IN THE COURT OF APPEALS OF IOWA

No. 1-175 / 00-0790
Filed April 27, 2001

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CLERK SUPREME COURT

IN THE MATTER OF THE ESTATE OF LINDA MAE GREENSLADE-DIRKES,
Deceased,

LAWRENCE DIRKES, Surviving Spouse,
Appellant,

vs.

TERRI NORBURG, Co-Executor and Beneficiary of the Estate of Linda Mae Greenslade-Dirkes,
Appellee.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister, Judge.

Lawrence Dirkes appeals a district court ruling denying his claim against his deceased wife's estate for a share of wrongful death benefits based on loss of financial support and spousal consortium. **AFFIRMED.**

Robert J. Hearity of Hearity Law Firm, Waterloo, for appellant.

Bruce L. Braley of Dutton, Braun, Staack, Hellman, Waterloo, for Terri-Lynn Norburg.

John C. Larsen of Redfern, Mason, Dieter, Larsen & Moore, Cedar Falls, for the estate of Linda Mae Greenslade-Dirkes .

Heard by Vogel, P.J., and Zimmer and Hecht, JJ.

VOGEL, P.J.

Lawrence Dirkes appeals from a district court ruling that found he waived any right to the wrongful death settlement recovered by his deceased wife's estate. Because we find Dirkes did voluntarily and intentionally waive his right to any share of the settlement proceeds apportioned to his claims for loss of financial support and spousal consortium, we affirm the district court.

Background Facts and Proceedings. Lawrence Dirkes is the surviving spouse of Linda May Greenslade-Dirkes, who died less than two months after the couple married. Teri-Lynn Greenslade-Norburg (Norburg), Greenslade-Dirkes' daughter and co-executor of her estate, was the sole beneficiary under the will. Dirkes' marital property rights were addressed by an antenuptial agreement the couple entered into the day before their marriage.[1]

One of the actions pursued by Greenslade-Dirkes' estate was filing a malpractice lawsuit for wrongful death, loss of spousal consortium and loss of parental consortium. Dirkes did not participate in the decision to the file the suit, and his role in the resulting litigation was minimal, limited to interrogatory answers and deposition testimony. He did receive copies of some materials, including the petition, and pertinent correspondence.

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[1] In the agreement each waived any interest in the other's property, and each agreed to make to the other a $50,000 testamentary bequest. It also provided that Dirkes would become a joint tenant with right of survivorship in Greenslade-Dirkes' home, and would in turn transfer to her $25,000. Upon his wife's death Dirkes received the proceeds of a $50,000 life insurance policy, succeeded to the marital home, and received the proceeds of a survivor pension. He also successfully pursued a claim against the estate for satisfaction of the $50,000 antenuptial bequest.

On multiple occasions prior to and during the pendency of the lawsuit, Dirkes told Norburg he had no desire to be included in the suit or to file an independent spousal consortium claim against the doctor and hospital,[2] and that he had no interest in receiving any of the settlement proceeds. Several months into the litigation Dirkes and Norburg received a letter from Max Kirk, the attorney the executors hired to pursue the malpractice lawsuit. The letter referenced an attached assessment of economic loss, and specifically noted:

> In addition to these numbers would come the loss of consortium for each of you respectively as surviving spouse and surviving child. The loss of consortium claims are the non-economic loss of love, support, guidance services that each of you would have been able to expect from Mrs. Dirkes but for her death.

Kirk also explained to Dirkes the claims contained in the lawsuit, including the spousal consortium claim, on at least two occasions.

The estate successfully settled the malpractice action and prepared to file an application for court authorization to compromise the lawsuit and for court apportionment of the settlement funds to Norburg only. Kirk sent a copy of the application to Dirkes along with a request that he certify his consent to the settlement and disbursement. The accompanying letter conveyed Kirk's understanding, garnered from conversations with Norburg, that Dirkes wished Norburg to retain all settlement proceeds. Upon receipt of the letter, application and request Dirkes contacted two different attorneys – Leroy Redfern and Terry Parsons – before retaining Jim Sheerer.

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[2] Although a consortium claim belongs to the surviving spouse, normally only the executor of the decedent's estate can bring such a claim. *See* Iowa Code § 613.15 (1999); *Fort Madison Bank & Trust Co. v. Farm Bureau Mut. Ins. Co.*, 543 N.W.2d 591, 595 (Iowa 1996).

Dirkes contacted Sheerer out of concerns the executors might contest his receipt of certain death benefits that had passed to him outside of the estate. Sheerer then communicated a compromise offer to Kirk, which Kirk forwarded to the executors via letter:

> I recently spoke with the attorney for Larry Dirkes who advises that Larry is concerned that the estate may try to recover from him the insurance he received upon Linda's death as well as the survivor pension he receives as a result of the death. The pension is in the approximate amount of $200.00 per month. I was really quite surprised by Larry's concern on these matters. The consequence is that he will sign the waiver of any right to receive a disbursement from the wrongful death settlement provided he can obtain a release from each of you individually as co-executors of Linda's estate.

Both executors signed the requested release.

