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IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF)
THE ESTATE OF) Filed June 28, 1979
ORACE M. CULVER,)
Deceased.) $\frac{125}{2-62217}$

Appeal from Adair District Court - M. C. Herrick, Judge.

Coexecutor appeals decision made by trial court on behalf of incompetent surviving spouse to elect her testamentary rather than her distributive share in the estate. - Affirmed.

James R. Cook & George E. Flagg, Des Moines, for Coexecutor.

Richard O. McConville & Don Mullin, of Mullin, Mullin, McLaughlin, Harvey & McConville, Creston, for Don Culver.

Clare Williamson, Greenfield, for Orace M. Culver, Decedent.

C. R. Bentz, Winterset, for Rosa L. Culver.

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

PER CURIAM

A coexecutor of the estate of Orace Culver, Velma Van Der Veer, appeals trial court's election under section 633.244, The Code 1977, that decedent's surviving spouse take her share of the estate under the terms of her husband's will rather than her statutory share. We affirm.

Our review is de novo. Iowa R. App. P. 4. There is no dispute that Rosa Culver is incapable of personally electing whether to take under or against the will of her deceased husband. In such a situation, section 633.244 provides that the court shall hold a hearing and "enter such orders as it may deem to be for the best interests of such person." Under Orace's will, Rosa was bequeathed all the personal property and a life estate in all of the real property consisting of 444 acres. The average annual rental income from the farmland is approximately \$9000.

Coexecutor Van Der Veer, who is the daughter of Orace and Rose Culver, argues that an election to take under the will is not in Rosa's best interest because the monetary value of her distributive share exceeds that of her testate share. Assuming for the moment this is true, we note the following pertinent language from in re Estate of Kees, 239 Iowa 287 at 292, 31 N.W.2d 380 at 382-83 (1948):

[T]here is substantial agreement among the authorities that the best interests of an insane spouse do not depend entirely on which provision, statutory or testamentary, is the more valuable. The question of value is a proper consideration but not controlling. Van Steenwyck v. Washburn, (citation), said to be the leading case on this subject, points out that if the court must elect for the widow the more valuable interest, without reference to any other consideration, it really will exercise no discretion. Courts generally appear to be somewhat reluctant in this class of cases to reject the provisions of the will if adequate to meet the probable wants of the incompetent spouse.

At the time of the hearing, Rosa's living expenses at the nursing home were around \$7000 per year. Given the poor state of her health, there is little likelihood she will need, or even have occasion to spend, a much greater amount. If an election was made against the will, Rosa's one-third interest in the value of the realty would be approximately \$101,000. Although we recognize that a fee interest is ordinarily more valuable than a life estate in the same property, the interest income from a sale of Rosa's share of the farmland would approximate \$7000 annually as compared to the

aforementioned rental value of \$9000. Additionally, the trial court properly noted that if Rosa took an undivided one-third ownership of the property "there would be a strong possibility of further litigation in the partition of the farmland, either in kind or by sale." Recognizing the considerable amount of discretion which is vested in the trial court in this type of case, we decline to interfere with the election made by the court and affirm its decision.

We find it unnecessary to decide the second issue raised by the coexecutor - whether a trial court making an election for an incompetent spouse may consider the spouse's independent means of support. On our de novo review, we have ignored Rosa's social security income and the value of her jointly held property and have nonetheless concluded that trial court acted within its discretion in electing as it did.

AFFIRMED.