes were a part of Sullivan's estate. The referee found Westra's claim for $5000 plus interest should be allowed but disallowed the other claims. In addition, the referee concluded Westra was indebted to the estate in the amount of $9010 as an excess amount paid to her during the administration of the estate for one year. Finally, the referee ordered the dental practice turned over to Westra as soon as possible and that at that time there should be an accounting made to determine if further sums were owed the estate by Westra. Sullivan's will made a specific bequest of the dental practice to Westra.

Westra filed motions asking the district court to reject the rulings of the referee and to grant her the relief requested. The district court approved the referee's rulings in toto. Westra has appealed both the ruling on the petition for declaratory judgment and the ruling on her claims and the counterclaims made by the estate.

The claims in probate are actions at law, and our scope of review is for errors of law. Findings of fact by the trial court have the force of a jury verdict, and we are bound by those findings, if they are supported by substantial evidence. The petition for declaratory judgment is also a case at law, and we are bound by the findings in that action, if they are supported by substantial evidence. The estate's request for an accounting, on the other hand, sounds in equity, and as to that part of the estate's counterclaim, our scope of review is de novo.

I.

We first address Westra's claims against the estate. Westra argues she is entitled to judgment against the estate for an unpaid debt of $5000 plus interest. This debt arose by reason of her lending the sum of $7500 to Sullivan. The evidence showed Sullivan had repaid $2500, but there was no evidence to rebut the testimony of Westra that no further amounts had been paid. The referee, and the trial court, found there was an outstanding debt in the

amount of $5000 from Sullivan to Westra and that Westra was entitled to judgment in that amount plus interest at the rate of twelve percent from the date of payment of the $2500. We find there is sufficient evidence to support that finding, and we affirm the court in that respect.

II.

We next address Westra's claims to disability insurance benefits and the refund of a partial premium on malpractice insurance. While Westra made a claim for those items (one in the amount of $719.62 for a disability payment on account of the disability of Sullivan and the other in the amount of $123 on account of a malpractice premium refund), she does not point out error of the court in ruling those sums were payable to the estate, nor does she argue any error by the court in such rulings. We are not compelled to consider matters not raised in argument by the appellant or for which no authority has been cited. Iowa R. App. P. 14(a)(3).

III.

Westra contends that in bringing a counterclaim to obtain possession of certain personal property of Sullivan, the estate has brought a replevin action. She argues such an action cannot be joined with any other action and the effort to join it with the other counterclaims denies the court of jurisdiction to determine the counterclaims.

We find the executor of the estate is empowered to bring actions for the purpose of assembling the property of

the decedent and to recover the same from anyone who wrongfully retains it. Iowa Code § 633.112 (1991). Westra is correct that an action in replevin cannot be joined with any other action. See Iowa Code § 643.2 (1991). Replevin is a summary remedy to obtain immediate possession of property by the issuance of a writ of the court, upon the posting of appropriate bond, with the determination of the ownership thereof to be determined by later hearing. Iowa Code ch. 643 (1991).

None of that procedure was followed here. The estate seeks to obtain personal property it claims does not belong to the dental practice or to Westra. The trial court was correct in ruling the property should be delivered to the estate. The claim to obtain those items was not a replevin action; Westra's arguments to the contrary are without merit. The presence of that claim did not deprive the court of jurisdiction to determine the other issues in the case. We affirm the trial court on this issue.

IV.

We next address the court's ruling in the declaratory judgment action. In this law action, we are bound by the findings of the trial court if they are supported by substantial evidence. Grinnell Mut. Reinsurance Co. v. Voeltz, 431 N.W.2d 783, 785 (Iowa 1988). The trial court found the estate proved the stock and promissory notes concerning the doctor's office building were registered in the name of Sullivan and that there was no evidence of a

transfer of the ownership of those stocks or the notes. Westra offered testimony that Sullivan had told her he was transferring the stock and assigning the notes to her, but she could make no showing that such transfer had in fact occurred. The court held she had failed in her burden to show the stock was transferred to her and ruled the stock and notes were property of the estate. We find the evidence supports the trial court's findings.

