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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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HUBERT A. KIEL, Individually and as Executor of the Estate of Blanche M. Kiel, Deceased,

Plaintiff-Appellee,

vs.

LOIS SCHUCHMAN, Individually and as Executor of the Estate of Blanche M. Kiel, Deceased,

Defendant-Appellant.

Filed June 26, 1984

4-92
83-571

Appeal from the Iowa District Court for Fayette County - L. John Degnan, Judge.

The defendant has appealed from the district court's order directing that time certificates which were payable to the decedent or the defendant were to be distributed pursuant to the terms of the decedent's will. REVERSED.

J. D. Villont of Donohue Law Office, P.C., West Union, Iowa, for defendant-appellant.

Alice T. Koempel of Traeger & Koempel, west Union, Iowa, for plaintiff-appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ., but considered en banc.

The defendant has appealed from the district court's order holding that time certificates which were payable to the decedent or the defendant were to be distributed pursuant to the terms of the decedent's will. We reverse.

The decedent, Blanche M. Kiel, died on November 8, 1977. After her death, time certificates of local banks were found in her safety deposit box. Certificates totaling $26,250 were held in the names of the decedent and the defendant. There were also time certificates in the total amount of $7,750 in the names of the decedent and the plaintiff. Also certificates were found in the names of the decedent and her grandchildren, each in the amount of $500.

Decedent's final will was executed on May 12, 1974. It provided in part:

> Item 2. It is my will that my daughter Lois Schuchman, shall receive the first $24,000 of my estate and the balance, if any, shall be divided equally between my children, Hubert A. Kiel and Lois Schuchman, the same to be their absolute property. . . .

The plaintiff and the defendant, decedent's son and daughter, respectively, were executors under the will and a dispute developed concerning whether the time certificates should be considered part of the estate subject to the distribution provided under the will.

On May 24, 1983, the trial court entered an order determining that it was the intent of the decedent to distribute the estate accumulated by her husband and herself equally to her two children by providing the defendant $24,000 to equalize a previous gift given to the plaintiff and that the remainder of the estate was to be divided equally between the plaintiff and the defendant. The court determined that there was an ambiguity concerning the will. The court found that the decedent attempted to divide her estate equally between her two children and to make a gift of $500 to three of her grandchildren.

On this basis the court concluded that the certificates were controlled by decedent's will notwithstanding the technical form of ownership, except for the certificates which were payable to her grandchildren.

A proceeding to construe a will is properly tried as an equity proceeding and review by this court is de novo. We give weight to the fact findings of the trial court, but are not bound by them. In re Estate of Herring, 265 N.W.2d 740, 741 (Iowa 1978).

The general rule is that a joint tenant's interest in joint tenancy property is not devisable. See 20 Am. Jur. 2d Cotenancy and Joint Ownership § 3 (1965); In re Estate of Roehlke, 231 N.W.2d 26, 28 (Iowa 1975). The decedent's interest ceases at death and the surviving joint tenant has sole ownership by operation of law. When a testator clearly intends to devise joint tenancy property, however, the surviving joint tenant is required to elect between taking the will as written or rejecting the will. In re Estate of Boldt, 342 N.W.2d 463, 467 (Iowa 1983). In Boldt the testatrix in paragraph II of her will expressly revoked all joint tenancies created during her lifetime. The court noted that the attempted revocation was invalid, id. at 465, but held that the case presented a classic illustration of required election under a will. Id. at 466. The court stated: "When an intention to devise joint tenancy property does not appear from the will—contrary to the case here—an election is not required." Id. at 467 (emphasis added).

In the present case testatrix did not attempt to revoke the joint tenancies; her will does not mention the joint tenancy property. We find this case to be clearly distinguishable from Boldt. There are no alternatives in Item II of the will before us from which an election can be made as existed in paragraph II of the Boldt will.

Plaintiff argues that the word "estate" in Item 2 of decedent's will is ambiguous and extrinsic evidence should be allowed to explain whether decedent intended her estate to include joint tenancy property. We do not agree. The principles governing will construction are set forth in Russell v. Johnston, 327 N.W.2d 226, 229 (Iowa 1982):

> In ascertaining the intent of the testator, which is the guiding light in will interpretation, we rely primarily on the language contained in the will; however, the substance and intent, rather than the words, are to control. Id.; Matter of Estate of Kalouse, 282 N.W.2d 98, 104 (Iowa 1979). To ascertain the substance and intent we examine the entire will, and the circumstances surrounding the decedent at the time he made the will, to determine the scheme of distribution and, ultimately, the testator's intent. This examination is subject to the limitation, prevailing generally, that extrinsic facts and circumstances cannot be resorted to in order to defeat the plain and unambiguous language of the will. (emphasis added).

