FILED
DEC 18 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE ESTATE OF HANS JOHNSON, Deceased;

CAROL JEAN GERDES,

Appellant.

Filed December 18, 1985

151

5-385
84-1731

Appeal from the Iowa District Court for Grundy County - James L. Beeghly, Judge.

Appellant, Carol Jean Gerdes, one of the beneficiaries of decedent Hans Johnson's estate, appeals from the district court order approving the executor's final report, asserting that testator's son held only a life estate with power of appointment which was not exercised and resulted in a partial intestacy of Hans Johnson's estate. **REVERSED.**

David J. Price of Price, Correll & Sheerer, Cedar Falls, for appellant.

Timothy M. Sweet of DeWolf, Beard, Monk & Sweet, Grundy Center, for appellee Margaret Ohrt.

LeRoy H. Redfern of Redfern, McKinley, Mason & Dieter, Cedar Falls, and Emil Trott, Jr. of Barrett & Trott, Des Moines, for appellees Dennis Johnson, Byron Johnson, Irene Drane, and Chester Johnson.

R. William Merner of Reed, Merner, Sabbath, Strever, Zanville, Oppold & Hansen, Cedar Falls, for the executor of decedent's estate.

Considered by Oxberger, C.J., and Snell and Sackett, JJ., but decided en banc.

SNELL, J.

Decedent Hans Johnson died in 1952. He was survived by his wife, Edel, and eight children: Minnie, Carol, Robert, Dennis, Byron, Irene, Chester, and Margaret. Minnie was adopted out of the family before decedent died. Decedent's will provided that Edel would receive a life estate in all decedent's property and that the remaining minor child, Carol, would receive $500 a year until she reached age 18. The will then stated:

> Paragraph 4. Subject to the foregoing, I give the remainder of my property to my children except as hereafter stated, share and share alike, as their property absolutely and by right of representation, provided however, . . . that Minnie Johnson Lund, who has been adopted, shall not be included in or among the children above referenced to . . ., however, the share that my son Robert Johnson shall receive by reason of the above provisions shall be held in trust as hereinafter provided.
>
> Paragraph 5. I hereby appoint my son, Dennis Johnson, as trustee for and on behalf of Robert Johnson and said trust fund is to be received and invested or reinvested according to the best judgment of said trustee. The net income of said trust fund shall be paid to my son Robert Johnson annually during his natural life but subject to the rest of this paragraph, and on his death the principal of said fund shall be paid as he may direct or Will or upon his failing to direct or appoint, in equal portions to his wife and children, share and share alike. The right of my said son to receive such income or principal shall not be anticipated or assignable nor in any event applicable to the payment of his debts. The right of any beneficiary to receive the income from this trust created by this will shall be free from the interference or control of his or her creditors. The trust may also be terminated when in the best judgment of the trustee the said Robert Johnson is able and capable of managing his affairs, and in that event the trustee is authorized and empowered to turn over to the said Robert Johnson any portion of the trust when he deems it advisable.

No trust for Robert was ever established. Robert died in 1956, a resident of California. He had no surviving spouse or children, and his will executed in 1944 disposed of his property as follows:

> I give, devise and bequeath unto my brother, Dennis Elmer Johnson, all of the property, whether real, personal or mixed, of whatsoever character and whatsoever situation, of which I may die seized or possessed, in fee simple and with absolute power of disposition.

Hans Johnson's surviving spouse, Edel, died testate on May 8, 1983. Her will gave all of her property to her daughters, Margaret and Carol.

On June 7, 1984, the executor of the Hans Johnson Estate filed its Final Report. The executor recommended in his proposed distribution that the court reform the trust created under Hans's will to give Robert's interest to Dennis Johnson. Carol filed an objection to the final report challenging this distribution.