Rather than receiving the promised written waiver by Dirkes, Kirk received a letter from attorney Gary Shea. The letter stated that Shea now represented Dirkes, and forwarded Dirkes' demand for one-fourth of the settlement proceeds in satisfaction of his spousal consortium claim. The estate then filed an application for authorization to compromise and for apportionment that acknowledged Dirkes' desire to present a claim for a share of the proceeds. Upon hearing the district court apportioned Dirkes a share of the settlement for loss of financial support and spousal consortium, but found he had waived his right to that share. It is from this ruling Dirkes appeals.

Scope of Review. Apportionment of a wrongful death settlement in probate is a proceeding in equity. *See* Iowa Code §§ 633.33 & 633.336 (1999). As such, our review is de novo. *In re Estate of Gearhart*, 584 N.W.2d 327, 329 (Iowa 1998). Although we are not bound by the district court's findings of fact, we do

give weight to such findings, especially those involving the credibility of witnesses. *See* Iowa R. App. P. 14(f)(7). We are not bound by the district court's conclusions of law. *Gearhart*, 584 N.W.2d at 329.

Waiver of Right to Award or Settlement Proceeds. Waiver is the voluntary or intentional relinquishment of a known right. *Scheetz v. IMT Ins. Co. (Mut.),* 324 N.W.2d 302, 304 (Iowa 1982) (quoting *Travelers Indem. Co. v. Fields*, 317 N.W.2d 176, 186 (Iowa 1982)). To prove Dirkes waived his right to a share of the settlement, the estate must show that a right to a portion of the proceeds existed, that Dirkes had actual or constructive knowledge of his right to a share of the proceeds, and that he intended to relinquish that right. *See id.* Waiver can be expressly demonstrated by affirmative acts, or inferred from relevant behavior, facts and circumstances. *Id.* Waiver is distinguishable from estoppel, in that only the latter requires proof of misleading conduct. *In re Property Seized from Sykes*, 497 N.W.2d 829, 832 (Iowa 1993).

There is no dispute that Dirkes had a claim for spousal consortium, that the malpractice suit advanced his claim, and that as a result he did have a right to a portion of the settlement proceeds. He does dispute he had any knowledge of that right, claiming he had no comprehension of the specific claims being made in the lawsuit. While admitting he had seen a copy of the petition some time after its filing, he states he "never really read it." He does not dispute he received the letter from Kirk referencing his consortium claim, but maintains he also failed to read that. Dirkes admits Kirk explained the consortium claims to him around the time of his deposition testimony, but contends he didn't

understand this explanation. He professes that, having disavowed any interest in a claim against the doctor or hospital, he assumed Kirk was referring only to Norburg's consortium claim.

Dirkes' receipt of several verbal and written confirmations of his claims is powerful evidence he knew of his right to share in any award or settlement of the malpractice lawsuit. Although he alleges no actual knowledge as he failed to read or understand these communications, this assertion finds its sole support in Dirkes' own testimony. The district court did not find his testimony credible and, in light of the numerous times Dirkes was provided with information on his claims, we defer to that assessment. Moreover, Dirkes' actual knowledge is irrelevant in light of the fact that Dirkes should have been, and a reasonable person of ordinary intelligence would have been, on notice of the fact the estate was pursuing his claim. *See Scheetz*, 324 N.W.2d at 304 (finding constructive knowledge of a right to be sufficient).

Dirkes also claims he never intended to waive his right to a share of the proceeds. He contends that when he told Norburg he had no interest in the settlement proceeds, he only intended to refer to any proceeds that would rightfully belong to Norburg. He also maintains that any statement he made regarding a willingness to waive his claim to the proceeds was only meant to refer to proceeds rightfully belonging to the estate. He acknowledges he never specifically stated he was reserving his right to claim a share based on loss of spousal consortium, but blames the failure on the fact he "wasn't knowledgeable enough at the time to make . . . that distinction." While unable to contradict the

fact Sheerer made an offer of waiver on his behalf, Dirkes denies he ever gave Sheerer permission to make such an offer or even communicate with Kirk.

As with Dirkes' knowledge of his right to a share of the settlement proceeds, crucial to the question of his intent are the district court's credibility assessments. Once again, the court found that Dirkes' assertions were simply "not believable." We concur, and note that intentional waiver is further demonstrated by the surrounding facts and circumstances.

Dirkes' general lack of interest in the malpractice lawsuit or the potential for an independent claim indicates he had no desire to recover funds from the suit. He made generic, blanket statements to the effect that he wished Norburg to receive all the settlement proceeds, and made absolutely no effort to distinguish between the shares due on the various claims. With the alleged exception of Dirkes himself, it was the clear understanding of all involved that he had no intention to claim a share of the settlement proceeds. Given all the foregoing, the weight of the evidence supports a finding that Dirkes intended to waive his right to a share of the settlement.

We find Dirkes voluntarily and intentionally waived his right to any portion of the settlement proceeds arising from the malpractice lawsuit instigated by Greenslade-Dirkes' estate. According, we affirm the ruling of the district court.

AFFIRMED.