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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed May 28, 1985

IN THE MATTER OF THE ESTATE OF RUDOLPH J. HOFFMAN, Deceased;

EDITH RIESSELMAN and IRENE BAUMHOVER,

Appellants.

5-190
83-1636

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Appeal from the Iowa District Court for Carroll County - M. D. Seiser, Judge.

Appellants appeal from trial court's determination in a will construction action. REVERSED.

Appellants pro se.

John A. Beltz and Raymond O. Snook, Glidden, for appellees.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

SACKETT, J.

This is an appeal from an order entered in the estate of Rudolph J. Hoffman. Appellants Edith Riesselman and Irene Baumhover are two of the ten surviving children of the decedent, Rudolph Hoffman.

Appellants were represented by legal counsel at the time of the filing of their briefs and requests for oral argument. At the time of oral argument, appellants did not have legal counsel but appeared and argued in their own behalf.

Certain issues were presented by the parties on oral argument that were not raised in their written briefs. Our review is limited to issues properly raised in their written briefs.

Decedent Rudolph J. Hoffman died in May of 1982. Prior to 1981 decedent executed a will and three codicils. On October 22, 1981, decedent executed the following document:

> I, Rose Kanealy writing for my Dad dated 10-9-81. Ma's estate can be sold immediately upon my death. My farm is not to be sold until 5 years after my death—everything is to be split equally among all my 10 children. I agree to this
> /s/ Rudolph Hoffman
> /s/ Rudolph Hoffman
> (on reverse side)
> Witnessed 10-22-81
> /s/ John M. Titler
> /s/ Jayne Helle

It was conceded by the heirs and the trial court determined the October 1981 document was the decedent's final will.

The sole issue for the trial court was the effect of the earlier will and codicils. The will and codicils executed prior to the October 1981 will provided (in relevant part) for a 5-year restriction on the sale of the land, contained a provision for holding the land in trust for 5 years and set forth the mechanics of an eventual sale.

The trial court held:

> The document dated October 22, 1981, did not completely dispose of Mr. Hoffman's entire estate even though it stated "everything is to be split equally among all of my 10 children." The reason is that it had previously provided that his farm "was not to be sold until 5 years after my death." It did not say what was to happen to the farm during the 5 years.

Appellants claim the trial court erred and that the October 1981 will disposed of all of decedent's property and revoked his prior will and codicil.[1] A subsequent will, not in terms revoking the former will, operates as a revocation of the first only insofar as it indicates a different intention as to the disposition of the same property. In Re Estate of Ramthun, 249 Iowa 790, 796, 89 N.W.2d 337, 340 (1958). All wills not inconsistent with each other must be construed together, and all their provisions, so far as possible, shall be carried into effect. Id. There are no revoking words in the October 1981 document. The October 1981 document does, however, dispose of all of Hoffman's farm. The most the 5-year no sale provision did was qualify the beneficiaries' right to alienation.

In Porter v. Tracey, 179 Iowa 1295, 1297; 162 N.W. 800, 801 (1917), decedent's will contained the following language:

> I desire that none of the real estate of which I die seized be sold for at least 5 years after my death, . . .[2]

The Porter court rejected the argument that to have made the wish or direction of the testator effective the will should have provided for a trustee in whom the estate should vest until the removal of the restriction upon the sale of the property. It explained:

> The will became effective for all its expressed purposes immediately upon the testator's death, and title to the property passed at once to the beneficiaries therein named. They became and are tenants in common thereof, entitled to possession, use, rents and profits, and their rights therein are subject only to the condition that, . . . , their tenancy in common cannot be changed into ownership in severalty until the end of five years from the testator's death. There is no occasion for the intervention of a trustee.

Id. at 1303-04, 162 N.W. at 803.

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[1] The trial court determined the provisions of the earlier will regarding appointment of an executor was not inconsistent with the October 1981 document. This finding was not challenged on appeal.

[2] The clause contained the additional language, which we do not determine relevant to the issue in this cause, "unless all legatees under my said will shall sign a written agreement or consent to said sale."

The October 1981 will gave title to the farm to the ten children as tenants in common subject to the 5-year restriction against sale. The children, therefore, are tenants in common entitled to possession, use, rents and profits subject to the 5-year restriction against sale. The entire fee of the farm was disposed of by the October 1981 will. The October 1981 will revoked the trust provision and provision for sale contained in the earlier wills.

The trial court is reversed.

REVERSED.