FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-472 / 90-171

IN THE MATTER OF THE ESTATE OF EMMA ROGERS, Deceased.

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IN THE MATTER OF THE LAWRENCE J. ROGERS TRUST.

BARBARA WARDENBURG, Executor and Beneficiary,

Appellee,

vs.

ROBERT L. ROGERS,

Appellant.

Appeal from the Iowa District Court for Johnson County, Thomas L. Koehler, Judge.

Robert Rogers appeals a district court order requiring him to pay $72,000 to exercise his options to purchase land from his father's trust and his mother's estate. **REVERSED.**

Philip A. Leff and Thomas Diehl of Leff, Leff, Leff, Haupert & Traw, Iowa City, and L.G. Klein, Oxford, for appellant.

James Claypool of Claypool & Claypool, Williamsburg, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

Emma and Lawrence Rogers owned a farm consisting of several tracts of land. They held two forty-acre tracts of land as tenants in common. Lawrence died in 1984, and Emma died in 1989.

Lawrence's will provided his son, Robert Rogers, had the option to purchase either from his estate or the trust established by the will, "all of the right, title and interest of my estate or said trust" in the two tracts for $500 per acre for one tract and $400 per acre for the other tract. Emma's will provided Robert Rogers had the option to purchase from her estate, "all of my right, title and interest" in the two tracts for $500 per acre for one tract and $400 per acre for the other tract.

Following Emma's death, Robert gave notice to Emma's executor and the trust of his intention to exercise the options. This litigation arises out of the dispute concerning the amount Robert must pay to purchase the two tracts.

Robert argued since his parents owned the land as tenants in common, the estate and trust each own only one-half of the respective tracts of land. As such, the price to purchase the trust and will's respective shares should be $18,000 each ((40 acres x one-half of $500) + (40 acres x $400)) for a total of $36,000. The estate executor disagreed, arguing the will and trust were unambiguous. According to the executor, the will and trust required

Robert to pay $36,000 each to both the will and trust ($500 x 40 acres + $400 x 40 acres) for a total of $72,000.

The district court found the will and trust unambiguous. It ruled for the executor. Robert has filed this appeal.

As this case was tried to the probate court sitting in equity, our review is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of facts, especially considering credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

The only issue in this case is whether the two provisions giving Robert a first option to purchase each of Lawrence's and Emma's undivided one-half interests as tenants in common in two forty-acre tracts are ambiguous. The alleged ambiguity arises in attempting to ascertain if the two provisions are intended to state a collective single price for acquisition of all interests in the two forty-acre tracts, or each undivided half interest is to be priced separately according to the stated price. To decide this issue, we must interpret the two wills according to appropriate principles of construction:

> It is well settled law (1) the testator's intent is the polestar and must prevail; (2) his intent must be gathered from a consideration of (a) all the language contained in the four corners of his will, (b) his scheme of distribution, (c) the circumstances surrounding him at the time he made his will and (d) the existing facts; and (3) technical rules or canons of construction should be resorted to only if the language of the will is ambiguous or conflicting or the testator's intent is for any reason uncertain.

> Matter of Estate of Anderson, 359 N.W.2d 479, 480 (Iowa 1984) [other citations omitted] . . .
> The determining factor in ascertaining whether [the prices indicated were for all the interest in the acreage or only the undivided one-half interest] is the intention of the testator, which is to be found from the language used as applied to all the surrounding circumstances and conditions present in the testator's mind when the will was made. Martin v. Beatty, 253 Iowa 1237, 1241-42, 115 N.W.2d 706, 709 (1962). We will not distort or nullify the testator's clear intention through the application of arbitrary or technical rules of construction. Id. at 1241, 115 N.W.2d at 709.
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> . . . The words of a will are to be used in their natural, usual, popular, and conventional meaning. Id. at 1242, 115 N.W.2d at 709. We are bound by the unambiguous language of the will. Matter of Estate of Anderson, 359 N.W.2d at 481. The court may not make a will for the testator, nor impose upon the will a forced or unnatural construction to accomplish what may now seem to be a more just or appropriate distribution of the estate. Martin v. Beatty, 253 Iowa at 1243, 115 N.W.2d at 710. We consider not what the testator meant to say but what he meant by what he did say. In re Estate of Fairley, 159 N.W.2d 286, 288 (Iowa 1968).

In re Estate of Nagl, 408 N.W.2d 768, 771 (Iowa App. 1987).

We have reviewed the wills and the pertinent circumstances is the present case. Any apparent clarity evaporates upon learning each party held only an undivided half interest as tenants in common in the two tracts. The question immediately arises: Does the stated price apply to the total combined interests or only the individual interest of the respective testator?

Our reading of the wills convinces us this ambiguity is real. The parents appear to be attempting to sell their land to their son at an advantageous price to preserve the family farm. However, the exact sale price and correct

allocation of the sale price is not clear from the instruments themselves. We are convinced sufficient ambiguity exists to necessitate the taking of parol and other evidence extrinsic to the wills themselves.

We turn to the other evidence before us in our de novo review. The trial court sitting in probate heard parol evidence before ruling. Daniel Boyle, attorney for Lawrence and Emma, testified. He had drawn up both wills involved in this case.

Mr. Boyle testified Lawrence and Emma wished to sell the two tracts for a total price per acre of $400 and $500 respectively. He further testified on cross-examination the parents wished to "have the opportunity to buy particular tracts of land at a particular price." Additionally, there is evidence another son, James, now deceased, had earlier purchased a forty-acre tract from Lawrence and Emma for $400 an acre.

We determine the trial court erred in ruling the wills were unambiguous as written. The court went outside the instruments to determine what were the interests being offered for purchase. It went outside the instruments to determine how many acres were included in each tract. The instruments could only convey the testators' undivided half interest in the tracts.

The stated price appears to be for a full ownership interest by its language. It is unclear as to how much of the stated sales price was to be allocated to the

respective interests. The ambiguity is compounded by the fact these two instruments must by their terms be construed together. When we consider this fact in the light of the surrounding circumstances, we are convinced the attorney who counseled the elderly Rogers and drew up their wills is correct as to the intent of the testators.

We reverse the trial court. We determine the wills are ambiguous as written. Upon consideration of the evidence before us, we determine the intent of the testators was to sell the two tracts to their son Robert for the total stated sales price of $400 and $500 per acre, respectively. Thus, if he wishes to acquire the land, Robert will pay $16,000 total for one tract and $20,000 total for the other tract. The total selling pricing thus is $36,000, to be equally divided between Emma's estate and Lawrence's trust/estate.

REVERSED.

Donielson, P.J., concurs; Sackett, J., dissents.

SACKETT, J. (specially concurring).

I agree with the result reached by the majority.