

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 4 1986

CLERK SUPREME COURT

435

JACKLYN LAVONNE WELDY,

Claimant-Appellee,

vs.

**ESTATE OF DELBERT F. WELDY,
SR.,** Deceased,

ALICE SCHEISS, Executor,

Appellant.

FILED JUNE 4, 1986

6-63
85-365

Appeal from the Iowa District Court for Clinton County, L. D. Carstensen,
Judge.

The executor appeals from an order in probate allowing a claim against
the estate. **AFFIRMED.**

George W. Pillers, Jr., of Pillers, Pillers & Pillers, P.C., Clinton, for
appellant.

Michael S. Bennett, Davenport, for appellee.

Considered by Oxberger, C.J., Donielson, and Hayden, JJ.

HAYDEN, J.

The executor appeals from an order in probate allowing a claim against the estate, asserting: (1) that the claim was untimely and that the court therefore lacked jurisdiction to act upon it; (2) that the court erroneously tried the case as an equitable action; and (3) that the evidence was insufficient to establish the existence of the agreement upon which the claim was based. We affirm.

Delbert F. Weldy, Sr. died in January 1984 and his son was appointed executor of the estate. Notice to creditors was published as required by statute; second publication of notice was on February 15, 1984.

On September 17, 1984 Jacklyn Weldy, who had been married to decedent's son, filed a claim against the estate alleging she had not been paid for housekeeping services performed for decedent. Notice of disallowance of the claim was filed by the executor on September 26, 1984. Claimant filed a trial certificate on November 5, 1984.

At trial to the court, claimant and two of her children testified that decedent had orally agreed to pay claimant fifty dollars per week for housekeeping services. Alice Scheiss, decedent's daughter and the successor executor of the estate, denied the existence of an agreement. She indicated, however, that as a conservator she entered into an agreement with claimant for a six-week period shortly before her father's death. She further testified that decedent had been a chronic alcoholic for the last three years of his life. Various witnesses presented testimony concerning the extent of services claimant performed for decedent and the period of time that she lived in his home during the last three years of his life.

The court allowed the claim in the amount of \$3,850 after deducting \$300 paid under the agreement acknowledged by the executor. The executor has appealed on behalf of the estate.

I.

Appellant argues that the court erred in failing to consider that the claim was untimely. It is contended that the claim is barred by Iowa Code section 633.410, which limits the time of filing to six months after the second notice of publication. Appellant further argues that the request for a hearing was filed eighteen days late and this also should have been considered by the court.

We have reviewed the record and find that error was not preserved on these issues. The case was tried on the merits without any mention of the statutory limitation periods now cited to this court. The executor did raise the untimeliness of the claim after trial in a motion to amend and enlarge the findings. This alone, however, is insufficient to preserve error.

Statutes of limitation have long been considered affirmative defenses which must be raised and proven at trial. See In re Plumb's Estate, 256 Iowa 938, 944 129 N.W.2d 630, 634 (Iowa 1964); Craig v. Craig Estate, 167 Iowa 340, 348, 149 N.W. 454, 457 (1914); Liska v. First National Bank in Sioux City, 310 N.W.2d 531, 535 (Iowa 1981). Appellant's failure to do so precludes consideration of the affirmative defenses on appeal. Liska, 310 N.W.2d at 535.

II.

Pursuant to Iowa Code section 633.33, contested claims are triable in probate as law actions. The executor argues, for the first time on appeal, that the court erred in trying the matter as an equitable action.

We note at the outset that any arguments concerning the nature of the proceedings should have been brought to the attention of the trial court. The failure to move for a correction at the time waives any error in this respect. Iowa Code § 611.12 (1985).

In any event, we find little, if any, support for the executor's contentions. The trial court ruled on objections which is characteristic of a law action.

See Citizens Savings Bank v. Sac City State Bank, 315 N.W.2d 20, 24 (1982).

The relief awarded was not equitable in nature. Finally, the trial court entered an order, not a decree which is more common in an equitable action. Id.

Based on these considerations, we conclude that this is a law action and limit our review of the remaining issue accordingly.

III.

The executor's final allegation of error is that evidence does not support a finding that an oral contract existed for the housekeeping services. It is argued that claimant's services were gratuitous and that the decedent did not have contractual capacity.

Since this is a law action, our review is limited to corrections of errors at law. Iowa R. App. P. 4. The trial court's findings of fact are binding if supported by substantial evidence in the record. Iowa R. App. P. 14(f)(1).

We conclude that the decision of the trial court should be affirmed. Claimant, as well as her children, testified that an oral agreement existed and that by its terms she was entitled to fifty dollars per week for housekeeping services. The mere fact that this evidence is disputed in the record is not a sufficient basis for reversal. The trial court apparently rejected the testimony of Alice Scheiss denying the existence of the agreement. We are not inclined to interfere with this credibility determination.

Further, the executor's claim that decedent did not have contractual capacity is not supported by the record. Evidence indicates decedent had a drinking problem. However, there is no indication that he was intoxicated at the time he entered into the agreement in question. Nor is there any indication that he was unable to appreciate the nature and effect of the agreement. Absent these factors, we do not find decedent lacked the capacity to contract See Snittjer v. Paterni, 181 Iowa 961, 962-63, 165 N.W. 175, 176 (1917).

Finding no error, the decision of the trial court is affirmed.

AFFIRMED.