IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

BEVERLY GRUENBERG HYMAN,)

Plaintiff-Appellant,)

vs)

PEOPLES BANK AND TRUST COMPANY,)

Defendant-Appellee)

Filed June 24, 1987 103

6-537
86-638

Appeal from the Iowa District Court for Linn County (No. 14032) - William R Eads, Judge

Plaintiff appeals from the trial court's granting of summary judgment to the defendant bank **AFFIRMED IN PART, REVERSED IN PART AND REMANDED**

Alfred A Beardmore, Charles City, for plaintiff-appellant.

D G Ribble and Ralph V Harman, Cedar Rapids, for defendant-appellee.

Heard by Donielson, P J , and Hayden, and Sackett, JJ., but decided en banc

SACKETT, J.

In this appeal we address the issue of an executor's personal liability on a note for new consideration given to decedent's widow.

Robert Gruenberg died in 1982 and Defendant *Peoples Bank and Trust Company* qualified as executor of his estate. Plaintiff Beverly Gruenberg Hyman is Robert's widow. After the bank qualified as executor, Beverly made three loans to the bank in the amounts of $40,000, $60,000, and $50,000. In exchange for the loans the bank executed three promissory notes. All three notes were payable to the Beverly Gruenberg Agency and signed in the following manner:

> Peoples Bank and Trust Company,
> Executor of Robert W. Gruenberg Estate
> By /s/ Peter B. Welch
> Peter B. Welch, Trust Officer

Beverly sued Peoples Bank in its corporate capacity on the notes. The bank answered and admitted borrowing the money and executing the notes. However, the bank claimed that because it had executed the notes as executor of Robert's estate the bank had no liability in its corporate capacity. Beverly moved for summary judgment. She claimed the notes were not debts of Robert's but were debts contracted by the bank after Robert's death, therefore, the bank was liable for the debts in its corporate capacity. The bank resisted Beverly's motion and filed its own motion for summary judgment, claiming the notes were signed solely as executor of Robert's estate and the bank had no liability thereon.

Without comment the trial court sustained the bank's motion and overruled Beverly's motion. Beverly appeals contending the court erred in (1) sustaining the bank's motion and (2) overruling her motion.

I. Scope of Review

The principles which govern appellate review of summary judgment are well settled:

> When a trial court is confronted with such [a] motion under [Iowa R. Civ. P. 237], it is required to examine, in the light most favorable to the party opposing the motion, the entire record before it including the pleadings, admissions, depositions, answers to interrogatories and affidavits, if any, to determine for itself whether any genuine issue of a material fact is generated thereby. If, upon this examination, the court determines no such issue is present, and the movant is entitled to judgment as a matter of law, entry of summary judgment is proper.
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> In reviewing the grant or denial of a summary judgment motion this court is guided by the same principles utilized by a trial court in making that determination. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied.

Adam v. Mt. Pleasant Bank & Trust Co., 355 N.W.2d 868, 872 (Iowa 1984) (quoting Drainage District No. 119, Clay County v. Incorporated City of Spencer, 268 N W.2d 493, 499-500 (Iowa 1978)).

II. Executors Individual Responsibility For Notes Given During Administration

Beverly contends the trial court erred because an executor may be sued individually on a promissory note given for new and independent consideration. The bank contends the trial court was correct because Robert's will gave it power to borrow and the Uniform Commercial Code establishes its only responsibility on the notes was as executor.

A. Executor's Authority To Borrow

Historically, the Iowa courts have clearly established an executor or administrator cannot, in the absence of authority given by the will of the decedent or by statute, make an executory contract binding on the estate he or she represents. Cohen v. Hayden, 180 Iowa 232, 241-42, 157 N.W. 217, 219 (1917). If an executor assumes to make an executory contract on new and independent consideration, it is his or her personal obligation and he or she is bound thereby, even though the debt was incurred for the benefit of the estate. Id. An executor

or administrator is not an agent in the sense that, under any pretext, he or she may escape personal liability on contracts entered into by him or her on behalf of the estate which he or she represents. Young Men's Christian Association v Caward, 213 Iowa 408, 413, 239 N.W. 41, 43 (1931); Rickel, Crocker & Christy v Chicago, Rock Island & Pacific Railroad, 112 Iowa 148, 152, 83 N.W. 957, 958 (1900); Winter v. Hite, 3 Iowa (Clarke) 142, 143-44 (1856). An executor or administrator is without inherent authority to impose liability on the estate by giving a note. 33 C.J.S. Executors and Administrators §203 at 1187 (1942).

