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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-222 / 93-1400

IN THE MATTER OF THE ESTATE OF HAROLD E. KISSELL, Deceased,

THE WATERLOO SAVINGS BANK and JEANNE PRIEBE,

Appellees,

vs.

ROSE J. WIENAND,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, James L. Beeghley, Judge.

Rose Wienand appeals a judgment of the district court in a probate action ruling she was not the intended beneficiary of the deceased's real estate holdings. **REVERSED AND REMANDED.**

Frederick G. White, Waterloo, and Charles J. Pickett of Pickett & Kober, Waterloo, for appellant.

Jerald L. Martin of Fulton, Frerichs, Martin & Andres, P.C., Waterloo, for appellees.

Heard by Hayden, P.J., and Habhab and Cady, JJ.

HAYDEN, P.J.

The decedent, Harold Kissell, was an employee of the Illinois Central Railroad for many years. Throughout his employment, he resided both in Freeport, Illinois, and Evansdale, Iowa, where he waited at either point for further orders from the railroad. In 1953 he commenced living with Rose Wienand in Freeport. This relationship continued for many years. Kissell told Wienand when he retired in 1979, he wanted to buy a house and move it to property he owned in Evansdale. He also told Wienand he wanted her to live with him. In 1979 Wienand and her daughter went to visit Kissell in Evansdale, where Kissell showed them the house (duplex) he wanted to buy and the land on which he wanted to move it.

Some time after executing his will Kissell obtained a permit to move the duplex. The permit identified the new address of the duplex to be 717 East End Avenue. The duplex was to be situated east of the property commonly known as 701 East End Avenue. Kissell acquired the property known as 701 East End Avenue, located on a parcel 110 feet by 200 feet, in 1974. A house and a garage were located on that parcel of land. Kissell rented the 701 East End Avenue property to Jeanne Priebe. During the time she rented the property, Kissell constructed a fence to enclose the parcel. Priebe rented from Kissell from 1974 until 1991.

In 1976 Kissell acquired a second parcel of property east of the original 701 East End. This property was described as "[a]ll of lot 39 except west five hundred ninety feet (590') measured along north line East End Ave. in Auditor Kobe's Plat Number 1 in the City of Evansdale, Iowa." Kissell later purchased a third plot in 1980 which included a portion of vacated East End Avenue in a property exchange with the city of Evansdale. Kissell exchanged a portion of East End Avenue he already owned for the portion of vacated East End Avenue. This property extended to a former railroad bed.

Kissell executed his last will and testament on July 18, 1979. Pursuant to the terms of the will, Jeanne Wolf (now Jeanne Priebe) was to receive the house and adjoining lot located at 701 East End Avenue, Evansdale, Iowa. Kissell made other specific bequests and devises and left the remainder of his estate to Rose J. Wienand. The duplex located at 717 East End Avenue was not mentioned.

In fact, that address did not exist at the time of the making of his will. According to city record, all the parcels of land purchased by Kissell on East End Avenue were taxed as one parcel.

Priebe resided at 701 East End Avenue until 1980, at which time she moved to the lower unit in the duplex at 715-717 East End Avenue in which Kissell and Wienand resided. Several garages were also added to the property at 715-717 East End Avenue. At this time, the fence on the

east boundary line of the original 701 East End Avenue was moved to the west near the garages.

Kissell died in December 1992. The Waterloo Savings Bank, as executor of Kissell's estate, filed a petition for declaration of rights against both Wienand and Priebe, seeking a determination of each parties' interest in the property on East End Avenue. The district court concluded the will, on its face, provides for Priebe to receive not only the property at 701 East End Avenue but all the adjoining land to the east. The district court ruled if Kissell had wanted Wienand to have the property located at 715-717 East End Avenue, Kissell would not have made a specific bequest of the "adjoining lot" to Priebe. Wienand appeals from this ruling.

Wienand argues she and Kissell were together, almost as husband and wife, for nearly forty years at the time of his death. Wienand points out Kissell erected a fence to the east of the garage at 701 East End Avenue, intending to define the boundaries of 701 East End Avenue. Wienand contends it does not make sense Kissell would bequeath property to a tenant when he planned not only to live in the duplex himself but to live there with her. Wienand maintains the terms of the will intended to convey to Priebe the house at 701 East End Avenue and the lot on which it sits.

The primary issue to be determined is whether the phrase "house and adjoining lot" was intended to include

the duplex at 715 and 717 East End Avenue or whether Kissell intended Priebe only receive the house and lot at 701 East End Avenue.

This case is in equity. Our review of an equity proceeding is de novo. Iowa R. App. P. 4.

Kissell executed his will on July 18, 1979. In it he specifically provided he intended to leave "the house and adjoining lot at 701 East End Avenue" to Priebe. At the time the will was executed no other structure existed on the property at East End Avenue. However, twenty-one days after signing the will, Kissell provided the address of 717 East End Avenue to a utility company. The evidence indicates prior to his signing the will, Kissell had begun making arrangements to move a duplex onto 717 East End Avenue in which he and Rose Wienand planned to live. While he may not have known the exact address for the duplex at the time he signed the will, it seems reasonable he would know the duplex would be assigned an address and would have identified it in the will if he intended to give it to Priebe.

The phrase "house and adjoining lot at 701 East End Avenue" is not in and of itself ambiguous. However, knowledge of the fact of the existence of a home in the same area does create a latent ambiguity. A latent ambiguity exists where language of the instrument does not lack certainty but some extrinsic or collateral matter outside the will renders the meaning obscure and uncertain.

In re Lepleys Estate, 17 N.W.2d 526, 529 (Iowa 1945). Kissell expressly gave Priebe the "house and adjoining lot."

In Iowa, in ascertaining the intent of the testator, the court should put itself in the position of the testator at the time of the writing of the will and take into consideration all the surrounding circumstances and conditions present in the mind of the testator at the time of the making of the will, the language of the entire will and impute to his words such meaning as under all the circumstances, will conform to his probable intention and be most agreeable with reason and justice. In re Estate of Kruse, 250 N.W.2d 432, 433 (Iowa 1977). The difficulty in these situations is to ascertain not what Kissell intended to say or what he should have said, but what he meant by what he did say. In re Estate of Kiel, 357 N.W.2d 628, 632 (Iowa 1984). Kissell stated in his will he gave Priebe the house and adjoining lot at 701 East End Avenue. The reading of the will suggests Kissell was referring to the house and lot at 701 East End Avenue, not the house at 701 East End Avenue and a lot east of 701 East End Avenue. Additionally, following the time the duplex was moved to the East lot, Kissell erected a fence running north and south seventy feet east of the west line of the land described as the east 110' of the west 590' of lot 39, clearly establishing the east line of the property he called "house and adjoining lot at 701 . . ." in his will.

In reviewing the entire situation, it seems unlikely Kissell intended to give away the home he and Rose had been living in as if they were husband and wife. Kissell and Rose had been living together for almost forty years. The couple lived in the duplex together and it would seem reasonable Kissell would not intend to displace Rose from her home.

Additionally, Kissell left the residuary of his estate to Rose. He clearly intended to provide for Rose following his death. Leaving the home they lived in together to another party is totally inconsistent with the intent evident in the will. Priebe only rented from Kissell. They were not relatives, nor were they good friends. Kissell had stated he felt sorry for Priebe and wanted to help her. The extrinsic evidence supports the position the property was meant and intended to go to Rose.

We reverse the finding of the trial court and remand for entry of judgment consistent with this opinion. We do not retain jurisdiction. Costs on appeal are taxed to appellees.

REVERSED AND REMANDED.