

IN THE COURT OF APPEALS OF IOWA

No. 3-187 / 92-1139

FILED

SEP 02 1993

CLERK SUPREME COURT

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IN THE MATTER OF THE ESTATE OF RUTH ASHTON, Deceased

JOHN C. FISHBURN, Executor,

Appellee.

MARSHALL V. DAUT and D'ARCY V. DAUT, a/k/a D'ARCY BARNETT,
Beneficiaries,

Appellants.

Appeal from the Iowa District Court for Muscatine
County, J. L. Burns, Judge.

The beneficiaries of an estate appeal from an order of
the district court upholding, over their objections, an
interlocutory report filed by executor of the estate.

AFFIRMED.

Jack E. Dusthimer of Carlin, Hellstrom & Bittner,
Davenport, and George A. Goebel of Goebel & Koury,
Davenport, for appellants.

David J. Meloy of Stanley, Lande & Hunter, Muscatine,
for appellee.

Heard by Oxberger, C.J., and Donielson, J., and
McCartney, S.J.*

*Senior Judge from the 2nd Judicial District serving on
this court by order of the Iowa Supreme Court.

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McCARTNEY, S.J.

Marshall Daut and D'Arcy Daut a/k/a Barnett, legatees of the Estate of Ruth D. Ashton, deceased, objected to an interlocutory report filed by the executor. They asserted in part that the executor had breached his fiduciary duty in failing to assure fairness in the distribution of certain personal property. They also contested the interpretation made by the executor of the provision of the will of the decedent providing for certain personal property distribution.

These legatees appeal from rulings of the district court which were adverse to their contentions. We affirm.

The decedent died on June 16, 1990, and thereafter an estate was opened and her will admitted to probate.

The appellee was nominated as executor in this will and undertook to discharge such duties.

The fourth paragraph of the will (unchanged by certain codicils not here at issue) provided as follows:

I give, devise and bequeath the use, income and profit from all the balance and remainder of my property to my mother, Cora M. Ashton, during her natural life, she to have the right to sell any of my property as she sees fit. At the death of my mother, Cora M. Ashton, I direct the following persons shall have their pick of my antique furniture, dishes and bric-a-brac, sterling silver, silver pieces, jewelry and books, Richard V. Daut, Cherie V. Daut, Marshall V. Daut and D'Arcy V. Daut. After the foregoing persons have had their choices, I give Sandra L. Isaacs her choice of anything in my house and apartment.

Richard V. Daut's portion is not at issue here, and the

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remaining three named persons are deemed to be the only parties having an interest in the estate of the decedent under the provisions of the quoted will provision.

In July 1990, the executor provided each of these three beneficiaries with copies of the will, pointing out the fourth paragraph concerning the distribution of the personal property contained within the home of the decedent. Thereafter, in December 1990, having caused the property to be appraised, he similarly provided copies of these appraisals to the three.

Subsequent to that, Marshall Daut (Marshall) advised the executor that he was interested in only several items, a quilt and a ring, together with some photographs. That advice, contained in a January 1991 letter, further indicated that Marshall would let D'Arcy Daut (D'Arcy) make the selections of the property "on our behalf."

The executor determined that the three beneficiaries would meet at the home of the decedent and there, in rotation, each beneficiary could select such item as he or she wished. A letter from the executor, written in January 1991, advised that all three beneficiaries should meet at the house and "each alternately select one item at a time."

In June 1991, the executor advised Marshall by letter (Marshall living in the State of Arizona) that the property selections would take place at the home of the decedent in Muscatine on August 8 and August 9, 1991, some two months before the time for selection.

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D'Arcy and Cherie appeared at the home for the selection process on August 8, but Marshall did not attend.

The home contained a great number of items described in the said fourth paragraph of the will, and the selection process took the better part of two entire days.

The parties agree that the executor advised D'Arcy and Cherie at the time of the selection of personal property that they were free to keep the items selected by them or sell them or otherwise dispose of them.

D'Arcy selected several items for Marshall and a number of items for herself which she thereafter in large part sold for a sum in excess of \$6800. Neither Cherie nor Marshall appear to have sold any of the items they selected.