Peoples Bank did not receive court approval to borrow the money from Beverly. Iowa does not provide statutorily for an executor to borrow money without court approval. Therefore, the first question is whether the power to borrow money and bind the estate can be given by decedent's will.

While Iowa has not specifically addressed this issue, courts in other jurisdictions generally have held power to bind the estate by giving a note may be conferred by the terms of the will. See Carre v. Seaman, 38 Del. 197, 190 A 564 (1937); Central Hanover Bank & Trust Co. v. Wheeler, 178 Ga. 498, 173 S E. 431, 433, (1934). Additionally, the Iowa Supreme Court has suggested a different result may be reached where authority has been given in the will. See Cohen, 180 Iowa at 241, 157 N.W. at 219. We determine the power to bind the estate on a promissory note can be given by will.

Furthermore, such a result would be in accord with modern conditions. We have seen the courts departing from early decisions in which administration of estates was relatively passive and the primary concern of the courts appeared to be the protection of beneficiaries from the acts of reckless and improvident fiduciaries. Today it is recognized that administration of a decedent's estate may be active as well as passive. See Annotation, Estate's Liability for Tort

of Executor, 82 A.L.R.3d 892, 898 (1978). Additionally, Iowa Code §633.265 (1987) provides:

> When the interests of creditors will not thereby be prejudiced, a testator may prescribe the entire manner in which the testator's estate shall be administered, and, also, the manner in which the testator's affairs shall be conducted until the testator's estate is finally settled.

Section 633.265 indicates a legislative intent to allow a decedent to give directions in his or her will on the administration of his or her estate.

B. Executor's Power Under Decedent's Will

The next issue is whether this court can determine as a matter of law the decedent gave the bank authority to borrow money from Beverly. Decedent's will basically bequeathed certain personal effects to Beverly and established several trusts. It bequeathed the remainder of the assets to defendant Peoples Bank. The provisions of the will applicable to these issues are set out below

> I grant to my trustee all powers necessary for the proper administration of each trust created by this Will which shall be in addition to those powers provided by the Iowa Probate Code.
>
> ***
>
> In extension but not in limitation of any power otherwise possessed by my trustee, I grant to it without the necessity of notice to or approval of any Court or person, the following powers:
>
> ***
>
> To continue any farming operation which may be acquired by the trust, to operate any farm with hired labor, tenants, or sharecroppers and to employ agents; to lease any farm for cash or a share of the crops; to acquire farm machinery, equipment, and livestock; to construct and improve buildings; to make or obtain loans at the prevailing rate of interest; to employ conservation practices; to manage any timber; in general, to perform such acts as my trustee deems appropriate using such methods as are commonly employed by other farm owners in the community in which the farm property is located.
>
> ***
>
> I nominate Peoples Bank and Trust Company as executor and I grant to my executor all powers granted to my

> trustee, all of which shall be in addition to and not in limitation of those which my executor otherwise would possess.

The inquiry does not end with reviewing the language of the will. The question of whether the bank had the authority to borrow the money is a question of intent to be determined by consideration of the language used in the instrument and the circumstances under which it was executed and accepted. Feaster v Fagan, 135 Iowa 633, 636, 113 N.W. 479, 480 (1907). Decedent had reason to assume in naming the bank as executor and in delegating to the bank certain authority that the bank would assume the standard of care generally applicable to executors, that is, a degree of prudence and diligence which a person of ordinary judgment would be expected to bestow upon his own affairs of a like nature. See Matter of Estate of Wiese, 257 N.W.2d 1, 6 (Iowa 1977). Also, as a bank normally engaged in a fiduciary capacity, the decedent had the right to assume Peoples Bank would exercise the skill and knowledge ordinarily possessed by such professionals. Id.

