IN THE COURT OF APPEALS OF IOWA

No. 1999-54 (9-209) / 98-1379
Filed October 15, 1999

IN THE MATTER OF THE ESTATE OF DONALD FRANKLIN ATKINSON, Deceased,

MARY JO ATKINSON,

Appellant,

vs.

JERRY ATKINSON, Administrator of the Estate of Donald Franklin Atkinson, Deceased,

Appellee.

Appeal from the Iowa District Court for Polk County, Ruth B. Klotz, Associate Probate Judge.

Mary Jo Atkinson appeals a probate court ruling denying her claim for fifty percent of the decedent's estate. **AFFIRMED.**

Eric Borseth of Borseth & Genest, Pleasant Hill, for appellant.

Jeanne K. Johnson and William A. Price, Des Moines, for appellee.

Considered by Streit P.J., and Mahan, and Zimmer, JJ.

ZIMMER, J.

Mary Jo Atkinson appeals a probate court ruling denying her claim for a one-half interest in certain real property in the decedent's estate. Mary Jo argues that Donald Atkinson's estate will be unjustly enriched if she is denied a share of the home that she and Donald occupied for twenty-five years during their relationship. We find substantial evidence supports the probate court's conclusions to the contrary and we affirm.

Donald Atkinson died intestate in October 1997. Donald had married Rose Atkinson in 1939. They had two children, Jerry and Diane. Donald and Rose separated in 1964 but never filed for divorce. Donald began living with Mary Jo Atkinson in August of 1966. At that time, Donald informed Mary Jo that he was in the process of filing for divorce. He later told her that his divorce was completed. Donald and Mary Jo exchanged rings, but never conducted a formal wedding ceremony.

In 1972, Donald purchased a home on contract in his name only. This house is the real estate at issue here. All contract payments came from Donald's account. The house was paid off in 1996 and a warranty deed was issued in satisfaction of the contract, again in Donald's name only.

After the purchase of the home, Mary Jo began using Atkinson as her last name on social security cards, work records, and income tax returns. The two filed joint returns from 1972 until Donald's death. Donald had little contact with his children or Rose during the course of his cohabitation with Mary Jo. After Donald had a stroke in 1993, he informed Mary Jo that he had not divorced Rose. Mary Jo did nothing about this revelation before Donald's death in 1997.

After Donald's death, Mary Jo petitioned for administration of his estate. Donald's son, Jerry, was named administrator. Mary Jo filed a claim against the estate, seeking a fifty percent interest in the home and reimbursement for improvements to the property that she paid for in 1982. The probate court ruled that Mary Jo likely could have established a common law marriage, were it not for the fact that Donald did not divorce Rose. The court also concluded that Mary Jo had failed to establish an interest in the home through unjust enrichment or a claim for reimbursement because she did not produce evidence of specific contributions to the acquisition or maintenance of the real estate, with two exceptions. The probate court did award Mary Jo $2,500 for her contribution to improvements to the home in 1982 and $470.00 for her payment of real estate taxes after Donald's death. Neither Mary Jo nor the estate appeal these awa ds. Mary Jo's sole argument on appeal involves the denial of her claim for a fifty percent interest in the real estate.

I. Scope of Review. Probate proceedings concerning contested claims are tried as law actions. Iowa Code § 633.33; *Matter of Estate of Buss,* 577 N.W.2d 860, 861 (Iowa App. 1998). Consideration of unjust enrichment and reference to equitable principles in contested claims do not alter their status as a law actions. *In re Filt's Estate*, 40 N.W.2d 286, 288 (Iowa 1949). Our review is accordingly for correction of errors. *See* Iowa R.App.P. 4; *Matter of Estate of Atwood,* 577 N.W.2d 60,62 (Iowa

App. 1998). We will affirm if substantial evidence supports the district court's findings. Iowa R.App.P. 14(f)(1).

II. Denial of 50% Interest in the Real Estate. Mary Jo contends she acquired an interest in the real estate either through unjust enrichment or implied contract.

A. Unjust Enrichment. Mary Jo argues Rose, who stands to inherit the house under the laws of intestate succession, will be the beneficiary of twenty-five years worth of Mary Jo's labor, investment, and maintenance. Because she and Donald lived together in the home, shared expenses, and took care of each other, Mary Jo asserts an entitlement to a fifty percent share of the real estate. The estate responds by arguing Mary Jo failed to present documentary evidence of her contributions to the acquisition of the property or its increase in value. Alternatively, the estate argues any 'enrichment' is offset by the equal benefit to Mary Jo from her living arrangement with Donald.