After the trial, the district court approved the executor's final report and the proposed distribution of Robert's remainder interest to Dennis. The district court found (1) that decedent's will was clear and unambiguous, (2) that decedent intended to create and vest in Robert a remainder interest which would pass to a trustee at Edel's death, (3) that at Robert's death his remainder interest passed under his will to Dennis, and (4) that Robert's failure to exercise his power of appointment was irrelevant since his remainder interest was vested. Carol has appealed from the district court's ruling.

On appeal, appellant asserts (1) that decedent's will did not create and vest in his son Robert Johnson a proportionate remainder interest, which passed under Robert's will to Robert's brother, Dennis Johnson; (2) that decedent's will instead gave Robert a life income interest in a proportionate remainder, coupled with a power of appointment, and that when Robert failed to exercise the power of appointment, his interest reverted to decedent's estate and passed as partially intestate property to decedent's surviving spouse and children; and (3) that the district court should not have admitted testimony showing that decedent's will was drafted by a nonlawyer, over appellant's objection that extrinsic evidence was inadmissible because decedent's will was clear and unambiguous.

A hearing on objections to a fiduciary's final report is an equitable proceeding. In re Roehkle's Estate, 231 N.W.2d 26, 27 (Iowa 1975). Our scope of review in equity cases is de novo. Iowa R. App. P. 4 (1983). We afford deference to the trial court's findings of fact, but are not bound by them. Iowa R. App. P. 14(f)(7) (1985).

In interpreting a will: "(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." In re Estate of Larson, 256 Iowa 1392, 1395, 131 N.W.2d 503, 504-05 (1964); In re Estate of Anderson, 359 N.W.2d 479, 480 (Iowa 1984). We follow the general rule that "extrinsic evidence is not admissible to vary, contradict or add to the terms of the will, or to show a different intention on the part of the testator from that disclosed by the language of the will." Matter of Estate of Kalouse, 282 N.W.2d 98, 104 (Iowa 1979). Where the will is unambiguous, it is to be "interpreted from the language used therein and the words used are to be understood to mean what they say, no less and no more." In re Proestler's Will, 232 Iowa 640, 646, 5 N.W.2d 922, 926 (1942). "The question is 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).

Life v. Fee Interest. Carol initially argues that the trial court erred in concluding that the will of Hans Johnson created a one-seventh fee interest in his son, Robert, which vested at the time of Hans' death. Carol argues that instead Robert's interest was a life income interest coupled with a general testamentary power of appointment. Under Carol's theory, Robert had no interest

in the trust corpus comprised of a one-seventh share of Hans' estate, because he only had a power to appoint the remainder. Carol contends that Robert had only a life income interest which was to come into possession upon the termination of the preceding life estate.

The Iowa Supreme Court has recognized that:

> A life estate, expressly created, will not be converted into a fee, absolute or qualified, or into any other form of estate greater than a life estate, merely by reason of there being coupled with it a power of disposition, however general or extensive.

Bussing v. Hough, 237 Iowa 194, 197, 21 N.W.2d 587, 588 (Iowa 1946). Hans' will appointed Dennis Johnson, as trustee, over an undivided one-seventh remainder share to be held in trust for Robert's benefit. Income was to be paid to Robert during his life but "upon his death the principal of said fund shall be paid as he may direct by Will, or upon his failing to direct or appoint, in equal portions to his wife and children . . ." This plain and unambiguous language of Hans' will gives Robert solely a life income interest in the one-seventh remainder share with a general testamentary power of appointment over the trust corpus.

This conclusion is directly in line with the Iowa Supreme Court's decision in Bussing. There, the will devised to trustees an undivided one-third of the residuary estate to control such property during the lifetime of the testator's widow "then said property to be distributed among the heirs of my said wife, or as she may direct." Bussing, 21 N.W.2d at 588. The court concluded that this devise gave the widow a life interest in one-third of the residuary estate with a power of disposition of the remainder as a separate interest.

> It is clear the will did not give the wife the one third interest absolutely or in fee. She was given only the income for life. She was not empowered to consume any of the corpus or to distribute it during her lifetime. The power of distribution given her was limited to the remainder.

