IN THE COURT OF APPEALS OF IOWA

No. 8-341 / 97-1204

IN THE MATTER OF THE ESTATE OF MARY S. WITT, Deceased,

WILLIAM A. WITT,

Plaintiff-Appellant,

vs.

JOHN H. WITT,

Defendant-Appellee.

FILED
OCT 29 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Pottawattamie County, Gordon C. Abel, Judge.

Bill Witt appeals a district court ruling that he could not, in his individual capacity, terminate a farm tenancy on a farm he inherited from his mother because the personal representative of the estate was in possession of the farm. **AFFIRMED.**

Jack E. Ruesch of Telpner, Peterson, Smith & Ruesch, Council Bluffs, for appellant.

William C. Bracker, Council Bluffs, for appellee.

Heard by Sackett, P.J., and Huitink and Mahan, JJ.

MAHAN, J.

Bill Witt appeals from a declaratory judgment that he, as devisee of the property, did not have the authority to terminate John Witt's farm tenancy for the 1997 crop year. We affirm.

Bill Witt and John Witt are brothers. Their parents, Herbert C. and Mary S. Witt, owned two farms as tenants in common. Herbert died in 1992 leaving his undivided one-half interest in one farm to Bill and in the other farm to John. This devise was subject to a trust, the income from which was paid to Mary. The trust dissolved upon Mary's death on November 29, 1995. The trust assets were distributed to the brothers on December 28, 1995. Mary made a similar devise of her undivided one-half interests in the farms so that each of her sons would become the owner in fee of one of the farms.

John had been farming on both properties under an oral lease, and continued to do so after Mary's death and the appointment of John and Bill as co-executors of the Mary Witt Estate on December 7, 1995. On or about March 21, 1996, Bill, in his individual capacity, served John with a notice that the farm tenancy on the property devised to Bill would terminate on March 1, 1997. It is undisputed this notice was served in compliance with chapter 562 of the Code of Iowa. The dispute centers on whether Bill, in his individual capacity, had the authority to terminate the farm tenancy in March 1996, while the personal representatives of the estate were in possession of the property.

The district court filed an order favorable to Bill on this issue on February 17, 1997. The district court reconsidered the order and filed an amended order on April 17, 1997, ruling Bill did not have the authority to terminate John's farm tenancy for the 1997 crop year. The Stipulation to Permit the Closing of the Estate filed on November 25, 1997, indicates Bill had relied upon the February 17 order to lease the farm to Mark Olsen. The parties appear not to have received notice of the amended order until June 1997. At that time, John agreed not to immediately enforce the amended order as Olsen had already completed a substantial amount of work for the 1997 crop year. Instead, the parties seem to have agreed to place $2000 of John's share of Mary's estate into escrow to be paid to whomever prevails on appeal. John died on July 17, 1997; Yvonne Witt is the executor of his estate.

I. STANDARD OF REVIEW. The standard of review of a declaratory judgment order is determined by whether the district court tried the action at law or as a proceeding in equity. *Ernst v. Johnson County*, 522 N.W.2d 599, 602 (Iowa 1994). A declaratory judgment ruling on the authority to terminate a farming lease while the farm is in possession of the personal representatives of the probate estate is equitable in nature and thus is reviewed de novo. Iowa Code § 633.33 (1997); Iowa R. App. P. 4; *Davis v. Roberts*, 563 N.W.2d 16, 19 (Iowa App. 1997). The findings of the district court are given weight but they are not binding upon this court. *Id.*

II. AUTHORITY TO TERMINATE THE FARM TENANCY. Title to Mary's real property passed instantly to John and Bill respectively as devisees under her will. *DeLong v. Scott*, 217 N.W.2d 635, 637 (Iowa 1974). However, the devisees take title "subject to the possession of the personal representative as provided in section 633.351." Iowa Code § 633.350. Section 633.351 requires the personal representatives to take possession of real property "if there is a lease of such real estate outstanding." John was farming under a lease of the property at the time of probate and thus John and Bill, as co-executors, were required to take possession of the farm. *Id.*; *Colthurst v. Colthurst*, 265 N.W.2d 590, 595 (Iowa 1978).

A personal representative is statutorily authorized to retain possession of the estate property for nine months from the date of appointment, unless otherwise ordered to surrender possession upon application of the personal representatives or any interested party. Iowa Code §§ 633.353-633.355. Neither Bill in his capacity as an interested party, nor John and Bill as personal representatives made such an application. Consequently, Bill was not in possession of the property before the September 1, 1996 deadline to give notice to terminate John's farm tenancy for the 1997 crop year. Iowa Code § 562.7.

While John and Bill, in their capacity as personal representatives, had possession of the property, they had the powers given them by the terms of Mary's will. Under Article IX (1) and (13) of Mary's will, they had the power and authority to lease real property for terms within or extending beyond the term of Mary's estate,

as well as the power and authority "to continue the operation of any farm property which is being held in [Mary's] estate . . . through arrangements with . . . tenants." These powers were exercisable without notice to or approval of the court. Iowa Code § 633.383; *Brietech v. Christenson*, 541 N.W.2d 840, 844 (Iowa 1995). Thus their failure to give notice to terminate renewed John's farm tenancy for the 1997 crop year; John's farm tenancy was not terminated by the notice given by Bill on March 21, 1996. Iowa Code § 562.6.

For these reasons, we affirm the declaratory judgment as entered by the district court.

AFFIRMED.

Huitink, J., concurs; Sackett, P.J., concurs specially.

SACKETT, P.J. (concurring specially)

I concur specially. In not giving a termination notice, the estate, in essence, gave John an additional one-year lease. This power to lease beyond the term of the estate was given to them by Mary's will; consequently, I concur with the majority's conclusion in this regard.

In doing so, I do not address the issue of John's self-dealing giving himself, without order of court,[1] an additional one-year lease. Nor do I address the issue that Bill held an undivided one-half interest in fee simple on the date the notice was given and, consequently, Mary's estate had no right to the possession of that interest. Neither of these issues were raised on appeal. Not having been raised, I have not considered them.

---

[1] Iowa Code section 633.155 provides, in part, "No fiduciary shall in any manner engage in self-dealing except on order of court after notice to all interested parties."