We are not dealing with a loan made by a commercial lender who would have had the expertise to protect and secure their loan. The money was borrowed from decedent's widow, the very person decedent obviously sought to protect in naming as executor, Peoples Bank and Trust Company, an institution with skill and knowledge in money management.

Viewing the evidence in the light most favorable to Beverly, we find there has been a factual issue raised about whether the bank had power under decedent's will to borrow $150,000 from his widow. We cannot find as a matter of law the bank's borrowing from Beverly was either authorized or in accordance with decedent's directives.

C. Applicability Of UCC

Finally, we consider the bank's argument this case is controlled by the Uniform Commercial Code. Iowa Code §554.3403(3) (1985) provides ". . . the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity." The bank contends each of the three notes strictly complied with §554.3403(3). By reason thereof the bank argues its signatures were made solely in a representative capacity and the bank has no personal liability thereon.

Iowa Code §554.3401(1) (1985) provides "[n]o person is liable on an instrument unless his signature appears thereon." The word "person" includes a corporation. Iowa Code §554.1201(28)(30) (1985). The bank argues that since its signature does not appear on any of the notes it is not liable thereon.

Although Iowa has not addressed the issue, the authorities in other jurisdictions disagree with defendant's argument. The Delaware court held that Uniform Negotiable Instruments law does not change the common law rule that an executor cannot bind the decedent's estate by making negotiable instruments. Carre, 38 Del. at 205, 190 A. at 564. The Negotiable Instrument Law provides that, where an instrument contains words indicating it was signed in a representative capacity, the party so signing is not personally liable on the instrument if he was duly authorized. See Hellawell v. Garrett Busch & Sons, 157 Misc. 805, 807, 285 N.Y.S. 717, 719 (1936); Wright v. Morris, 50 Ga. App. 196, 177 S.E. 365, 366 (1934); First National Bank of Salem v. Jacobs, 85 W.Va. 653, 102 S.E. 491, 493 (1920). It is determined such provisions are not intended to exempt from personal liability an executor who executes a note without authority. State National Bank of Bonham v. Hester, 1 S.W.2d 915, 916 (Texas 1928).

We do not find the record shows as a matter of law the bank had authority to execute the notes We reject the bank's argument the issues are determined by the Uniform Commercial Code We affirm the trial court's refusal to grant Beverly a summary judgment We reverse the summary judgment granted to Peoples Bank and remand to the trial court

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

All judges concur except Sneil, J , and Oxberger, C J , who dissent.

SNELL, J. (dissenting)

Appellee, People's Bank & Trust Company, is the acting executor of the estate of Robert W. Gruenberg. Appellee's qualifications for that position are not questioned by any party to this appeal. Appellee borrowed money from Robert's widow, appellant, Beverly Gruenberg, on three occasions: November 30, 1982, December 28, 1982, and May 5, 1983. The total amount borrowed was $150,000.00. Each of the loans was evidenced by a separate promissory note, payable on demand. On January 6, 1986, appellant filed a petition seeking to recover from appellee, in its individual corporate capacity, the amount due on the notes. On February 7, 1986, appellant filed her motion for summary judgment. Appellee resisted the motion and, on April 16, 1986, filed its summary judgment motion. Following a hearing, the district court denied appellant's motion and granted appellee's motion. This appeal followed.

I.

Gruenberg contends that People's Bank & Trust is liable in its individual capacity on the notes. This, she contends, is because a contract of an executor made on new and independent consideration moving between the executor and its promisee is the personal contract of the executor, although made in the interest, and for the benefit, of the estate. See 34 C.J.S., Executors and Administrators, § 715(b) at p. 700 (1942). Accordingly, argues Gruenberg, People's Bank & Trust may, and in fact must, be sued in its individual capacity. See id. People's Bank & Trust prefaces its argument by pointing to the signatures entered on the promissory notes. The second and third notes were signed by People's Bank & Trust in the following manner:

> Peoples Bank and Trust Company
> Executor of Robert W. Gruenberg Estate
> By Peter B. Welch
> Peter B. Welch, Trust Officer