The will before us is clearly unambiguous. A testamentary reference to decedent's estate is commonly used to refer to all of the property decedent has after death which is to be distributed by the will. See, e.g., In re Hartwig's Estate, 70 Idaho 77, 211 P.2d 399, 401 (1949) ("the general term 'estate' when used in a will, unless otherwise restricted, means all of testator's property left after death"); In re Kessler's Estate, 85 Ohio App. 240, 85 N.E.2d 609, 610 (1949) (joint and survivorship checking and savings accounts are not part of decedent's "estate" within the meaning of statute governing death in common accident); Gradman v. Brown, 183 Md. 634, 39 A.2d 808, 811 (1944) ("the word estate means, in the testamentary law, such property that passes upon death, to the personal representative of the decedent"). Testatrix's interest in the joint tenancy property terminated at her death and is not considered part of her testamentary "estate" as that term is ordinarily defined. Extrinsic evidence should not be admitted to create an ambiguity in a will where one otherwise does not exist. No ambiguity being present, the duty of the court is to then apply the legal construction of the will. The legal construction of this will is that the bank deposits which the testator held in joint tenancy with other parties are not a part of her estate and are not controlled by her will. To hold otherwise would be rewriting the will or correcting a mistake, which we cannot do.

The following decisions are controlling and binding on this court on the issue before us on appeal:

> In re Estate of Griffin, 166 N.W.2d 800, 801 (Iowa 1969) ("Courts have the power to interpret and construe a will but may not rewrite it or change its terms by construction."); Martin v. Beatty, 253 Iowa 1237, 1243, 115 N.W.2d 706, 710 (1962) ("Obviously the court may not make a will for the testator, nor impose upon the will a forced or unnatural construction to accomplish what may now seem to be a more just or appropriate distribution of the estate."); In re Syverson's Estate, 239 Iowa 800, 809, 32 N.W.2d 799, 803 (1948) ("It is not the province of a court to make, remake, or try to improve the will of such a testator."); In re Heckmann's Estate, 228 Iowa 967, 975, 291 N.W. 465, 469 (1940) ("The court cannot make a new will."); Gilmore v. Jenkins, 129 Iowa 686, 692, 106 N.W. 193, 195 (1906) ("a court cannot correct a mistake in a will, or make a new will for the parties").

In re Estate of Boldt, 342 N.W.2d at 466. Consequently, the judgment of the trial court is reversed.

REVERSED.

All judges concur except Oxberger, C.J., and Schlegel, J., who dissents.

I respectfully dissent. The majority acknowleges that an election is required when decedent's intent to devise property held in joint tenancy appears from the will; however, it concludes that since the will did not specifically mention the jointly held property, no such intent appears.

To ascertain the intent of the decedent, the court relies primarily upon the language contained in the will; however, the substance and intent, rather than the words, are controlling. Russel v. Johnston, 327 N.W.2d 226, 229 (Iowa 1982). Although extrinsic facts and circumstances may not be utilized in order to defeat plain and unambiguous language, "[i]f a simple reading of the will does not unmistakably reveal the maker's intention, the court may resort to certain accredited canons of construction to aid in resolving any doubt." In re Estate of Thompson, 164 N.W.2d 141, 146 (Iowa 1969).

Decedent provided in Item 2 of her will that Lois was to "receive the first $24,000.00 of [her] estate and the balance if any shall be divided equally between [Hubert and Lois]." Lois argues, and the majority agrees, that this provision is unambiguous, and that the testamentary reference to decedent's estate was not intended to include the property held in joint tenancy. In support of its position, the majority cites several cases standing for the proposition that the term "estate" has but one meaning. Interestingly enough, not one of these cases is from this jurisdiction.

Under the Iowa Code, the term "estate" is used to mean a variety of things. For inheritance tax purposes, the term "estate" always includes property held in joint tenancy. See Iowa Code section 450.3(5). For probate purposes, the term "estate" may or may not include such property, depending upon the context in