V.

Finally, the issue of accounting presents a more difficult problem. On this point, our scope of review is de novo. The accounting is complicated because, in this professional endeavor, the court entered an order for the continuation of the dental practice with Westra as the sole dentist with the sole responsibility to produce income from the practice.

The business called "Joseph L. Sullivan and Associates" was left to Westra. Sullivan's will left her:

> . . . my dental practice, consisting of my equipment, inventory, accounts receivable, furniture and furnishings, subject to any liens, mortgages or assignments, if any, relating thereto, subject to the following conditions:
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> > If there be any Iowa Inheritance tax or Federal Estate Tax due upon said devise unto Becky Westra, that said portion of the tax due on her inheritance shall be payable by her rather than from the general assets of my estate.

At the time the estate was opened, it became necessary to obtain an order releasing certain bank accounts

associated with the dental practice to allow Westra to pay federal and state employment taxes and other operating expenses. This action was necessary because at the death of the testator the executors took possession of all property, real or personal, of the decedent. Iowa Code § 633.351 (1991). At the time of Sullivan's death, there were federal and state employment taxes due in an amount in excess of $5000; the accounts released by the court contained not more than $3000.

The executors sought and obtained an order of the probate referee releasing those accounts to Westra and, in that same order, also provided that the business known as Joseph L. Sullivan and Associates should continue to be operated by Westra. The order further directed she was authorized to deduct from income from the business an amount not to exceed $4000 per month. In addition, it was provided that any sums in excess of the amount of $4000 per month were payable to the estate. Westra testified it was represented to her that the agreement and order were only to free the bank accounts and that they would only be in effect for a short time. No provision was made for the eventuality that the business might not earn a net income. The order remains in effect at this time.

The probate referee later found Westra had not provided the accounting as contemplated in the order. The only items furnished were 1989 and 1990 tax reports on the operation of the business prepared for the estate to attach

to its tax documents. For the period ending May 31, 1989, Westra was paid $45,744. In addition, she returned $11,266 to the dental practice. In 1990 Westra was paid $31,727, and she returned $10,000 to the business. Westra testified the funds were returned to the business in order to attempt to reduce the indebtedness of the business which was causing substantial interest payments.

The estate later agreed to look at her payments on an annual basis to determine whether her net income exceeded $48,000 per year. The probate referee found Westra's net income exceeded $48,000 by $9010 in 1989; she was ordered to pay this amount to the estate. In 1990 Westra received $6273 less than the $48,000; the referee found no significance in this reduction.

To determine the question of the accounting by Westra, we look to the statutory requirements for the administration of estates. First, we look to the authority of the executors to continue the business. Iowa Code section 633.83 provides that "[u]pon a showing of advantage to the estate, the court may authorize the fiduciary to continue any business of the estate for the benefit thereof." That section further states: "The court may on its own motion, and upon the application of any interested party shall, review such authorization, and upon such review, may revoke or modify the same." The title to the dental practice passed to Westra at the time of the death of Dr. Sullivan. In re Estate of Foster, No. 90-1714, slip

op. at 6-7 (Iowa April 15, 1992); Iowa Code § 633.350 (1991).

By virtue of these provisions, Westra became the owner of the "dental practice, consisting of [the] equipment, inventory, accounts receivable, furniture and furnishings, subject to any liens, mortgages or assignments, if any relating thereto" as of the date of Sullivan's death. The requirement she continue the operation of that business and the requirement she pay over to the executors all amounts of any net profit above $48,000 per year effectively transferred to the executors (1) property, in the form of accounts receivable, the title to which transferred to Westra at the time of Sullivan's death, and (2) property that came into being after the death of Sullivan. Under those circumstances, the executors became obligated to account to Westra for all sums paid to them, and to preserve those assets for the payment of only such Iowa inheritance tax and federal estate tax payable by the estate that were attributable to the inheritance received by Westra. Any balance after the payment of those taxes would be payable to Westra as a part of the inheritance of the dental practice.