The initial note was signed in the identical manner as the second and third notes, except that Peter B. Welch was designated as the "Assistant Trust Officer." In its motion for summary judgment, People's Bank & Trust maintained that this method of signature, when seen in light of both Iowa Code section 554.3403 (1985) and the power given by decedent's will, establishes as a matter of law that they are not personally liable on the notes. The district court granted appellee's summary judgment motion "for the reasons and on the basis set forth" both in that motion and in appellee's earlier resistance to Gruenberg's motion. Gruenberg maintains the district court erred both by denying her motion and by granting appellee's motion.

The purpose of a summary judgment is to avoid a trial where no genuine issue of material fact exists. Neoco, Inc. v. Christenson, 312 N.W.2d 559, 560 (Iowa 1981). In reviewing the grant of summary judgment under Iowa Rule of Civil Procedure 237, the question is whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. Suss v. Schammel, 375 N.W.2d 252, 254 (Iowa 1985); Brown v. Monticello State Bank of Monticello, 360 N.W.2d 81, 83-84 (Iowa 1984). We examine the record in a light most favorable to the party opposing the motion for summary judgment to determine if movant met his or her burden. Matherly v. Hanson, 359 N.W.2d 450, 453 (Iowa 1984).

II.

Gruenberg claims the promissory notes bound not the estate but, rather, People's Bank & Trust individually. The cases firmly establish that an executor cannot, in the absence of authority given by the will of the decedent or by statute, make an executory contract binding on the estate he represents. Cohen v. Hayden, 180 Iowa 232, 241, 157 N.W. 217, 219 (1917); Peoria Steam Marble Works v. Hickey, 110 Iowa 276, 278-79, 81 N.W. 473, 474 (1900); see also 31

Am. Jur. 2d Executors and Administrators, § 164, at p. 95 (1967); 31 Am. Jur. 2d Executors and Administrators, § 174, at pp. 100-01 (1967). If the executor assumes to make such a contract on new and independent consideration, it becomes the executor's personal obligation and he or she is bound thereby even though the debt was incurred for the benefit of the estate. E.g., Cohen, 180 Iowa at 242-43, 157 N.W. at 219. These decisions stand as particular applications of the general rule that an executor is without inherent authority to impose liability on the estate he or she represents by giving a note. See 33 C.J.S. Executors and Administrators § 203 at 1187 (1942). In delineating the executor's authority, however, the cases employ the qualifying phrase "in the absence of authority given by the will of the decedent." E.g., Cohen, 180 Iowa at 241, 157 N.W. at 219. Accordingly, in situations in which a will grants such authority to the executor, the executor, when acting in that capacity, can bind the estate contractually by giving a note. Although our state apparently has never decided this precise point, such a result is consistent with reasoning and holdings reached by other states. E.g., Carre v. Seaman, 38 Del. 197, 205, 190 A. 564, 567 (1937); Central Hanover Bank & Trust Co. v. Wheeler, 178 Ga. 498, 500-02, 173 S.E. 431, 433 (1934); Harris v. Woodward, 133 Ga. 104, 108, 65 S.E. 250, 252 (1909); Prieto v. Leonardo, 32 Tex. Civ. App. 205, 208-10, 74 S.W. 41, 42-43 (1903); see also New Martinsville Bank v. Burlingame, 116 W. Va. 122, 125-26, 178 S.E. 690, 691-92 (1935); 31 Am. Jur. 2d Executors and Administrators, § 174 at 100-01 (1967). In addition, this principle is consistent with Iowa Code section 633.265 (1987) which states that

> when the interests of creditors will not thereby be prejudiced, a testator may prescribe the entire manner in which the testator's estate shall be administered, and, also, the manner in which the testator's affairs shall be conducted until the testator's estate is finally settled.

