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CLERK SUPREME COURT
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IN THE COURT OF APPEALS OF IOWA

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| ORA JEAN ROSENBERG, MONA ANN JACKSON, Plaintiffs-Appellees, vs. PAUL S. LIGHT, Trustee under the Will of Clarence L. Light, Deceased; SYLVIA J. LIGHT, Guardian of William M. Light; SYLVIA J. LIGHT; SUSAN LEE JACKSON and KIMBELL WAYNE ROSENBERG, Defendants-Appellants. | ) | Filed May 30, 1980<br>0-54<br>2-63399 |

Appeal from Poweshiek District Court - Michael Enich, Judge.

Defendant Susan Lee Jackson appeals trial court order denying her motion to vacate a judgment concerning the partition sale of real estate that was part of the corpus of a trust in which she had an interest. Affirmed.

Seymore M. Raben, Davenport, for defendant-appellant, Susan Lee Jackson.

Roger W. Sunleaf, Montezuma, for Ora Jean Rosenberg, Mona Ann Jackson, Paul S. Light, Trustee under the Will of Clarence L. Light, Deceased, Sylvia J. Light, Guardian of William M. Light, Sylvia J. Light and Kimbell Wayne Rosenberg.

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

Defendant Susan Lee Jackson appeals trial court order denying her motion to vacate a judgment concerning the partition sale of real estate that was part of the corpus of a trust in which she had an interest. Susan contends she was an indispensable party to the partition proceeding, but was not properly served with notice of the proceeding, thereby depriving her of procedural due process of law. We affirm the trial court.

Our review in partition actions brought pursuant to the authority of section 557.9, The Code 1973, is de novo. Thiele v. Whittenbaugh, No. 63712, slip op. at 5 (Iowa, filed April 23, 1980).

I.

On May 10, 1974, Susan filed under 557.9, The Code 1973, a motion to vacate the judgment involving a partition sale. Susan asserted the court lacked jurisdiction to enter a judgment against her in the partition action since she was not served with notice in accordance with Iowa R. Civ. P. 56(b). Plaintiffs filed a special appearance alleging the motion to vacate was not filed timely, the trial court agreed and denied the motion; the Iowa Supreme Court reversed. On June 7, 1978, plaintiffs and the other defendants filed a resistance generally denying the allegations of the motion and asserting Susan was not an indispensable party entitled to notice. The trial court overruled defendant's motion on February 27, 1979.

Under the will of Clarence Light, certain farm real estate was placed in trust, with the income from it to be distributed among William M. Light, Clarence's son, and Ora Jean Rosenberg and Mona Ann Jackson, William's daughters. Upon the death of the last of these parties, the corpus was to be distributed to the heirs of Ora and Mona. Susan is a daughter of Mona and her potential heir.

On October 9, 1970, Ora and Mona filed a petition in equity seeking sale of the real estate in question. Service of the original notice for the action on Susan was attempted on October 12, 1970, by serving a guardian ad litem appointed for her. This service was based on the presumption Susan was a minor under the age of eighteen and under the custody and control of Mona. Susan asserts, however, she was not living with her mother at the time notice was filed, but had married a man on October 2, 1970, and was living with him in Rock Island, Illinois.

The trial court ordered on November 18, 1970, the property be sold. The property was subsequently sold with over $5000 in costs assessed against the corpus. Susan testified she first learned of the sale of the farm in 1973 and would have objected to the sale if she had known about it.

II.

The key issue raised by Susan is whether she was an indispensable party or otherwise entitled to participate in the partition action. If she was not an indispensable party to that action, she was not entitled to notice and any defects in service are immaterial and not a ground for reversal. We hold Susan was not an indispensable party since under 557.9, The Code, her consent to the partition sale was not necessary. Making her a party to the action was optional, and her presence was not required; any defects in service are thus not grounds for reversal. Iowa R. Civ. P. 273.

Indispensable parties in a partition action concerning real property are "[a]ll owners of undivided interests, and all holders of liens against less than the entire property . . . ." Iowa R. Civ. P. 273(a). Other persons who may also be made parties are "persons having actual, apparent, claimed or contingent interests, and holders of liens on the entire real estate . . . ." Iowa R. Civ. P. 273(b). Susan possessed a contingent remainder interest in the property here because her interest would vest only on the happening of an uncertain event: Susan surviving her mother, her aunt, and her grandfather. Moreover, the persons comprising the class of takers under the remainder are unknowable because the heirs of Ora and Mona cannot be determined until after their deaths. Huse v. Noffke, 271 N.W.2d 682, 684 (Iowa 1978); Long v. Crum, 267 N.W.2d 407, 410 (Iowa 1978); Buchan v. Buchan, 254 Iowa 566, 569-70, 118 N.W.2d 611, 613-14 (1962); see Lincoln Joint Stock Land Bank v. Mitchell, 239 Iowa 995, 1000-01, 33 N.W.2d 388, 391 (1948). Thus, Susan as holder of no more than a contingent remainder interest was not an indispensable party to this action.