Id. at 198, 21 N.W.2d at 589.

Likewise, taking Hans' will by its four corners, it is apparent that Hans did not give Robert the one-seventh interest absolutely or in fee. Robert was given only the income for life. He was not empowered to consume any of the corpus or to distribute it during his lifetime. The only power of disposition conferred upon Robert was limited to the remainder and limited to disposition by will. Hans also specified takers in default if Robert failed to exercise his power.

The appellees argue that this interpretation is erroneous because Hans gave each of his seven children an equal one-seventh remainder share absolutely, which interests vested upon Hans' death. Their contention ignores the fact that Hans explicitly gave Robert's share special treatment. Hans' will provides "I give the remainder of my property to my children except as hereafter stated, share and share alike, as their property absolutely and by right of representation, provided . . . however the share that my son Robert shall receive by reason of the above provisions shall be held in trust as hereinafter provided."

The detailed trust that Hans established for Robert did not give him rights to any more of the trust corpus than the income generated therefrom. Robert's life estate was, however, vested since its becoming a possessory interest awaited only the termination of the preceding life estate, which was a certainty. Simes and Smith, The Law of Future Interests § 142 at 128-29 (2d Ed. 1956); Bergin and Haskell, Preface to Estates in Land and Future Interests 37-38 (1966).

Power of Appointment. The law of the state of the domicile of the donor of the power of appointment (the testator of the first will) governs as to questions relating to the sufficiency and construction of the provisions of the appointing instrument (the second will). Bussing, 237 Iowa at 200, 21 N.W.2d at 590. Because

Hans was the donor of Robert's power of appointment and was domiciled in Iowa, Iowa law governs the exercise of the power.

In Iowa, a power of appointment is not exercised by a residuary clause in a will unless in addition an intent to exercise such power appears from the terms of the will. Crecelius v. Smith, 255 Iowa 1249, 1254, 125 N.W.2d 786, 789 (1964); Bussing, 237 at 200, 21 N.W.2d at 590; Proestler's, 232 Iowa at 645, 5 N.W.2d at 925.

> Where a power of appointment is vested in one who has become deceased, it is usually held that the will of the decedent will constitute an exercise of the power in three classes of cases, to-wit: (1) Where there is a reference to the power in the will, (2) where there is a reference to the property which is the subject on which it is to be executed, and (3) where the provisions of the will would otherwise be ineffectual.

Proester, 232 Iowa at 646, 5 N.W.2d at 926.

Robert's will contained a residuary clause giving all of his property to his brother, Dennis Johnson. Robert's will made no reference to his power of appointment nor to the trust corpus nor to a one-seventh remainder share of his father's estate. Such a reference would be unlikely since Robert's will was executed eight years before his father's. None of the provisions of Robert's will would be rendered ineffective by a determination that his power was unexercised. We, therefore, conclude that the residuary clause of Robert's will was not sufficient to exercise his power of appointment.

If the donee of a power fails to exercise the power, the appointive fund passes to the takers in default, or if none, to the donor or the donor's estate. Simes, § 1031 at 494. Hans designated Robert's wife and children as takers in default. However, Robert died unmarried and without children. Therefore, the trust corpus passes to Hans' estate.

Partial Intestacy. *Hans'* will made no provision regarding where the property should go if Robert's power was unexercised and takers in default did not exist. Therefore, the one-seventh remainder share must pass in partial intestacy.

Carol argues that Edel, as Hans' surviving spouse, is entitled to a one-third share of this partially intestate property. Carol relies on Iowa Code section 633.272 (1985) as the basis for her claim, which provides:

> If part but not all of the estate of a decedent is validly disposed of by will, the part not disposed of by will shall be distributed as provided herein for intestate estates. If the testator left a surviving spouse, and the spouse does not elect to take against the will, such spouse shall receive, in addition to the property given to him by the will, one-third of the intestate property, and that one-third shall be subject to the payment of its proportionate share of debts and charges against the estate.

