IN THE COURT OF APPEALS OF IOWA

No. 1-264 / 90-1350

FILED
DEC 31 1991
CLERK SUPREME COURT

JANE MARY SCHETTLER,

Appellant,

vs.

ELMER JOSEPH SCHETTLER; RONALD W. MUHLBAUER; OLSEN, MUHLBAUER, MAHONEY & CO.; and SCHETTLER SEED FARM, INC., n/k/a ELMER SCHETTLER ENTERPRISES, INC.,

Appellees,

and

JAMES R. VAN DYKE,
Defendant.

Appeal from the Iowa District Court for Carroll County, Gilbert K. Bovard, Judge.

Jane appeals the district court summary judgment for defendants. **AFFIRMED.**

Gary D. Ordway and Michael D. Huppert of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, Des Moines, and Thomas W. Polking of Wilcox, Polking, Gerken, Schwarzkopf & Hoyt, P.C., for appellant.

Kay E. Dull of Miller and Dull, Sioux City, and William S. Gibb and Eric J. Eide of Johnson, Erb, Latham, Gibb & Carlson, P.C., Fort Dodge, for appellees Elmer Schettler and Schettler Seed Farm, Inc.

Richard A. Steffen of Herrick, Langdon & Langdon, Des Moines, and Michael M. Sellers of Dreher, Wilson, Simpson, Jensen, Sellers, Harvey, Butters, Adams & Kaiser, Des Moines, for appellees Muhlbauer and Olsen, Muhlbauer, Mahoney & Co.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

OXBERGER, C.J.

Jane and Elmer Schettler were married on April 15, 1967. Elmer was engaged in farming with his father and also involved in the family seed business. After Elmer's parents moved to town, Elmer and Jane occupied the family farmstead. In 1971 Elmer purchased the seed business from his father and this business was incorporated in 1976 and given the name Schettler Seed Farm, Inc. Elmer and Jane each held 250 shares of stock. Elmer and Jane were the only initial directors. Elmer served as president; Jane served as secretary.

Through the years Elmer was the driving force behind the direction and growth of the corporation. From 1976 to the time of the dissolution, Ronald M. Muhlbauer, a certified public accountant, and his firm, prepared the year-end balance sheets, profit and loss statements, and corporate tax returns for the corporation. Muhlbauer also prepared the Schettlers' individual tax returns and gave personal tax planning advice to Elmer.

Elmer and Jane separated in June of 1983. On October 27, 1983, Elmer and Jane entered into an agreement whereby Jane transferred 150 shares of her stock for 40 acres of Elmer's farmland, and his promissory note for $60,000 with interest at 8%. The value placed on Jane's shares was based upon the book value of the corporation.

On January 9, 1984, Elmer petitioned for dissolution of the parties' marriage. Jane retained attorney James Van Dyke to represent her. Van Dyke met with Muhlbauer who represented to him that the fair market value of her shares, based on the corporation's book value, was $141,000. Jane and Elmer then entered into an agreement whereby Jane would sell her remaining Shares in the corporation to Elmer for their book value. This agreement became part of the parties' stipulation which was incorporated into their dissolution decree on April 11, 1984.

Because of weather conditions and an extreme demand for Elmer's seeds, his net worth more than tripled in four years. Jane thus filed a petition to modify the parties' dissolution decree on March 15, 1988. She sought increased child support and alimony. That case was ultimately resolved by the court of appeals. See In re Marriage of Schettler, 455 N.W.2d 686 (Iowa App. 1990).

Jane also filed her petition which has led to this appeal on September 29, 1988. Her petition was in twenty-eight counts and alleged that Elmer, her attorney, and the accountants all practiced fraud and deceit upon her as a minority shareholder to induce her to transfer her shares of stock for book value which was far below the fair market value of that stock. The district court granted defendants' motions to adjudicate law points and granted summary judgment to the defendants.

The court held that Jane was barred by principles of judicial estoppel from bringing her current claims. The court believed that no matter how Jane captions her theories, her goal is to get a larger property settlement from assets which were the subject of the parties' dissolution decree. The court noted that a property settlement cannot be the subject of a subsequent action to modify. Jane cannot collaterally attack the dissolution decree because of the one-year statute of limitations set out by Iowa Rules of Civil Procedure 252 and 253. Furthermore, the court held Jane's claims are not supported by substantial evidence because she had full access to all the company records throughout the relevant time frames and Elmer had given instructions to his accountant to cooperate with Jane's attorney.

From the district court's rulings, Jane has appealed. She has settled her suit against attorney James Van Dyke. He is no longer a party to this appeal.

JUDICIAL ESTOPPEL: The trial court found that Jane's claim of fraud, misrepresentation and negligence, based upon acts allegedly occuring prior to the entry of the April 12, 1984 decree of dissolution was "an intentional assertion of an inconsistent position in a subsequent proceeding". We agree. Jane admits she "discovered" the alleged acts which underlie this present claim, on February 9, 1988. Nearly one month later, she filed her action to modify the divorce

decree on March 15, 1988. Jane's argument for modification was based upon a substantial increase in the value of the corporation which occurred after the entry of the decree. Jane succeeded in obtaining judicial acceptance of her contention. We find Jane's attempt to assert the increase prior to the divorce is an inconsistent position in a subsequent action. Where a theory has been presented successfully in one court, the doctrine of "preclusion by inconsistent positions" judicially estops that party from subsequently asserting an inconsistent position. Vennerberg Farms, Inc. v. I.G.F. Ins, 405 N.W.2d 810, 814, citing 1 B Moore's Federal Practice, Paragraph 0.405(8) at 238 (1984). We affirm the trial court. Each party will pay his or her own attorney fees. Costs are taxed to the appellant. We have considered all other issues and affirm the trial court.

AFFIRMED.