FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

PAUL M. WELLS,

Appellee,

vs.

HILDRED WELLS and UNION BANK AND TRUST COMPANY,

Appellants.

Filed September 9, 1977

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2-58637

Appeal from Wapello District Court - L. R. Carson, Judge.

An appeal of a declaratory judgment that provisions of a joint will bar the survivor from disposing of her property during her lifetime. - Affirmed with modification.

Johnson, Bauerle & Hester, of Ottumwa, for Appellants.

John N. Moreland, of Ottumwa, for Appellee.

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

PER CURIAM

Appellant Hildred Wells appeals the trial court's declaratory judgment that she is barred, by provisions of a joint will made with her deceased husband Lester, from disposing of her own property during her lifetime. We affirm with modification.

Hildred acknowledges that the joint will is a mutual and contractual instrument; and that no revocation occurred before the death of her husband. Both Hildred's rights as survivor and their son Paul's rights as a third party devisee vested at Lester's death when the will became irrevocable:

> "The surviving testator, having accepted the benefits of a will jointly executed by him and another and containing reciprocal provisions, cannot repudiate the contract by which the will was made so as to affect the disposition made by the will for the benefit of third persons upon the death of the surviving testator." Estate of Randall v. McKibben, 191 N.W.2d 693, 701 (Iowa 1971).

A joint and mutual will does not, without more, bar a survivor from disposing of property during his lifetime. The court in In re Estate of Lenders, 247 Iowa 1205, 1215, 78 N.W.2d 536, 542 (1956) observed:

> "It may be stated generally that the courts do not consider that the parties to a joint and mutual will intended to restrict either party from disposing of property in good faith by transfers effective during his lifetime or her lifetime, unless a plain intention to this effect is expressed in the will or in the contract pursuant to which it was executed."

The threshold question is whether the provision that at the death of the survivor "all the rest, residue, and remainder of our estate" passes to their son Paul indicates a plain intention to preclude any disposition of property by the survivor Hildred during her lifetime. In **Lenders** in separate but mutual and contractual wills, a husband and wife left at the death of the survivor to certain beneficiaries "the property I may own at the time of my death." 247 Iowa at 1208, 78 N.W.2d 538. Hildred and Lester promised that whoever survived would devise to Paul "the rest, residue and remainder of our estate." The key words of the devise are "our estate." Paul argues Lester's death operated to freeze his parents' estate which then remains intact as an entity awaiting only the death of Hildred before it passes to him with respect to Hildred's assets at Lester's death. The disposition of Lester's estate is clearly specified in the will, and permits only a limited invasion

of the corpus on terms and conditions in the will.

Paul's argument gives a restricted and technical meaning to the word "estate" rejected in Miller v. Miller, 200 Iowa 1070, 205 N.W. 870 (1925). **Miller** defined estate as it is commonly understood: ". . . it refers to and includes all forms of personal property, as well as real estate..." 200 Iowa at 1075, 205 N.W. at 874. We cannot conclude that the use of the word "estate" rather than "property" operates to establish the required clear restriction upon the survivor such as is found in this devise:

> "It is our will, and we direct, that upon the happening of the death of either of us, all property, both real and personal of which we may be possessed at the time of such death shall be disposed of as follows. . ." Estate of Randall v. McKibben, 191 N.W.2d 693, 696 (Iowa 1971).

The language of the devise does not indicate the requisite clear intention that Hildred as survivor be barred from disposing of property during her lifetime. The question remaining under **Lenders** is whether the proposed trust arrangement is a permissible transfer. **Lenders** provides that intervivos gifts which are reasonable, absolute and bona fide may be made by a survivor to a joint will. However, **Lenders** places two restrictions on such devises: 1) they may not be testamentary in effect, and 2) they may not be made for the purpose of defeating the contract or have that effect. 247 Iowa at 1216, 78 N.W.2d at 542. **Lenders** defines testamentary gifts in part as those which take effect at death. Gifts which grant a present interest to the recipient are not testamentary. 247 Iowa at 1219, 78 N.W.2d at 544.

The proposed trust fails under either of the applicable tests of **Lenders.** In this case the "living trust" which is to be funded by the pourover provisions of the proposed new will does not transfer a present interest to the grandchildren. The arrangements for the grandchildren take effect upon Hildred's death; they are, therefore, testamentary in effect. As such they are contrary to the contract between Hildred and Lester.

The trial court is affirmed in so far as the proposed trust is declared invalid. We hold that all assets held by Hildred at Lester's death are subject to the contractual provision of the will subject to her right to make such intervivos transfers as are permitted by **Lenders.** We remand for a modification of judgment in accord with this decision.