Carol's reliance on this section is misplaced. The distribution of intestate property is governed by the law in effect at the time of Hans' death in 1952. Section 633.272 did not come into effect until 1963. Therefore, this section has no application in the present case.

Iowa Code section 633.2 (1950) provided:

> **Presumption attending devise to spouse.** Where the survivor is named as a devisee in a will, it shall be presumed, unless the intention is clear and explicit to the contrary, that such devise is in lieu of such distributive share, homestead, and exemptions.

Edel was named as a devisee in Hans' will. Edel elected to take under the provisions of the will. At that time, Edel no longer had a third interest in all of Hans' property.

> By her election to take under the will, the widow merely chose between the portion of the estate tendered her in that instrument and the distributive share to which she was entitled under the law. Having elected which she would take, she might not thereafter, owing to some contingency not anticipated, reconsider such election, while retaining that taken under the will also, or claim a part of the estate not disposed of by that instrument. Thus, as was held by the Supreme Court of Minnesota,

> after electing to take under the will, she was estopped from claiming a share of a devise which, under the laws of that state, had lapsed and become intestate property; for that, by her election to take under the will, she waived all right to the distributive share to which otherwise she would have been entitled.

McAllister v. McAllister, 183 Iowa 245, 253, 167 N.W. 78, 81 (1918); see also McGarry v. Mathis, 226 Iowa 37, 45, 282 N.W. 786, 790 (1939).

If a portion of Hans' estate became intestate property, it was nevertheless a portion of his estate renounced by Edel in electing to take under his will. See McGarry, 226 Iowa at 45, 282 N.W. at 790.

Therefore, the one-seventh remainder share must be distributed to Hans' heirs pursuant to Iowa Code section 636.31 (1950), which provides:

> Subject to the rights and charges hereinbefore provided, the remaining estate of which the decedent died seized shall, in the absence of a will, descend in equal shares to his children, unless one or more of them is dead, in which case the heirs of such shall inherit his or her shares in accordance with the rules herein prescribed, in the same manner as though such child had outlived its parents.

The one-seventh remainder share now passes in equal one-seventh shares to Hans' surviving children, Minnie, Carol, Dennis, Byron, Irene, Chester, and Margaret. Minnie Johnson Lund, who was excluded from the class of equally sharing children, is nevertheless entitled to share as an intestate heir under the law as it existed at the time of Hans's death. See Snook v. Herrmann, 161 N.W.2d 185, 190 (Iowa 1968); Day v. Town Club, 241 Iowa 1264, 1268, 45 N.W.2d 222, 225 (1950) (adopted children lose no right of inheritance from natural parent by reason of adoption). Costs are assessed to the estate.

REVERSED.

All judges concur except Sackett and Hayden, JJ., who dissent.

SACKETT, J. (dissenting)

Paragraph four provides in applicable part:

> . . . I give the remainder of my property to my children . . ., share and share alike, as their property absolutely and by right of representation, . . . however, the share that my son Robert Johnson shall receive . . . shall be held in trust as hereinafter provided. [emphasis added]

The majority in interpreting the will has failed to consider the fact the bequest was made in paragraph four which provides the shares go to the children absolutely (including Robert). Instead, the majority seeks to define Robert's interest by going to paragraph five which is a paragraph directing the trustees as to the receipt and investment of Robert's share. From paragraph five they determine the interest given Robert in the proceeding paragraph was but the right to income for life. They then determine their conclusion is directly in line with Bussing v. Hough, 237 Iowa 194, 21 N.W.2d 587 (1946).

What the majority also ignores is the bequest in Bussing was made to the trustees in trust for decedent's wife, and the wife had only income for life and was not empowered to consume any corpus or to distribute it during her lifetime.

The bequest here was made to Robert and Robert could receive the money when and if he was capable of managing his own affairs. Bussing clearly does not dictate the result the majority reached.

I agree with the trial court that Robert had a vested remainder interest. I would affirm the trial court.

Hayden, J., joins this dissent.