FILED
JAN 24 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE ESTATE OF DONALD D. WOOD, Deceased;

EDNA L. WOOD,

Appellant.

Filed January 24, 1984 215

3-409
2-69386

Appeal from the Iowa District Court for Boone County - Paul E. Hellwege, Judge.

Plaintiff appeals from the trial court's ruling in this declaratory judgment action regarding certain provisions in a will. AFFIRMED AS MODIFIED.

Jerry L. Jones, Ames, for appellant.

Richard B. Clogg of Elgin, Hoyman, Clogg & Patin, Indianola, for appellee, Eugene F. Wood, executor of decedent's estate.

Heard by Donielson, P.J., and Snell and Sackett, JJ.

DONIELSON, J.

Plaintiff appeals from the trial court's ruling in this declaratory judgment action regarding certain provisions in a will. She claims that (1) decedent's devise to her of a life estate in his house was not conditioned on her paying off his home improvement loan and (2) she was decedent's common law wife at the time of his death. We affirm as modified.

Decedent Donald Wood and plaintiff Edna Wood were married in a civil ceremony in December 1977; each had been married before and each had grown children. In September of 1979, a decree was entered dissolving the marriage. In December of 1979, Edna moved back into decedent's house; she continued to live there even though she and decedent were never formally remarried. In March of 1981, decedent executed a will which provided in part:

> I will and devise to my former wife, Edna L. Wood, the use and occupancy of my personal residence at Ogden, Iowa, for her life or until she remarries, or fails to occupy same for a period of 90 consecutive days . . . .
>
> I direct that said life tenant shall pay all taxes, insurance and maintenance of said premises during her occupancy thereof. I further direct that any remaining unpaid balance due for home improvement loan on said premises, outstanding at Peoples Trust & Savings Bank, at the time of my death shall be paid by said life tenant.

Decedent died twelve days after executing the will. After the will was admitted to probate, a dispute arose as to whether or not the will requirement that Edna repay the Peoples Trust loan was valid and also as to whether or not Edna was decedent's common law wife at the time of his death. Edna filed a petition for declaratory judgment on these matters. The executor of decedent's estate, Donald F. Wood, answered the petition, and a trial was held. The trial court found that Edna's right to possession of the house was conditioned upon her repaying the Peoples Trust loan, and that she was not decedent's common law wife at the time of his death. Edna has appealed.

I.

217

Edna first argues that the court erred in holding that her right to the life estate was conditioned on her paying off the home improvement loan. Although we agree with the court that a "condition" of sorts was imposed by the will, the court's failure to declare what particular kind of condition is involved here requires us to do so. Specifically, we must determine whether this case involves a condition precedent, a condition subsequent, or something else. These terms have been defined as follows:

> A condition precedent is one which must happen or to be performed before the estate to which it is annexed can vest or be enlarged; . . . A condition subsequent is one annexed to an estate already vested, by the performance of which such estate is kept and continued.

Black's Law Dictionary 366 (rev. 4th ed. 1968). Our courts have always preferred conditions subsequent due to the traditional preference for vested estates over contingent estates. See, e.g., Schrader v. Schrader, 158 Iowa 85, 89, 139 N.W. 160, 162 (1912).

In this case, it is readily apparent that the condition imposed by the will regarding Edna's payment of the loan is not a condition precedent since the will does not require Edna to pay the loan before the vesting of her life estate. Rather, the condition is more in the form of a condition subsequent, although it does not have the full legal effect of a condition subsequent. For the precise effect of this condition on Edna's life estate, we again refer to the Schrader case:

> a devise made upon condition that the devisee pay a stated sum of money to another person, and providing no limitation over upon failure to make such payment . . . is in the nature of a legacy to the third person so designated, and is to be treated as a charge upon the land so devised.

158 Iowa at 92, 139 N.W.at 163. Thus, we hold that the will's requirement that Edna pay the loan is effectively a charge on Edna's life estate in favor of the Peoples Trust & Savings Bank and is not a condition subsequent, and that the unpaid balance due on that loan is to be treated as a lien upon the property in

which Edna was devised the life estate. With this clarification, the trial court's conclusion that a condition was imposed by decedent's will is affirmed.

II.

Edna also contests the trial court's finding that she was not decedent's common law wife at the time of his death. In claiming that a common-law marriage existed between her and decedent, it was Edna's burden to prove (1) intent and agreement in praesenti to be married by both parties; (2) continuous cohabitation; and (3) public declaration that the parties are husband and wife. In re Marriage of Winegard, 278 N.W.2d 505, 510 (Iowa 1979). Since there is no public policy in Iowa favoring common law marriages, we regard with suspicion such claims of marriage. Id.

We agree with the trial court that Edna did not sustain her burden of proving the existence of a common law marriage in this case, especially with regard to the public declaration requirement. Edna and decedent were divorced in 1979. Thereafter, both Edna and decedent filed their tax returns under the "single" filing status. Edna's name was removed as beneficiary from decedent's life insurance policies. In response to a question from decedent's surgeon, Edna denied that she was decedent's wife. Finally, decedent's will refers to Edna as his "former wife." Under these circumstances, we cannot say that Edna has satisfied her burden of proof.

Other than the modification set forth in division I above, the trial court's judgment is affirmed.

AFFIRMED AS MODIFIED.