



IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE ESTATE OF)
D. STEPHEN PETERSON, Deceased;)

KATHLEEN B. LANIGAN,)

Plaintiff-Appellant,)

Filed May 31, 1983

vs.)

KIM D. PETERSON, Fiduciary of the)
Estate of D. Stephen Peterson,)

3-7
2-68240

Defendant-Appellee.)

Appeal from Black Hawk District Court - C. W. Antes, Judge.

Plaintiff appeals from the judgment of the trial court denying two of her three claims against decedent's estate. AFFIRMED.

George Lindeman of Lindeman & Yagla, Waterloo, for plaintiff-appellant.

Charles F. Hinton of Hinton Law Firm, Waterloo, for defendant-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ. Hayden, J. takes no part.

DONIELSON, J.

Plaintiff appeals from the judgment of the trial court denying two of her three claims against decedent's estate. She raises three issues on appeal: (1) that she and decedent owned a \$19,000 certificate of deposit in joint tenancy and that she, as the survivor of the two, is entitled to the certificate; (2) that she is entitled to reasonable rent for the three years during which decedent leased her tavern; and (3) that defendant failed to object when plaintiff began testifying about transactions she had with decedent, and the trial court should thus have treated as waived defendant's objection under the dead man statute that plaintiff was incompetent to testify about the transactions. We affirm.

Decedent D. Stephen Peterson and Kathleen B. Lanigan became acquainted in 1958. In 1969, decedent and his wife separated, and decedent and Kathleen began to see each other often. In 1971, decedent's marriage was dissolved. Although decedent and Kathleen did not carry out their plans to marry, they continued to spend considerable time together. Decedent used some of Kathleen's furniture in his mobile home; however, they did not live together at any time.

In 1970, Kathleen leased her tavern to decedent for a year; the written lease stated that the rent was to be determined by the parties. Decedent operated the tavern from 1970 until 1973 but did not pay any rent. Kathleen cleaned the tavern, kept the books, and worked as a waitress. When the tavern was sold in 1973, the profits were deposited in a savings account in decedent's name.

Decedent died in 1981. Kathleen filed three claims against his estate. She asserted (1) that she and decedent owned a \$19,000 certificate of deposit in joint tenancy and that she, as the survivor of the two, was entitled to the certificate; (2) that she was entitled to reasonable rent for the three years during which decedent leased her tavern; and (3) that she was entitled to either the return of her furniture or payment of its value. The executor of decedent's estate, Kim D. Peterson, contested Kathleen's claims, and a trial was held.

Kathleen testified that at the time she and decedent signed the lease, "we decided . . . instead of paying me lease-money, let's start a savings account, so we can build up an equity for ourselves." Kathleen also testified that she and decedent had bought, fixed up, and sold for profit, two houses, a van, and a camper. Kathleen testified that the profits the two received were deposited in savings accounts in decedent's name for income tax purposes. After Kathleen testified about her "understanding" with decedent about the ownership of the profits from their ventures, counsel for decedent's estate objected that under the dead man statute (Iowa Code § 622.4), Kathleen was incompetent to testify about her transactions with decedent. The trial court sustained the objection, and Kathleen did not testify about further transactions. Kathleen introduced as exhibits photocopies of pages in decedent's bank account register showing the handwritten notation "K + me," which, she asserted, showed that decedent intended the funds to be jointly owned.

The trial court denied Kathleen's claim to the certificate of deposit, stating that the account had always been in decedent's name and that there was no evidence Kathleen claimed any interest in the account until after decedent's death. The trial court also denied Kathleen's claim to rent for the tavern, stating that the parties had never agreed on the rent. The trial court did, however, grant Kathleen's claim for the return of her furniture; it directed the estate return the furniture or else pay Kathleen \$1139. She brought this appeal, challenging the trial court's denial of her first two claims. The estate does not challenge the order regarding the furnishings.

I. Actions in probate for the establishment of contested claims are triable at law. Iowa Code § 633.33. Hence our review is for the correction of errors at law. Iowa R. App. P. 4.

