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IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF	)	
	)	Filed September 9, 1977
THE ESTATE OF	)	
	)	167
WALTER L. CAREY	)	2-58979

Appeal from Madison District Court - M. C. Herrick, Judge

Appeal from trial court's ruling that the provisions of the decedent's Will constituted an equitable conversion of the realty.

AFFIRMED.

Robert Jenks, of Des Moines, counsel for appellants, the heirs at law of Walter L. Carey; namely Mary Helen Jamison, Margaret Sanders and Virginia Underwood.

John E. Casper, of Flander & Casper, of Winterset, counsel for appellant, the Executor.

Michael Kulik, of Thoma, Schoenthal, Davis, Hockenberg & Wine, of Des Moines, counsel for appellees, the heirs at law of Edgar Carey; namely, Paul Carey, Emma Speicher, Wanda Johnson, Raymond Carey, Paul E. Carey and Pat Dale Carey.

Heard by Donielson, Acting C. J., Snell, Oxberger and Carter, JJ.; Allbee, C. J., participating.

DONIELSON, Acting C. J.

Appellants, the executrix and certain heirs of the decedent, assert that the trial court erred in ruling that the provisions of decedent's Will constituted an equitable conversion of the realty into personalty. The decedent, Walter L. Carey, died testate on October 18, 1974. He never married and had no children. A sister-in-law, Olive I. Carey (the executrix), seven nieces and nephews, and two great-nephews survived him.

The decedent executed a contractual Will with Olive Carey in 1965. The contractual provisions of the Will related to 285 acres of undivided realty held in tenancy in common with Olive Carey, and 57 acres owned by the decedent in fee. The 285 acres had initially been owned by the decedent and his brother, Dean Carey, but, upon Dean's death, his surviving spouse, Olive, inherited the one-half interest. Pursuant to the agreement contained in the Will, the survivor received a life estate in the other's realty.

The following provisions of decedent's Will are relevant to the consideration of the present appeal:

ITEM FOUR. Upon the termination of the life estate hereinbefore created, I authorize my Executor to sell all real estate owned by me at the time of my death, either at private sale or public auction, and if sold at private sale, said real estate shall not be sold for a sum less than the Inheritance Tax Appraisers' value placed thereon. Any sale of said real estate is to be made subject to the approval of the District Court of Madison County, Iowa. If, at the time of the termination of the life estate, or if the said Olive Irene Carey predeceases me, the Executor of her estate and the Executor of my estate are unable to agree on a sale of said real estate as a whole, then I authorize and direct my Executor to commence a partition action or any other action in law or equity which he may deem necessary to the end that said real estate may be sold in its entirety for the greatest and highest price obtainable. I do not believe said real estate could be equitable divided into two equal parts and, therefore, I do not suggest that my Executor attempt to agree upon a division of said real estate.

ITEM SIX. Upon my death all personal property which I may own shall be converted into cash and after the payment of costs and expenses of administration and expenses of my last illness and burial and any other provable claims against my estate, shall be divided equally, share and share alike, among Charles L. Carey, Phillip Carey, Emma Speicher, Wanda Johnson, Paul Carey and Raymond Carey.

ITEM SEVEN: If Olive Irene Carey survives me and the sale of the real estate is postponed after my death a partial distribution, if there are funds remaining in my estate, may be made by my Executor and the final distribution shall be made after the termination of the life estate and sale of real estate.

ITEM EIGHT. I own approximately fifty-seven (57) acres in which the said Olive Irene Carey does not own any interest but it is my intention that she shall have a life estate in this particular real estate to the same extent and under the same terms and conditions as she will have in the real estate which she and I own jointly.

On Novembr 17, 1967, Walter Carey added a Codicil to his Will, which provided in pertinent part:

It has been determined that the farm which is owned by Olive Irene Carey and myself has on it certain deposits of limestone and rock, which can be used and mined in a commercial quantity. I therefore direct my executor named in my last will and testament to take these deposits into consideration upon any sale, as authorized under my last will and testament. And I further direct that my executor not sell the farm unless and until the value of the rock deposits is considered and reflected in any sales price. I further empower my executor to employ persons of technical skill and knowledge to determine with exactness if necessary the extent and value of the rock deposits.