In the present case, Peoples Bank & Trust was executor of the estate and, as such, according to the will it possessed all powers granted by the will to the estate's trustee. That trustee was also People's Bank & Trust. These powers include the power granted by Article X, paragraph 1, "[t]o . . . borrow . . . for terms within or extending beyond the term of any trust," and the power granted by Article X, paragraph 7, "to make or obtain loans at the prevailing rate of interest." The will explicitly provided that these powers could be exercised by the trustee "without the necessity of notice to or approval of any Court or person . . . ." In addition, the will expressly provides that, as executor, "Peoples Bank and Trust Company shall [not] be liable for acts . . . in which [it] did not concur." I would hold that these provisions of the will authorized the bank to bind the estate by giving the notes.

The general principles relied upon by the appellant merely stand for the proposition that the law of agency does not apply to cases such as the present one. See Young Men's Christian Association, 213 Iowa 408, 412, 239 N.W. 41, 43 (1931); Winter v. Hite, 3 Iowa 142, 143-44 (1856) ("[a] trustee, guardian or executor is not the agent or hand of the court concerning those contracts that he has no authority to make, ..." (emphasis added)). Agency is, of course, the law of derivative authority, 3 Am. Jur. 2d, Agency, §§ 1-2 (1962), and in the context of the executor of an estate there is obviously no "principle" from which to derive that authority. See Winter, 3 Iowa at 143-44; see also Cohen, 180 Iowa at 241-43, 157 N.W. at 219-20, and cases cited therein. In the present case, however, the pertinent authority was granted expressly by the will and did not derive, nor was it claimed to have derived, from a principle-agent relationship. Accordingly, the fact that Peoples Bank & Trust was not an "agent" of the estate as stated by these cases is neither here nor there.

III.

People's Bank & Trust signed the notes as "Executor of the Robert W. Gruenberg Estate." It is immediately apparent that those cases which find such signatures *insufficient* to bind the estate are inapposite to the present question, as those are not cases in which the executor *acted under express* testamentary authority. See Young Men's Christian Association v. Caward, 213 Iowa 408, 409, 412-13, 239 N.W. 41, 43 (1931); Dunne v. Deery, 40 Iowa 251, 252 (1875). Accordingly, those cases stand for the proposition that such signatures standing alone and without the backdrop of testamentary authority *do not affect* a binding liability as against the state. Here again the law of agency does not apply to executors of estates. Cf. Grismore v. Consolidated Products, 232 Iowa 328, 335, 5 N.W.2d 646, 651 (1942) (no liability on principal for acts of agent beyond agent's authority). As People's Bank & Trust was expressly granted such authority, however, those cases are both factually and legally distinguishable. Because in this case People's Bank & Trust both executed the notes as "Executor of the Robert W. Gruenberg Estate" and possessed the authority to do so, I would hold, as a matter of law, that People's Bank & Trust is not personally liable on the notes. Cf. Feaster v. Fagan, 135 Iowa 633, 636, 113 N.W. 479, 481 (1907) (where executor's authority to act is granted by will, executor's signature as "executor of estate" indicates the action was taken in executor's representative capacity).

Moreover, this decision need not be based on the cases alone, as I think the district court's summary judgment is correct on statutory grounds also. Article Three of the Iowa Uniform Commercial Code provides the statutory law governing commercial paper. Iowa Code §§ 554.3101-554.3805 (1987). The notes at issue here clearly come within the ambit of its provisions regarding negotiable instruments. Iowa Code § 554.3104 (1987). Section 554.3403 of

that Article provides that

> (1) A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation. No particular form of appointment is necessary to establish such authority.
>
> (2) An authorized representative who signs his own name to an instrument
>
> > (a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;
> >
> > (b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.
>
> (3) Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.

An estate is an "organization" within subsection (3) of the above-quoted section. Iowa Code § 554.1201(28) (1987). An executor of an estate is a "representative" within this section. Iowa Code § 554.1201(35) (1987). The undisputed facts as disclosed in Part II above establish that People's Bank & Trust was authorized to make the notes. As a result, pursuant to Iowa Code § 554.3403(3) (1987), the notes at issue here were signed by People's Bank & Trust in its capacity as representative of the estate. This is true as a matter of law. They accordingly can be sued in that capacity only. The district court's grant of summary judgment to the bank was correct.

IV.

