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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

HAROLD D. PORTER, JAMES E. PORTER and DONNA C. BINGHAM,

Plaintiffs-Contestants-Appellees,

vs.

SENA C. PORTER, WAYNE E. NELSON, (Appellant), and RAMSEY MEMORIAL HOME,

Defendants-Proponents.

Filed June 28, 1979

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2-62314

Appeal from Polk District Court - John Hughes, Judge.

Appeal from trial court's order on motion to adjudicate law points in will contest. Reversed.

Gene L. Needles, of Zohn & Needles, of Des Moines, for appellant.

Jeff H. Jeffries, of Hopkins & Huebner, of Des Moines, for appellees.

Heard by Oxberger, C. J., Donielson, Snell, and Johnson, JJ; Carter, J. takes no part.

DONIELSON, J.

This appeal presents a single issue for our review: the determination of the devolution of property bequeathed to a testator's spouse but with a gift over to another in case such spouse predeceases testator, where the spouse, having been divorced from testator after execution of the will, and therefore barred by section 633.271, The Code 1977, from taking under the will, survives the testator.

Corwin E. Porter executed a will dated December 14, 1973, at which time he was married to Sena C. Porter. On December 17, 1976, the marriage between Corwin and Sena Porter was dissolved. On July 1, 1977, Corwin Porter died, without revoking the December 14, 1973 will. On September 9, 1977, plaintiffs, the children of Corwin Porter's first marriage and his heirs at law, filed a petition contesting the will. The trial court ruled that property passing under the will to Sena Porter would pass by intestacy. Appellant Wayne Nelson, the son of Sena Porter and former step-son of Corwin Porter and contingent beneficiary under the will, was granted permission to appeal that ruling in advance of judgment, and the case was transferred to us.

Corwin Porter's will contained the following paragraphs:

> ARTICLE I
>
> In the event my wife, Sena C. Porter, survives me, I hereby give all of my property, real and personal, to her absolutely.
>
> ARTICLE II
>
> If my wife, Sena C. Porter, shall predecease me, then and in that event I give all of my property, real and personal, to my son-in-law,[1] Wayne E. Nelson, or his heirs, share and share alike.
>
> ARTICLE III
>
> In the event that my son-in-law, Wayne E. Nelson, shall predecease me and leave no heirs, then and in that event I give all my property, real and personal, to the Ramsey Memorial Home of Des Moines, Iowa, absolutely.
>
> * * *
>
> ARTICLE VI
>
> I am aware that this Will neglects to mention my children, Harold, James and Donna, and it is my desire to leave my estate as set out above and not to my children.

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[1] Apparently the term "son-in-law" was substituted for "step-son," which more accurately described the relationship between Corwin Porter and Wayne Nelson.

Section 633.271 reads in pertinent part: "If after making a will the testator is divorced or the marriage is dissolved, all provisions in the will in favor of the testator's spouse are thereby revoked." This code section has never been construed in Iowa, and similar statutory provisions in other jurisdictions have been construed with conflicting results. Appellant contends that the will should be construed and given effect as though Sena, the divorced spouse, had predeceased Corwin, passing the estate to him. See Russell v. Estate of Russell, 534 P.2d 261 (Kan. 1976); In re Estate of Fredericks, 311 So.2d 376 (Fla. App. 1975); In re Estate of Zimmerman, 28 Ill. App. 3d 107, 328 N.E.2d 199 (1975); In re Estate of Shelton, 19 Ill. App. 3d 542, 311 N.E.2d 780 (1974); Steele v. Chase, 281 N.E.2d 137, (Ind. App. 1972); First Church of Christ v. Watson, 286 Ala. 270, 239 So.2d 194 (1970); Volkmer v. Chase, 354 S.W.2d 611 (Tex. Civ. App. 1962); Peiffer v. Old National Bank and Union Trust Co., 166 Wash. 1, 6 P.2d 386 (1931). See also Uniform Probate Code § 2-508 (1969), which specifies that ". . . property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent . . . ". Appellees urge that since the bequest to Wayne Nelson was to take effect only on the condition that Sena Porter predecease testator, when she survived testator, the condition precedent did not occur, the bequest was nullified, and the entire estate passed by intestate succession, in equal shares to appellees under section 633.219. See Davis v. Davis, 24 Ohio Misc. 17, 51 Ohio Ops.2d 388, 258 N.E.2d 277 (1977); Matter of Lampshire, 57 Misc. 2d 332, 292 N.Y.S. 2d 578 (1968). For discussion and authorities, see Annot., 74 A.L.R. 3d 1108 (1976).

Corwin Porter's will was properly executed and was not revoked prior to his death. It sets forth a complete scheme for disposition of his estate and unequivocally disinherits his natural children. There is nothing that negates the validity of the will as such; rather, it makes no provision for the unanticipated dissolution of his marriage to Sena. It is clear that section 633.271 prevents Sena from taking under the will. The issue to be resolved is whether operation of that statute should invalidate the entire will and prevent Wayne from taking.

We find that the majority and better reasoned view is that urged by appellant. Under the factual circumstances and will provisions in this case, we hold that property which is prevented from passing to a former spouse because of revocation by marital

dissolution under section 633.271 passes as if the former spouse failed to survive the testator. Thus, the revocation of the bequest to Sena as a result of the divorce nullifies only those clauses of the will in her favor, and the remaining portions of the will are to be carried out as if Sena did not survive Corwin Porter. Since Wayne Nelson survived testator, the entire estate passes to him.

To hold otherwise would defeat the clear intention of Corwin Porter, and the testator's intent is "the polestar and must prevail." In re Estate of Larson, 256 Iowa 1392, 1395, 131 N.W.2d 503, 505 (1964). There is overwhelming evidence that Corwin Porter's unmistakeable intent was to specifically disinherit his three natural children, and to bequeath his estate to others before it should pass to his children. Although the clear intent of the testator is the single most important consideration, our decision might well be different if Wayne Nelson, Corwin Porter's former step-son, were the only contingent beneficiary under the will. Article III of the will states that if Wayne Nelson should predecease Corwin Porter, and leave no heirs, the estate should pass absolutely to the Ramsey Memorial Home. Article VI mentions plaintiffs by name and specifies Corwin Porter's intention to bequeath them no part of his estate. Corwin Porter's clear intent, however, was to dispose of his property in a manner not in conformity with the intestacy statutes. Construing section 633.271 in this case to carry out the will provisions as though Sena had predeceased Corwin Porter avoids intestacy and carries out Corwin Porter's intent. See In re Fairley's Estate, 159 N.W.2d 286 (Iowa 1968). The judgment of the trial court is reversed.

REVERSED.

All judges concur, except Oxberger, C. J., who dissents.

OXBERGER, C. J. (dissenting)

If the Legislature had intended the result reached by the majority's decision, it could have patterned section 633.271, The Code 1977, after section 2-508 of the Uniform Probate Code. It did not. In my opinion, the majority's decision effectively rewrites section 633.271 - an exercise which is beyond the province of this court. I would affirm the trial court's ruling.