The sole issue before this court is whether the provision of decedent's Will constituted an equitable conversion of the realty into personalty, § 633.384, The Code, or whether the Will is silent as to the remainder interest in the realty, thereby resulting in a distribution in accordance with the partial intestacy statute, § 633.272, The Code.

In finding in favor of the objectors, the trial court relied upon all the language in the Will and Codicil¹ and concluded:

"... Taking all these provisions of the will together it seems clear that the testator intended to require the sale of the real estate on his death, if he survived, or later on the death of Olive Irene Carey, or, at the very least, the will reflects his opinion that such a sale would be necessary in order to make distribution. It is therefore the opinion of the Court that this will works an equitable conversion of the real estate.

¹ In its Conclusions of Law, the trial court stated:

If the will evidences the testator's intent that the remainder interest in the real estate should pass to beneficiaries named therein and the will authorizes or directs the executor to sell the real estate, then there would be an equitable conversion of the remainder interest in the real estate and the same would pass as personal property under the express provisions of the will. While it is true that the statement, "I authorize my executor to sell all the real estate owned by me at the time of my death," would not be sufficient, standing alone, to mandate the sale of the land, the testator goes on to state in the last sentence of Item Four as follows: "I do not believe said real estate could be equitably divided into two equal parts and, therefore, I do not suggest that my Executor attempt to agree upon a division of said real estate." Further in Item Seven it is provided: "If Olive Irene Carey survives me and the sale of the real estate is postponed after my death a partial distribution, if there are funds remaining in my estate, may be made by my Executor and the final distribution shall be made after the termination of the life estate and sale of real estate." Also the codicil drawn in 1967 relates to the sale of the real estate and calls the attention of the executors to the possibility of deposits of limestone and authorizes the employment of expert appraisers to determine the value of the same.

"This construction avoids a partial intestacy which is disfavored by the courts wherever possible and construes the will toward disposition of the entire estate. *Anderson v. Anderson*, 227 Iowa 25, 206 N.W. 446.

"It also seems significant to the Court that in the distribution made under Item Six the testator treats Charles L. Carey equally with the five children of Edgar Carey, deceased. If he had intended the laws of intestacy to govern then Charles L. Carey would have been given one-third . . ."

Equitable conversion is defined as the constructive alteration in the nature of property by which in equity real property is regarded as personalty. *Beaver v. Ross*, 140 Iowa 154, 157-158, 118 N.W. 287 (1908); *In re Estate of Schwertley*, 228 Iowa 1209, 1213-1214, 293 N.W. 445 (1940). Section 633.384, The Code, has codified this doctrine by providing that a "testamentary direction to sell real property, and the exercise of a testamentary power of sale of real property, shall constitute an equitable conversion of real estate into personal property, but shall not affect distribution of the estate under the provisions of the Will."

Although the law does not favor conversion under wills and there is a presumption against it, *In re Estate of Schwertley*, supra, at 1217, the Iowa Supreme Court has endorsed the doctrine, and stated the following requirements for its application in *Hanson v. Hanson*, 149 Iowa 82, 84, 127 N.W. 1032 (1910):

"To work a conversion of real estate into personalty, there must be either (a) a positive direction to sell; (b) an absolute necessity to sell in order to execute the will; or (c) such a blending of realty and personalty by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the same as money."

We feel that various provisions in the Will, when read as a whole, satisfy the first and second prongs of the Hanson test, and we agree with the trial court that this Will works an equitable conversion of the property.

I.

Direction to Sell

With regard to the question of a positive direction to sell the realty, the court has made it clear that conversion must arise from an "express, clear, and imperative direction, or from a necessary implication of such express direction."

Id.; see also *In re Estate of Sanford*, 188 Iowa 833, 838, 175 N.W. 506 (1920).

Item Four of the decedent's Will provides in part: "Upon the termination of the life estate hereinbefore created, I authorize my Executor to sell all real estate owned by me at the time of my death" The Iowa court has held that a power of sale which merely authorizes an executor to sell at his discretion is not sufficient to constitute a testamentary direction to sell. In re Estate of Jurgens, 239 Iowa 490, 492, 31 N.W.2d 633 (1948); Brickson v. Schwebach, 219 Iowa 1368, 1372, 261 N.W. 518 (1935).