Neither was Susan's consent to the partition required for a valid judgment. The law of Iowa prior to the enactment of the predecessor of § 557.9, The Code 1973, was restrictive as to the alienability of any estate subject to a life estate: a partition suit by the life tenants and remaindermen would not be allowed under any circumstances. Huse, 271 N.W.2d at 684; Traversy v. Bell, 195 Iowa 1243, 1247, 193 N.W. 439, 441 (1923). The strict rule enunciated in Traversy was modified by the amendment of section 557.9

in 1947. Act of April 18, 1947, Ch. 274, § 1, 1947 Iowa Acts 374 (codified at § 557.9, The Code); see Huse, 271 N.W.2d at 684; Long, 267 N.W.2d at 409. This section now provides:

> No expectant estate shall be defeated or barred by an alienation or other act of the owner of the precedent estate, nor by the destruction of such precedent estate by disseizin, forfeiture, surrender, or merger; provided that on the petition of the life tenant, with the consent of the holder of the reversion, the district court may order the sale of the property in such estate and the proceeds shall be subject to the order of court until the right thereto becomes fully vested. The proceedings shall be as in an action for partition.

§ 557.9, The Code (emphasis added).

The language of the statute and the expressed statement of legislative purpose make it clear a life tenant with the consent of the holder of the reversion may now, in a proper case, have property comprising the life estate sold and the proceeds held intact, even where holders of future interests cannot be presently determined. Thiele, No. 63712, slip op. at 6; Huse, 271 N.W.2d at 684; Long, 267 N.W.2d at 409. Section 557.9, The Code, does not require the consent of any persons holding a contingent remainder interest or any right of present possession as required by Traversy. Huse, 271 N.W.2d at 684, cited in Thiele, No. 63712, slip op. at 6 n.2. Neither does it require any showing of waste to the property or necessity, as argued by Susan. Id. The district court acting within its discretion may order the sale, provided the parties seeking partition provide: a petition for sale by the life tenants and consent of the holder of the reversionary interest. Id. See generally Restatement of Property § 180-181 (1936).

Two of the three life estate holders, Ora and Mona, petitioned for sale of the property. The other concurrent life estate holder, William, acquiesced to this action. The second condition of section 557.9, The Code, is also satisfied by the consent of Ora and Mona since they hold the reversionary interest here, defeasible only if they are survived by heirs.

A reversion is the interest remaining by operation of law in the grantor, or in the successor in interest of a testator, after conveyance of an interest less than the entire interest. Long, 267 N.W.2d at 410 (quoting from 1 American Law of Property § 4.16, at 432 (A. J. Casner ed. 1952)). The reversionary interest is always vested and takes effect whenever the prior estate terminates and the contingent transfer fails. Huse, 271

N.W.2d at 684-85 (quoting from 1 American Law of Property § 4.16, at 432 (A. J. Casner ed. 1952)). Here, until the uncertainty of whether the remainder will ever vest is resolved, there is the possibility the estate will revert. When Clarence died, he simultaneously devised the life estate and remainder interest; the reversionary interest passed under the residuary clause of the will, § 633.350, The Code; Huse, 271 N.W.2d at 685; Long, 267 N.W.2d at 410. Such reversion is defeasible if Ora or Mona die with heirs surviving.

No specific devise of the reversionary interest is found in Clarence's will. The residuary clause thus devises the reversionary interest to the trust with William, Ora, and Mona as holders of life estates in it. However, this disposition is subject to paragraph four that states the testator's intent not to give William any title or interest in the property devised. Thus, Ora and Mona are the holders of the reversionary interest as present beneficiaries of the trust. The only consent necessary under the second condition of section 557.9, The Code, is that of Ora and Mona, and the trial court had authority to decree a sale of this property. Long, 267 N.W.2d at 410. Susan does not take any part of the reversionary interest since her interest in the trust is contingent, not vested. Since the reversion vests immediately upon death of the testator, § 633.350, The Code; Long, 267 N.W.2d at 410; DeLong v. Scott, 217 N.W.2d 635, 637 (Iowa 1974), the contingency of Susan's interest prevents her from sharing in the reversionary interest.

Susan contends the reversionary interest to the life tenants was extinguished and her consent as the child of a life tenant must be obtained for approval of the sale. We find this argument to be without merit. She bases her argument on the following:

> A reversion may be created subject to a limitation in contingent remainder. Suppose A, owning land in fee simple, conveys it as follows:
>
> "To B for life, remainder to the children of B."
>
> At the time of the conveyance, B has no children. There is then a reversion in the grantor until a child of B is born, at which time the reversion is extinguished.

1 American Law of Property § 4.16, at 432 (A. J. Casner ed. 1952), quoted in Long, 267 N.W.2d at 410. Since the contingent remainder here belongs to the heirs of Ora and Mona, not their children, this example is inapposite. In the above example, the

reversion is extinguished because the contingency on which it is based has been resolved: there now exists a child of B who can take, subject only to other children being born—a vested remainder subject to open. Here, the description of the holders of the remainder interest as "heirs" establishes the existence of a requirement of survival. Lincoln Joint Stock Land Bank, 239 Iowa at 1000-01, 33 N.W.2d at 391. The heirs of Ora and Mona would be uncertain and unascertainable until each of their respective deaths; the remainder interest is contingent, id., and the reversion continues to exist until the remainder vests or fails to vest. See Huse, 271 N.W.2d at 685.

We note Susan retains the same interest in the proceeds as she had in the property sold, Iowa R. Civ. P. 276; see Thiele, No. 63712, slip op. at 11. We do not determine the rights, if any, that Susan may have to recover in an action for waste.

Trial court is affirmed.

AFFIRMED.