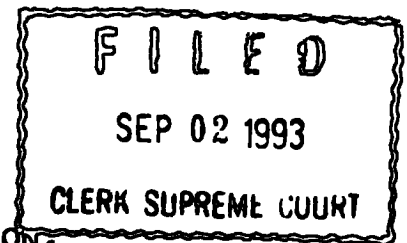


IN THE COURT OF APPEALS OF IOWA

No. 2-566 / 92-574



IN THE MATTER OF THE ESTATE OF LILLIAN P. THOMPSON,
Deceased,

LOIS MINCH and ROGER THOMPSON,

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Appellants.

Appeal from the Iowa District Court for Story County,
Carl D. Baker, Judge.

Two beneficiaries appeal a district court probate order
concerning the distribution of certain assets under
decendent's will. **REVERSED AND REMANDED.**

James C. Ellefson of Welp, Harrison, Brennecke & Moore,
Marshalltown, for appellants.

Frank B. Johnston of Newbrough, Johnston, Brewer,
Maddox & Nadler, Ames, for appellees Children
International, f/k/a Holy Land Christian Mission
International, Piney Woods Country Life School, and World
Vision.

Considered by Oxberger, C.J., and Donielson and Habhab,
JJ.

HABHAB, J. 000594

Lillian P. Thompson died testate on July 29, 1989. Her will was admitted into probate. Frank B. Ambrose and Beeulah Settle were appointed as executors. Thompson's will, in pertinent part, provided:

SECOND. I hereby devise and bequeath to my niece, Lois Minch, and to my nephew, Roger Thompson, in equal shares, all the personal property belonging to me. Should any of this personal property not be wanted by either one of them, then that part which they do not care to take shall be given to the Salvation Army This personal property shall also include any automobile of which I die seized.

* * *

SIXTH. All the rest and residue of my estate of whatever kind and nature, both real, personal or mixed and wheresoever located of which I die seized or entitled, up to \$60,000.00 I devise and bequeath to the Piney Woods Country Life School, [address], and to the School of the Ozarks, [address], in equal shares. . . .

Should this residuary estate of mine exceed \$60,000.00 then that amount over \$60,000.00 I devise and bequeath to the Holy Land Christian Mission International, [address], and Piney Woods Country Life School, and World Vision, in equal shares, said inheritances to be used where most needed.

At the time of her death Thompson owned real estate worth \$184,000, stocks and bonds worth \$80,161, mortgages, notes and cash worth \$71,801, insurance worth \$1,000, miscellaneous property, including household goods, worth \$12,635, and a joint checking account with her sister, Ruby, worth \$108,231.

The executors filed a final report. They proposed that the stocks and bonds, mortgages, notes and cash, insurance,

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and miscellaneous property should all be considered personal property. Thus, the total amount of personal property was \$165,598. Under paragraph two of the will, the executors proposed to divide this amount equally between Lois and Roger.

The executors subtracted the specific bequests in the will from the value of the real estate owned by Thompson. The amount of \$129,028 remained to be distributed pursuant to paragraph six of the will, the residuary clause.

Children International, formerly known as Holy Land Christian Mission International, Piney Woods Country Life School, and World Vision filed an objection to the final report. They claimed the phrase "personal property," as used in paragraph two of the will, was ambiguous. They believed paragraph two referred only to tangible personal property, and that intangible personal property should be disposed of pursuant to the residuary clause.

The district court agreed with the objectors. The court found that because paragraph six provides, "All the rest and residue of my estate of whatever kind and nature, both real, personal, and mixed," decedent intended some personal property would be included in her residuary estate. The court concluded decedent intended to include only tangible personal property in paragraph two, and that she intended to include intangible personal property in the residuary estate under paragraph six. The court determined

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the phrase "personal property" in paragraph two meant only tangible personal property. Lois and Roger have appealed.

Pursuant to Iowa Code section 633.33, this case was tried as a proceeding in equity. Therefore, our scope of review is de novo. See Iowa R. App. P. 4.

The facts of this case are not in dispute. The only question before us is the proper interpretation of the phrase "personal property" in the will. Lois and Roger contend the district court should not have construed the phrase "personal property," as used in paragraph two of the will, to mean tangible personal property.