The doctrine of unjust enrichment embodies the equitable principle that one should not be permitted to unjustly enrich himself or herself at the expense of another or to receive property or benefits without making compensation therefor. *Slocum v. Hammond*, 346 N.W.2d 485, 491 (Iowa 1984) (citations omitted). The doctrine does not vest courts "with a roving mandate to sort through terminated personal

[1]Mary Jo does not base her claim on the existence of a common law marriage, nor could she. Iowa Code § 595.19(2) (1997) ("Marriages between persons either of whom has a husband or wife living are void, ..."); *Ellis v. Ellis*, 13 N.W. 65, 66 (Iowa 1882) (refusing to recognize common law marriage that would create a bigamous situation).

relationships in an attempt to nicely judge and balance the respective contributions of the parties." *Id.* at 491-492. In *Slocum*, the Iowa Supreme Court found no record support for the contention that the defendant's retention of the house would be unjust. Dee Slocum had cohabited with Tom Hammond for a number of years while he constructed a house. They later terminated their relationship and she sought a one-half interest in the house. Agreeing with the trial court, the Iowa Supreme Court found no evidence to show that Hammond profited or enriched himself inequitably at Slocum's expense. She had furnished much less labor on the project than many of Hammond's friends, in whom no interest in the real estate would be recognized. Although there was evidence that Slocum had done much of the housekeeping during their cohabitation, she had contributed no capital and took no risk in the purchase or construction of the home; she was not named in the mortgage and contributed no funds. We find similar circumstances here.

We find ample support in the record for the probate court's conclusion Mary Jo failed to prove unjust enrichment because she could not show any specific contribution to the acquisition or value of the house. The probate court declined to base contribution on the mere fact of extended cohabitation. Mary Jo stated she made an equal contribution to the $500 downpayment but offered no evidence to support her contention. No checks originated from her account to go toward the contract payments. She presented no evidence of payments for improvements or maintenance to the house, other than those for which she was awarded reimbursement. The record also revealed Donald performed most repairs and improvements himself. Even after she learned in 1993 that Donald had never divorced Rose, Mary Jo took no action to gain an interest in the house. The deed issued in 1996, after the house was paid for, but again she did nothing to have her alleged interest in the home recognized.

Mary Jo also bases her unjust enrichment claim on the fact that she tended to Donald during his frequent illnesses and paid her share of the utilities and expenses. We find she received reciprocal benefits from her living arrangement with Donald. Donald also assumed a seemingly equal share of the household maintenance and repair duties, even after he had a stroke in 1993. While Mary Jo contributed funds toward repairs in 1982, Donald went out and bought the materials and made the repairs. Although the parties did share expenses, Mary Jo received the benefit of living rent-free. She did not assume any financial or tax liability for the home—her name was not on the contract or the deed. Mary Jo also benefitted from Donald's financial abandonment of his family; he likely could afford the house payments because Rose had paid off all of their joint debts left from the marriage and he did not pay regular support. We find no evidence of the estate's enrichment at Mary Jo's expense.

Mary Jo's claims for imposition of resulting or constructive trusts also fail because they were not raised below, *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Com'n*, 453 N.W.2d 512, 527 (Iowa 1990) (refusing to address arguments raised for the first time on appeal), and they lack evidentiary support. A resulting trust arises from the nature or circumstances of consideration involved in a transaction. *Newell* *v. Tweed*, 40 N.W.2d 20, 24 (Iowa 1949). Legal title vests in one person but he or she is obligated in equity to hold legal title for the benefit of another, the intention of the former to hold in trust for the latter being implied. *Id.* A resulting trust enforces the intent. *Slocum*, 346 N.W.2d at 492. Where the party claiming a resulting trust knows that title has been taken to property, failure to demand conveyance of that party's interest negates the intent required to form the resulting trust. *Id.* (failure to permit name to be put on deed negated intent), *citing Newell*, 40 N.W.2d at 25 At the time Donald received the deed to the house in 1996, Mary Jo knew he was not divorced but failed to demand recognition of her interest in the house.

Constructive trusts fall into three categories: (1) those arising from actual fraud; (2) those arising from constructive fraud (appropriation of property by fiduciaries or others in confidential relationships); and (3) those based on equitable principles other than fraud. *Slocum*, 346 N.W.2d at 493 (citations omitted). There were no allegations of fraud here, therefore, only the third option remains. A party seeking imposition of a constructive trust must establish the right by clear, convincing, and satisfactory evidence. *Id.* As discussed above, nothing in this situation invokes equitable principles.

B. Implied Contract. Mary Jo contends that the Iowa Supreme Court has previously recognized an implied contract based on unjust enrichment in a 'marital-type relationship,' citing *In Re Fili's Estate*, 40 N.W.2d 286 (Iowa 1949). We disagree that the cited case supports Mary Jo's claim.

In *Fili's Estate*, our Supreme Court allowed recovery on a claim in probate for services rendered by an unmarried cohabitant who believed she had been legally married.to the decedent. Mary Jo's claim is not one for services; her attorney so stated at the hearing. The theory under which a case was tried in the trial court will be the theory upon which an appeal is based. *Shill v. Careage Corp.*, 353 N.W.2d 416, 420 (Iowa 1984) (citations omitted). This case was not tried as a claim for services. Instead, Mary Jo sought to establish her contribution to the acquisition and improvement of the real estate. In *Fili's Estate,* the claimant plead and introduced evidence of the value of her services. 40 N.W.2d at 289. Here, the probate court frequently excluded testimony regarding the extent of Mary Jo's caretaking of Donald during his many illnesses because the extent and value of these services were not at issue. These rulings are not appealed. Mary Jo's claim in this regard was not properly preserved for our review.

AFFIRMED.