It is essential to the application of the doctrine that the property be subject to an imperative direction for conversion. Beaver v. Ross, supra, at 158. We agree with the trial court that authorization is not sufficient in and of itself to mandate the sale of the land. We also feel that, taken together, all of the pertinent provisions of this Will and Codicil reflect a clear and imperative direction that this land be sold. In reaching this conclusion, we primarily rely upon other language in Item Four:

... If, at the time of the termination of the life estate, or if the said Olive Irene Carey predeceases me, the Executor of her estate and the Executor of my estate are unable to agree on a sale of said real estate as a whole, then I authorize and direct my Executor to commence a partition action or any other action in law or equity which he may deem necessary to the end that said real estate may be sold in its entirety for the greatest and highest price obtainable. I do not believe said real estate could be equitable (sic) divided into two equal parts and, therefore, I do not suggest that my Executor attempt to agree upon a division of said real estate. (emphasis added).

Our interpretation is further strengthened by Item Seven, which provides:

If Olive Irene Carey survives me and the sale of the real estate is postponed after my death a partial distribution, if there are funds remaining in my estate, may be made by my Executor and the final distribution shall be made after the termination of the life estate and sale of real estate. (emphasis added).

We feel that the emphasized language in these two Items, along with the other language of the Will and Codicil, evinces a clear and positive direction that the executor sell the real estate.

II

Absolute Necessity to Sell

We decide that the previously discussed portions of Items Four and Seven indicate that the sale of this real estate is an absolute necessity in order to carry out the terms of the Will. In order to satisfy this prong of the Hanson test, it must be demonstrated that it is an absolute necessity to sell the realty in order to carry out the testator's intent. *Grady v. Grady*, 221 Iowa 561, 564, 266 N.W. 285 (1936); *Brickson v. Schwebach*, *supra*, at 1371.

In *Emmack v. Tish*, 214 Iowa 794, 797, 243 N.W. 517 (1932), the Court stated that while it is true

"...that a mere authority to the executor to sell the real estate does not necessarily work an equitable conversion. ... [i]t is also the rule of this state that a direction to sell the real estate and thereby to work an equitable conversion may be implied from the terms of the will, as a whole, where the intent of the testator to that effect is plainly indicated; and this is so where a sale of the realty becomes necessary to an execution of the provisions of the will."

The will in Emmack stated, "...I hereby give and grant unto the said executor full power and authority to sell and dispose of any real estate which I may own at the time of my death, ..." *Id.* at 795. The court there found an equitable conversion because the Will, when read in its entirety, compelled the sale of the property to comply with the intent of the testator. The language in the Will in our case is at least as strong, if not stronger, than the language in the Emmack Will regarding the necessity of sale of the realty. We feel that Items Four and Seven of this Will, when read together with the other requirements set forth in the Will and Codicil, compel the conclusion that the sale of this realty is absolutely required in order to carry out Walter Carey's intent.

Our resolution of this case is consistent with the presumption against partial intestacy, *Anderson v. Anderson*, 227 Iowa 25, 35, 286 N.W. 446 (1939), and the related notion that a testator intends to dispose of his entire estate. *Bankers Trust Co. v. Allen*, 257 Iowa 938, 947, 135 N.W.2d 607 (1965). Our disposition is also consistent with another crucial presumption delineated by the court in *Bankers Trust Co. v. Allen*, *id.* at 945:

"There is a strong presumption (we have said 'very strong') decedent did not intend a bequest not expressed in the will. In re Estate of Syverson, 239 Iowa 800, 805, 32 N.W.2d 799, 801, 802, and citations; In re Estate of Eason, supra, 238 Iowa 98, 101-103, 26 N.W.2d 103, 105, 106; In re Will of Rosnow, 273 Wis. 438, 78 N.W.2d 750, 751, 752 (disapproving In re Will of Nielsen, 256 Wis. 521, 41 N.W.2d 369, cited by Bertha); 95 C.J.S., Wills, section 633, page 898; 96 C.J.S., Wills, section 718."

Although other related issues were raised on appeal, we need not consider them to resolve this case. Therefore, upon the grounds discussed herein, we find that this Will effected an equitable conversion of the realty into personalty, and thus affirm the judgment of the trial court.

AFFIRMED.