

IN THE COURT OF APPEALS OF IOWA

No. 1-504 / 91-99

FILED

APR 28 1992

CLERK SUPREME COURT

IN THE MATTER OF THE ESTATE OF AGNES JUHL, Deceased.

BETTY COOK,

514

Appellant,

vs.

JON (JOHN) RASMUSSEN, CAROL RUDE and MARY ELLEN TOMSCHE,

Appellees.

Appeal from the Iowa District Court for Hamilton
County, Newt Draheim, Judge.

Betty Cook appeals a district court judgment dismissing
her petition to construe the will of Agnes Juhl to include
her as a beneficiary. **AFFIRMED.**

Ted Enabnit of Ted Enabnit, P.C., Mason City, for
appellant.

Patrick B. Chambers, Webster City, for
executors-appellees.

Jon Rasmussen, Apple Valley, Minnesota, Carol Rude,
Zumbrota, Minnesota, and Mary Ellen Tomsche, Bettendorf,
pro se.

Considered by Donielson, P.J., and Hayden and Habhab,
JJ.

HAYDEN, J.

In 1976 Agnes Juhl executed her first will. The will gave the residue of her estate to her two sisters, Mary Rasmussen and Emma Christensen. Neither Agnes nor Emma had any children. Mary had three children. These children were Mervin, Edith and Hans. Mary, Emma, and Hans died after this will was written. Hans left four surviving children, the petitioner, Betty Cook, and respondents, Jon Rasmussen, Carol Rude, and Mary Ellen Tomsche.

In 1980 Agnes again contacted her attorney, Edna Rodenborn, to prepare a new will. Paragraph five of the will, as executed, provided the residue of her estate would go one-third to Mervin, one-third to Edith, and then

One third to Jon Rasmussen of Minneapolis, Minnesota, Carol Gage of Fort Sheridan, Illinois, and Mary Ellen Tomsche of Des Moines, Iowa, my great nephew and nieces.

Agnes entered into a voluntary conservatorship in July 1984. The conservator, Candice Anderson, testified Agnes asked for help with her financial matters, but she was still competent at that time and did not appear to be forgetful. In December 1984 Agnes began to suffer the effects of Alzheimer's disease and became confused. Anderson continued to take care of Agnes's financial affairs.

In November 1988 it was apparent Agnes did not have long to live. Anderson consulted with attorney Charles Deppe about making some distributions of Agnes's funds as gifts for estate tax purposes. At that time Agnes had assets

worth over \$300,000. Anderson then discovered Hans had four children, but only three were mentioned in Agnes's will. The decision was made to make gifts of \$10,000 each to Mervin and Edith, and gifts of \$2,500 each to Jon, Carol, Mary Ellen, and Betty.

Agnes died on December 19, 1988. After the will was admitted to probate Betty filed a petition to construe the will. She claimed paragraph five of the will created a class gift to Agnes's great nephew and nieces. She stated she was a member of the class and her name had been omitted from the will by mistake or inadvertence.

The district court concluded there was no ambiguity in the will. It found the words "great nephew and nieces" was used as a description for identification purposes only and did not create a class gift. The court dismissed Betty's petition. Betty now appeals.

A declaratory action to construe or interpret a decedent's will is tried in equity, and our review is de novo. In re Estate of Anderson, 359 N.W.2d 479, 480 (Iowa 1984). In a de novo review, we make findings of fact anew. In re Estate of Redenius, 455 N.W.2d 295, 297 (Iowa App. 1990). When considering the credibility of witnesses, we give weight to the fact findings of the trial court, but are not bound by them. Id.

When the terms of a will are plain and unambiguous, its meaning must be determined from the language used without resort to extrinsic circumstances. Bankers Trust Co. v.

Allen, 257 Iowa 938, 944, 135 N.W.2d 607, 610 (1965). Before extrinsic evidence may be admitted to show a testator's intent, a patent or latent ambiguity must be shown. Redenius, 455 N.W.2d at 298. A patent ambiguity is one which appears on the face of the will and arises from the phraseology of the defective, obscure, doubtful, or uncertain language. Id. A latent ambiguity exists where the language of the instrument does not lack certainty, but some extrinsic or collateral matter outside the will renders the meaning obscure and uncertain. Id. Ambiguous generally means of a doubtful nature or meaning, uncertain, or open to various interpretations. In re Estate of Crist, 434 N.W.2d 904, 907 (Iowa App. 1988).

We assume a decedent selected language adopted to express his or her meaning and decedent knew and appreciated the effect of the language used in the will. Id. A court may not, under the guise of ambiguity, add to the provisions of a will, make or remake the will of a testator, inquire into the wisdom of the testator's distribution, or implement broad principles of equity and justice. In re Estate of Kiel, 357 N.W.2d 628, 630-631 (Iowa 1984).

Betty contends there was a latent ambiguity in Agnes's will. She relies on the Anderson case which found there was a latent ambiguity in a bequest to "nieces and nephews" where there was only one niece and nephew related by blood. 359 N.W.2d at 481. In that case extrinsic evidence was admitted to show the testator intended to include the nieces and nephews of his wife. Id.

We find no such latent ambiguity in this case. We determine the phrase "my great nephew and nieces" was used to describe the three people specifically mentioned. The phrase, as used here, does not have a doubtful or uncertain meaning. The meaning of Agnes's will is evident from the language used. Therefore, we will not consider extrinsic evidence to interpret the will, and the rules of construction are inapplicable. The bequest in paragraph five does not include Betty, as she was not mentioned.

Betty raises several other arguments, but these are based on her claim the will is ambiguous. We do not address these arguments based on our holding the will was not ambiguous. We affirm the decision of the district court dismissing Betty's petition. Costs on appeal are taxed to appellant.

AFFIRMED.