In September 1991, D'Arcy and Marshall, through an attorney, objected to the selection process. However, the executor advised the attorney there was "a large amount of personal property left in the house" available for selection and that Marshall could select that property and that he, too, could sell it as "D'Arcy is doing." However, neither Marshall nor D'Arcy selected any further property.

The appellants, and particularly Marshall, assert that Marshall believed he was only to take several items of considerable interest to him and his family, things he believed he was to keep according to what he perceived to be the intent of the testator.

Based upon the foregoing, the objectors and appellants here assert that the executor breached his fiduciary duty in failing to assure fairness in the distribution of the foregoing personal property under the provisions of paragraph four of the will. They further assert that the executor improperly interpreted the effect and nature of the said will provision regarding the said personal property.

Our review is de novo, and although we are not bound by the findings of fact made by the trial court, we give them due consideration. Iowa Rs. App. P. 4, 14(f)(7).

Generally, the burden is upon the fiduciary to go forward in producing evidence in support of his conduct when his report has been attacked by beneficiaries. In re Christensen's Estate, 229 Iowa 1162 296 N.W.198. Although these are exceptions to this general rule, we will assume it as controlling in our review.

Although a fiduciary is under an obligation to act in good faith, an executor, dealing as he does with various interested parties, must administer the estate in accordance with the will. Bauer v. Myers 278 N.W.302 (Iowa 1938).

The executor provided the three interested beneficiaries with copies of the will and of the appraisals. He advised the parties of their respective rights to select property, and it is apparent that adequate

advance notice was provided them as to the time, place and manner of the selection process.

The court is not cited to any authority by the appellants that the executor was obliged to provide the beneficiaries with legal advice. As stated above, his obligation was to manage the estate in accordance with the terms of the will and, of course, in accordance with law. The appellants are held to a standard of reasonable conduct in similar fashion and are presumed to know the extent and nature of their bequest as well as to choose to be involved in the administration of the estate. Stapleton v. Haight 135 Iowa 564, 113 N.W.351.

We, therefore, conclude that the executor sustained his burden of going forward and that the findings of the district court in overruling this objection were appropriate based upon both the facts of the case and the law applicable.

We, therefore, do not consider the assertion of the executor that the appellants waived any claims they may have with regard to the selection process.

The objectors and appellants here further argue that the executor, as well as the district court, were in error in interpreting the provisions of the fourth paragraph of the will as imposing no conditions or restrictions upon either the selection or disposition of the personal property. The appellants argue the executor should have sought declaratory judgment action interpreting such

paragraph and, with regard to the district court, that it improperly determined that there were no such limitations or restrictions.

The language of the fourth paragraph is clear and unambiguous. The verb "pick" is defined as meaning, to select or choose. Webster's Dictionary, 5th Edition. The word must be interpreted and construed in light of the circumstances surrounding its use. The language in the fourth paragraph of the will reinforces this conclusion. The testator "give(s)" property to her mother and she "give(s)" to Sandra I. Issacs her choice. Her use of the common word "pick" means the right to select property for their own. Otherwise the word is meaningless, a result not intended by the testator.

The fourth paragraph does not permit or need any further interpretation by a court. Estate of Rogers, 473 N.W.2d 36 (Iowa 1991). Although the appellants may have believed they were limited in what they should take and that they were presumably to keep such items as family mementos, those restrictions do not appear either overtly or by implication. D'Arcy was present for the property selection and took a substantial number of items, most of which she apparently sold. She also selected items for Marshall. Marshall's subjective belief is not supported by the plain meaning of the will language.

We, therefore, further conclude that the interpretation given by both the executor and by the district court upon

trial as the meaning of the quoted language is correct. Although the appellants claim the clause is "arguably contradictory in regards to the distribution of the same property," we do not find the provision contradictory.

The appellants further question the propriety of the fees ordered to be paid the executor. Fees were granted in the sum of \$12,846, but the computation made by the appellants is that the appropriate fee was \$12,588.

Appellants did not raise this issue at trial, and we therefore do not accept their invitation to now undertake to independently calculate such charges.

After examining all of the issues raised in this appeal, we affirm the district court in its ruling overruling the objections made by the appellants to the interlocutory report and which were raised on this appeal.

Costs are taxed two-thirds to the appellants and one-third to the estate.

AFFIRMED.