IN THE COURT OF APPEALS OF IOWA

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No. 2-430 / 92-206

IN THE MATTER OF THE ESTATE OF FOREST W. MOFFIT, Deceased,

MARK RHOADS, WILLIAM RHOADS II, DAWN MOFFIT, and MICHAEL MOFFIT,

Appellants,

vs.

LEORAL EVANS and RUSSELL RHOADS, JR., As Co-Executors of the Estate of Forest W. Moffit, Deceased; MARY EVANS, WILLIAM MOFFIT, JOHN MOFFIT, ROBERT A. RHOADS, RUSSELL RHOADS, JR., and JANELL FERNEAU,

Appellees.

FILED
MAR 30 1993
CLERK SUPREME COURT

Appeal from the Iowa District Court for Cedar County, Max R. Werling, Judge.

Plaintiffs appeal from a district court judgment construing the will of Forest Moffit. **AFFIRMED.**

Robert N. Downer and Timothy J. Krumm of Meardon, Sueppel, Downer & Hayes, Iowa City, for appellants.

J.L. Kuehnle of Sebasta & Kuehnle, Mechanicsville, for appellees co-executors.

David L. Baker of Riccolo & Baker, P.C., Cedar Rapids, for appellees Mary Evans, William Moffit, John Moffit, Robert Rhoads, Russell Rhoads, Jr., and Janell Ferneau.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

OXBERGER, C.J.

Forest W. Moffit executed his will on June 6, 1969. Forest and his wife, Mary Moffit, did not have any children. Forest and Mary did have eight nieces and nephews: Robert Rhoades, Russell Rhoades, William Rhoades, Charles Moffit, John Moffit, Janell Ferneau, William Moffit, and Mary Evans. In the third part of his will, in paragraphs A through H, Forest left each of the nieces and nephews a specific bequest. Paragraph J provided:

> The rest, residue and remainder shall be equally divided among the living nephews and nieces of my wife and myself (including the ones who are named in subsections A. through H. above).

Charles Moffit died on February 21, 1974. He had two surviving children, Dawn Moffit and Michael Moffit. William Rhoades died on November 11, 1987. Two of his surviving children were, Mark Rhoades and William Rhoades II.

Forest died on May 23, 1990. His will was admitted to probate. Plaintiffs Mark Rhoades, William Rhoades II, Dawn Moffit, and Michael Moffit, filed a petition to construe the will. They claimed that as the surviving children of Charles Moffit and William Rhoades they are entitled to a share of the estate under paragraph J.

The district entered its judgment on January 14, 1992. The court construed the will to express an intent that the nieces and nephews who are to inherit are those living at the death of the testator. The court found the terms of

the will were unambiguous, and resort to extrinsic evidence was not required. The court concluded the antilapse statute, found in Iowa Code section 633.273 (1991), did not apply. Plaintiffs appealed.

A declaratory judgment 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. Id. In so doing, we give weight to the fact findings of the trial court, but we are not bound by them. Id.

Section 633.273 provides:

> 1. If a devisee dies before the testator, the devisee's heirs shall inherit the property devised to the devisee, unless from the terms of the will, the intent is clear and explicit to the contrary.
>
> 2. A person who would have been a devisee under a class gift, if the person had survived the testator, is treated as a devisee for purposes of this section, provided the person's death occurred after the execution of the will, unless from the terms of the will, the intent is clear and explicit to the contrary.

Under the antilapse statute, the property right and interest inherited by the heirs of the deceased devisee are the same which the devisee himself would have been entitled to take under the will, had he survived the testator. Tuecke v. Tuecke, 257 Iowa 199, 205, 131 N.W.2d 794, 797 (1964).

The antilapse statute does not apply to bequests conditioned upon survivorship. In re Estate of Simpson, 423 N.W.2d 28, 29 (Iowa App. 1988). The burden of proof to

show that the antilapse statute does not apply rests upon plaintiff. In re Estate of McCarthy, 256 Iowa 66, 71, 126 N.W.2d 357, 360 (1964). An intent contrary to the antilapse statute must appear from the terms of the will. Nicholson v. Fritz, 252 Iowa 892, 894, 109 N.W.2d 226, 227 (1961). Such an intent must be clearly shown, and doubts are resolved in favor of operation of the statute. Id. at 897, 229.

We conclude paragraph J of Forest's will clearly shows an intent contrary to the antilapse statute. By including the language "my living nephews and nieces," Forest made the bequest conditional upon survivorship. We agree with the district court that the terms of the will are unambiguous, and resort to extrinsic evidence is not required. We conclude the antilapse statute does not apply to paragraph J of the will. Therefore, plaintiffs are not entitled to share in the estate under this paragraph.

We affirm the district court. Costs of this appeal are assessed to plaintiffs.

AFFIRMED.