The majority cites Feaster v. Fagan, 135 Iowa 633, 636, 113 N.W. 479, 480 (1907), and Feaster alone, for the following legal proposition:

> The question of whether the bank had the authority to borrow the money is a question of intent to be determined by consideration of the language used in the instrument and the circumstances under which it was executed and accepted.

I do not find this proposition implicitly, impliedly, or directly contained in Feaster. The case does contain, however, the following language:

> When an executor authorized by will to make a conveyance has also an individual interest in the property, as devisee or otherwise, the question whether a conveyance by such person is an exercise of the power to convey given in the will, or the exercise only of the right to pass such person's individual interest, is a question of intent to be determined by consideration of the language used in the instrument and the circumstances under which it was executed and accepted.

Id., 135 Iowa at 635-36, 113 N.W. at 481.

The issue of whether an executor possessed the authority to take a particular action on behalf of the estate, the question in the case at bar, was simply not present in Feaster. It was assumed in Feaster that the executor possessed the authority to convey certain property. The issue in that case was whether the executor had exercised that authority in making the conveyance. In the present case, however, the majority applies Feaster to the issue that necessarily precedes that dealt with in Feaster: Whether the bank possessed the authority at all. The majority's unfortunate adoption of inapposite case language results in the bank being forced to prove facts not required by the pertinent law. Specifically the majority holds that, notwithstanding the express testamentary provisions which grant the bank authority to borrow money, that authority is also somehow contingent upon the decedent's presumed intent with respect to the wisdom of each such transaction. As the majority puts it:

> [A]s a bank normally engaged in a fiduciary capacity, the decedent had the right to assume Peoples Bank would exercise the skill and knowledge ordinarily possessed by such professionals.

It appears that the majority confuses this case with those brought pursuant to Iowa Code section 633.160 (1987). That section provides as follows:

> Every fiduciary shall be liable and chargeable in the fiduciary's accounts for neglect or unreasonable delay in collecting the credits or other assets of the estate or in selling, mortgaging or leasing the property of the estate; for neglect in paying over money or

> delivering property of the estate the fiduciary shall have in the fiduciary's hands; for failure to account for or to close the estate within the time provided by this Code; for any loss to the estate arising from the fiduciary's embezzlement or commingling of the assets of the estate with other property; for loss to the estate through self-dealing; for any loss to the estate arising from wrongful acts or omissions of any cofiduciaries which the fiduciary could have prevented by the exercise of ordinary care; and for any other negligent or willful act or nonfeasance in the fiduciary's administration of the estate by which loss to the estate arises.

(emphasis added). See generally In re Matter of Wiese's Estate, 257 N.W. 21 (Iowa 1977); Klein's Estate v. Ware, 229 N.W.2d 753 (Iowa 1975). This case, however, was not brought under that section. Nor has the plaintiff at any time accused the bank of mismanagement of the estate. The issue we have been asked to resolve is limited to the proper capacity in which the plaintiff may sue the bank in order to recover on three promissory notes. No party claims the will's provisions are ambiguous; the decedent's intent is consequently not pertinent to our interpretation of those provisions. Cf. Matter of Estate of Eickholt, 365 N.W.2d 44, 46 (Iowa App. 1985) (testator's intent is polestar to construction of will and extrinsic evidence is inadmissible to disprove intent as expressed in language of will). The majority holds that the question whether People's Bank and Trust acted in accordance with the decedent's intent, and therefore possessed the authority to borrow money, remains as a triable issue. However, the propriety of the bank's management practices was at no time an issue in this case prior to its arrival at this court. The issue was neither pled by the parties, joined as an issue on the motions for summary judgment, presented to the district court, decided by the district court, nor presented by either appellate brief. This court today reaches out gratuitously to integrate it into this appeal. Taking action on our own motion, as the majority does in this case, has proven unfortunate in the past, see In re Marriage of Frederici, 338 N.W.2d 156, 159 (Iowa 1983).

My review of the record leads me to conclude that there is no genuine issue of material fact generated and that People's Bank & Trust is entitled to judgment as a matter of law. I would affirm the district court.

Oxberger, C.J., joins this dissent.