Where the terms of a will are plain and unambiguous, a construction by the court is unnecessary. In re Estate of Kiel, 357 N.W.2d 628, 630 (Iowa 1984). Where there is no patent ambiguity, a will must be construed as written unless some latent or hidden ambiguity appears. Id. A court may not, under the guise of ambiguity, add to the provisions of a will. Id.

Generally, the words of a will are to be used in their natural, usual, popular, and conventional meaning. In re Estate of Nagl, 408 N.W.2d 768, 771 (Iowa App. 1987). "Personal property" has been defined as "everything which is the subject of ownership and is not classified as real estate." Gingerich v. Protein Blenders, Inc., 250 Iowa 654, 657, 95 N.W.2d 522, 524 (1959).

However, where the use of words in their broad meaning has the effect of frustrating another bequest, courts may

construe the words in a more restricted sense. In re Estate of Chadwick, 247 Iowa 1050, 1054, 78 N.W.2d 31, 34 (1956). This is based upon the inference that the testator intended each provision of the will to be effective. Id.

In Chadwick, the will in question provided that the testator's sister "shall have the privilege of taking and keeping any item of the personal property herein bequeathed, except one case of flat table silver." 246 Iowa at 1052, 78 N.W.2d at 33. The will went on to state that any items so selected were for the sister's personal use. Id. In a separate paragraph, the will provided all cash and securities were to be used to create a fund to pay an annuity to a different beneficiary. 247 Iowa at 1053, 78 N.W.2d at 33.

The court there found the phrase "personal property" was susceptible to two different meanings. 247 Iowa at 1054, 78 N.W.2d at 33. The court concluded the testator intended "personal property" to mean only tangible personal property, not cash and securities. 247 Iowa at 1055, 78 N.W.2d at 34. The court noted that a broader interpretation of "personal property" under the terms of the will would make the creation of the annuity fund impossible. Id.

In the present case, a broad interpretation of the phrase "personal property" does not act to totally eliminate another bequest. Unlike the will in Chadwick, here there is no separate, specific provision for cash and

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securities. However, a broad interpretation could eliminate a portion of the residuary estate. We conclude that because there may be two different interpretations of the phrase "personal property," we must proceed to construe Thompson's will.

In interpreting wills, the intent of the testator is the polestar and must prevail. In re Estate of Rogers, 473 N.W.2d 36, 39 (Iowa 1991). In determining intent, the question is not what the testator meant to say, but rather what is the meaning of what the testator did say. Id. The testator's intent must be determined from all of the language contained within the four corners of the will. Id.

The residuary clause provides, "All the rest and residue of my estate of whatever kind and nature, both real, personal or mixed," (emphasis added).

In construing the residuary clause, we note that the purpose of such clause is to make a complete testamentary disposition of the testator's estate, so that no part of it may be left to pass as intestate property. See In re Estate of Hoagland, 203 N.W.2d 577, 581 (Iowa 1973). We conclude this was decedent's purpose in paragraph six of the will in question here. We determine that the inclusion of the term "personal" in the list of property in the residuary clause means only that testator intended to make a complete testamentary disposition. By listing all the

possible types of property, she insured no part of the estate was left to pass as intestate property.

Furthermore, when a word or expression occurs more than once in a will, it will be presumed to have been used in the same sense each time, unless the context shows a contrary intention. In re Estate of Miquet, 185 N.W.2d 508, 515 (Iowa 1971); Schaefer v. Merchant's National Bank, 160 N.W.2d 318, 321 (Iowa 1968). Thus, there is an inference the phrase "personal property" has the same meaning in paragraph two and paragraph six of the will. We reject a construction which gives the phrase the meaning tangible personal property in one paragraph and intangible personal property in a different paragraph.

We conclude all personal property in decedent's estate, whether tangible or intangible, should be disposed of pursuant to paragraph two of the will. Only if some personal property remains left after application of paragraph two may it be included in the residuary estate, and disposed of pursuant to paragraph six. We therefore reverse the decision of the district court. We remand with directions to approve the executor's final report.

Costs of this appeal are assessed to appellants Children International, Piney Woods Country Life School, and World Vision.

REVERSED AND REMANDED.