We find Westra has been used to make money for the estate from an asset that becomes hers. She returned money to the dental practice in order to keep it alive. The estate also wanted the business to continue. Because the title to the business became hers, the fact that she did

not pay over to the estate profits above $48,000 for one year is irrelevant. The estate is not, and has not been, insolvent although its cash position might require the liquidation of some assets for the payment of claims and debts of the estate other than those of the dental practice. The estate would have no authority to collect money from the dental practice for the payment of general obligations of the estate.

Had an appropriate application under Iowa Code sections 633.83 and 633.354 been made on behalf of Westra, the court would have been obligated to revoke or modify the order for continuation of business and order the personal representatives to surrender the personal property to Westra. It would have been appropriate for the court, under those circumstances, to require the posting of bond, by Westra, for the fulfillment of her obligations to pay Iowa inheritance tax and any federal estate tax attributable to her devise. We do not find any reason to require Westra to pay over to the estate any amount over and above $48,000 per year, and we create no requirement for her to make further accounting of the income and expenses of the dental practice. To the extent that the trial court required such matters, we reverse.

On our de novo review, we determine there should be no limit on Westra's salary nor on the amount she may put back in the business. The estate has been unable to deliver the specific bequest to Westra for a long period of time. The

estate is solvent; as noted in the previous section, we find in favor of the estate on the issue of ownership of the dental office building stock. The estate should not receive Westra's excess net income. We modify the referee's determination such that Westra does not owe the estate $9010 for 1989 payments. We order that the dental practice should be transferred to Westra immediately.

The trial court is ordered to set the amount of bond to be deposited by Westra to assure the payment of such Iowa inheritance tax and federal estate tax due because of her inheritance.[1] Upon the deposit of such bond with the clerk of the district court, the district court shall order the dental practice transferred and delivered to Westra. Westra shall continue to be obligated to pay the liens and mortgages or assignments, if any, relating to the dental practice.

VI.

In conclusion, after consideration of all arguments raised, we affirm the award of $5000 plus interest to Westra. We deny her claims to disability insurance benefits and the refund of a partial premium on malpractice

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1. It appears from the probate inventory and preliminary inheritance tax report that the dental practice had a value of $15,000. If that is the accepted value, the Iowa inheritance tax on that value would be $1500. See Iowa Code § 450.10(3) (1991). Based upon the total value of the estate, as reported, there is no federal estate tax due on the estate. A bond in the amount of $1500 would adequately assure the executors of sufficient funds with which to discharge the obligations of Westra to pay taxes.

insurance. We also affirm the declaratory judgment placing ownership of the dental office building stocks and the promissory notes with the estate. Finally, we modify the order on continuation of business such that Westra does not owe the estate for income in excess of $48,000. We remand this matter to the district court, sitting in probate: (1) for the setting of a bond for the delivery of the specific devise of the dental practice under the provisions of article II of the last will and testament of Joseph L. Sullivan, and (2) to order the delivery of that devise upon the deposit of the established bond. Thereupon, the estate shall immediately take steps to turn over the dental practice to Westra upon her deposit of the bond as set by the court.

AFFIRMED AS MODIFIED; REMANDED.

All judges concur except Donielson and Habhab, JJ., who dissent.

DONIELSON, J. (concurring in part and dissenting in part)

I respectfully dissent to one of the majority's holdings. In division V of its opinion, the majority modifies the referee's order, as affirmed by the district court, and holds there should be no requirement Westra pay over to the estate any amount the practice earns in excess of $48,000 per year. The majority also determines that Westra need not pay the estate $9,010, representing the amount the practice's income exceeded $48,000 in 1989.

I disagree. First, Westra agreed to such a limitation on her salary. Second, I would give weight to the referee's factual findings concerning the amount Westra earned in 1989. Accordingly, I would affirm the district court.

Habhab, J., joins this dissent.

HABHAB, J. (dissenting)

I join with Judge Donielson in his dissent.