II. We first consider Kathleen's claim that the court erred in sustaining the

defendant's objection to portions of her testimony on the basis of the dead man statute (Iowa Code § 622.4). Specifically, she claims that defendant waived the objection because she had already been allowed to testify about the same subject matter without objection. We note that Kathleen does not assert that the court erred in sustaining defendant's contention that, as a substantive matter of law, she was incompetent to testify as to the matter at hand. Our review here is therefore limited to the narrow issue of whether defendant waived her objection by failing to assert it earlier. See Iowa R. App. P. 14(a)(3).

This issue arose during a discussion of the certificate of deposit which was placed in decedent's name only. She testified that this was done for tax reasons and that the understanding was that it was to be for their future. She further testified as follows:

I said, "If it ever grows to any amount of money, should anything happen to me, you are not mentioned in my will. You would be and will be when we are married, but you are not now. My children know nothing about this, and it will be all yours. There will be no contesting it whatsoever."

Q. And what was the understand [sic] with regard to if you survived him? A. The idea was that everything was to go to me and --

Q. Now, excuse me; finish. A. He said he had already talked to his children.

MR. HINTON: Now wait a minute.

THE WITNESS: I am sorry.

MR. HINTON: I am going to have to object at this time, your Honor. The witness is incompetent to testify to apparently what is going to be a conversation with a person since deceased, under the Deadman's Statute, and we would like to lodge that objection, even though the question didn't indicate to me the nature of the outcome. We would like to ask the objection precede that portion of the answer coming in on the ground we didn't have time to interpose an objection before the answer was given.

THE COURT: Well, I think, based on the present record, the objection is a valid objection. I will sustain it.

We conclude that defendant did not waive his objection by asserting it too late. Iowa Code § 622.4 defines the testimony prohibited thereunder:

A party to an action or proceeding, or a person interested in an action or proceeding, or a person from, through, or under whom a party or interested person derives any interest or title by assignment or otherwise, and a husband or wife of a party or person, shall not be examined as a witness in regard to any personal transaction or communication between the witness and a person who, at the commencement of the examination, is deceased or mentally ill, in a case against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of the deceased person, or the assignee or guardian of the mentally ill person.

(emphasis added). In the testimony set forth above, Kathleen was first merely recounting her own remarks. When she began testifying with regard to decedent's statements, however, defendant's counsel immediately raised the statutory objection. We believe § 622.4 is directed toward making those in Kathleen's position incompetent to testify as to the latter sort of evidence; i.e., statements made by decedent. Defendant therefore raised his objection in a timely manner and did not waive his right to assert his evidentiary claim under the dead man statute. Since Kathleen does not challenge the merits of the court's ruling sustaining defendant's objection, we assume its correctness.

III. Our finding that defendant did not waive his evidentiary claim under § 622.4 and our presumption that the court properly sustained defendant's objection to Kathleen's testimony regarding decedent's statements all but disposes of her claim that she is entitled to the certificate of deposit. She claims that she and decedent owned the certificate as joint tenants and that she became the sole owner at decedent's death. It is undisputed, however, that the certificate contained decedent's name only and that no effort or intent was ever demonstrated to put Kathleen's name on it as well. The record contains no clear and admissible evidence showing any intent to create a joint tenancy. Under these circumstances, we cannot say that the trial court erred in denying Kathleen's claim to the \$19,000 certificate of deposit.

IV. We also agree with the trial court's denial of Kathleen's claim for unpaid rent under the 1970 lease. The only reference to rent contained in the lease stated in full as follows: "monthly rental to be determined by parties." Our case law requires that "a contract must be definite and certain in order to be given legal effect." Palmer v. Albert, 310 N.W.2d 169, 172 (Iowa 1981). No rent figure was ever agreed to by Kathleen and decedent. As stated by the trial court, "if the claimant had wished rent, she and the decedent should have discussed this matter further." We will not rewrite and specify the rent terms of the lease for Kathleen's benefit at this late date. See 17A C.J.S. Contracts § 296(3) (1963). The lack of specific rental terms in the lease precludes Kathleen's claim for past rent thereunder.

The ruling of the trial court is affirmed in all respects.

AFFIRMED.