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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LELA DORSEY,

Plaintiff-Appellee,

vs.

ELVA CRON, EXECUTOR FOR THE ESTATE OF ABBY CRON,

AND WALTER G. CRON,

Defendants-Appellants.

Filed August 26, 1982

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2-67291

Appeal from Cass District Court - Leo Connolly, Judge.

Defendant-executor appeals from an order entered in plaintiff's favor in her action to determine her interest in certain real estate and to obtain an accounting of all income received therefrom since the death of the testator. AFFIRMED AND REMANDED.

Harold G. DeKay, Atlantic, Iowa, for defendants-appellants.

Rhoda E. Schollars, Anita, Iowa, for plaintiff-appellee.

Considered en banc.

Defendant-executor appeals from an order entered in plaintiff's favor in her action to determine her interest in certain real estate and to obtain an accounting of all income received therefrom since the death of the testator. Defendant claims that the original deed establishing the testator's interest gave her a fee simple rather than a life estate and that the trial court abused its discretion in granting plaintiff's motion for a continuance in order to avoid dismissal under Iowa R. Civ. P. 215.1. We affirm and remand.

On September 26, 1904, Minnie Aggen deeded certain described farm land to Abbie Cron "and to -h- heirs and assigns." However, the deed further stated that she was "[t] o have the above described land during her life time, and at her death the same is to go to her children and to their heirs. But if she dies without children, then the said land is to go to her sisters Minnie M. Aggen and Maggie Aggen." Abbie Cron died in 1976, leaving two children surviving—plaintiff Lela Dorsey and defendant Walter Cron, executor of Abbie's estate. Under her will, however, the property subject to the 1904 deed was left to Walter alone. He has since died; his surviving spouse, Elva, is now acting as executor of Abbie's estate.

Plaintiff filed her petition on July 24, 1978, seeking a declaration that she and Walter were tenants in common of that land by virtue of the deed. She also sought an accounting of all rents and profits derived from the property after Abbie's death and a judgment for her share thereof. In December, 1980, the trial court granted plaintiff's motion to continue the case to 1981 to avoid automatic dismissal under Iowa R. Civ. P. 215.1.

The court issued its findings and conclusions on August 5, 1981. The only question resolved at that time was the interpretation of the 1904 deed. The court held that the grantor's intention must be ascertained by examining the entire instrument and, under this rule of construction, it was evident that Abbie's grantor intended her to have only a life estate rather than a fee simple. Therefore, she

could not leave the whole property to Walter by will; he and plaintiff were held to be tenants in common and plaintiff was held entitled to an accounting. Plaintiff was granted no other specific relief at that time. Defendant brought this appeal.

I. Defendant argues that the language of the deed had the effect of creating a fee simple in Abbie by operation of the Rule in Shelley's Case. In greatly simplified form, that rule held that in a conveyance to a grantee for life, remainder to grantee's heirs, the two interests merged to give the grantee a fee simple. See 36 Iowa Code Ann. 101-04 (1950). The Rule in Shelley's Case was statutorily abrogated in 1907, id. at 103, Iowa Code section 557.20, but instruments executed before that time may still be governed by it. See Blair v. Kenaston, 223 Iowa 620, 624, 273 N.W. 184, 187 (1937).

We conclude, however, that the rule has no application in this case. The habendum clause states that the land is to go to Abbie's "children and to their heirs" after her death, not to her "heirs" alone. The distinction between "children" and "heirs" is critical in cases involving the Rule in Shelley's Case:

> The rule has no application where, as in this case, the conveyance is to one for life with remainder over to the children of the life tenant because the word "children" is a word of purchase and not of limitation unless it is manifest that the grantor intends to use the word children as the equivalent of the word heirs.

Blair, 223 Iowa at 625, 273 N.W. at 187. Because the rule does not apply here, Abbie did not receive a fee simple interest.

Our conclusion is further supported by the rule of construction stated in In re Estate of Fleck, 261 Iowa 434, 440, 154 N.W.2d 865, 868 (1967):

> We are satisfied the granting clause and additional provisions or habendum are to be construed together, to the end that intention of the parties manifested by the language employed be given full effect so far as it can be ascertained, and not in conflict with applicable rules of law.

In considering all the relevant language in the 1904 deed, we think the trial court correctly decided that Abbie was intended to have only a life estate with

remainder to her children. She therefore had no power to devise the property to Walter alone; instead, he and plaintiff both derived their interests as tenants in common from the deed.

II. Defendant also claims that the trial court abused its discretion by granting plaintiff's motion for a continuance so as to avoid dismissal under Iowa R. Civ. P. 215.1. Though her argument is rather sketchy, defendant appears to argue that there was no support for the court's decision in the record. We disagree. Plaintiff's attorney filed a verified application for a continuance on December 11, 1980, stating that Walter died in 1980 and no one had yet been substituted for him to administer Abbie's estate. In addition, plaintiff's attorney had entered her appearance in this case in July, 1980, after plaintiff's former attorney died in August, 1978. Rule 215.1 states in part as follows: "[a]ll such cases shall be assigned and tried or dismissed without prejudice at plaintiff's costs unless satisfactory reason for want of prosecution or grounds for continuance be shown by application and ruling thereon after notice and not ex parte." Plaintiff's attorney provided sufficient reasons to justify the continuance; the trial court did not abuse its discretion in so granting it.

We affirm the ruling of the trial court and remand for further proceedings on plaintiff's request for an accounting.

AFFIRMED AND REMANDED.