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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE ESTATE OF MINNIE BENSON, DECEASED.

FRANK FRITZ and SARAH MULLINS, Executors,

Plaintiffs-Appellees,

v.

SARAH MULLINS; MARVIN RAY FAUST, Executor of the Estate of Bessie Ward, Deceased; ROBERT HUNTBATCH; ELMER HUNTBATCH; CORA SHARPE; CLIFFORD HUNTBATCH; CHARLES HUNTBATCH; MAXINE PALO; DOROTHY BOEKE; IVA BEHRENS; Children of Ella Keniry; ROGER KENIRY; CAROLYN KNOTT; JOAN GEHRKE; MARLENE MENTEER; RITA BURTON; MICHAEL KENIRY; DONOVAN KENIRY; DELORES CHAPLIN; EDWARD HUNTBATCH; HELEN STUDER; ALICE SANDERS; FREDERICK HUNTBATCH; GIBSON HUNTBATCH; IDA MAE ENABNIT; ALWILDA KRAMER; OPAL HUNTBATCH; MARY JO MORGANSEN; THOMAS C. HUNTBATCH; LILLIE BULLOCK; GEORGE HUNTBATCH; and DANIEL F. WIECHMANN, JR., Guardian ad Litem for all unknown Claimants;

Defendants-Appellants and Appellees.

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Appeal from Franklin District Court - C. W. Wild, Judge.

Declaratory judgment action to determine the members in a testamentary gift to a class, raising issue of whether testator intended to include those alive when will was executed but who predeceased testator. Affirmed.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

Don W. Burington, of Laird, Burington, Bovard & Heiny, of Mason City, for Defendants-Appellants, Maxine Palo, Dorothy Boeke, Iva Behrens, Roger Keniry, Carolyn Knott, Joan Gehrke, Marlene Menteer, Rita Burton, Michael Keniry, Donovan Keniry, Delores Chaplin, Edward Huntbatch, Helen Studer, Alice Sanders and Frederick Huntbatch.

Harding & Stevens, of Des Moines, for Defendants-Appellants, Opal Huntbatch, Mary Jo Morgansen and Thomas C. Huntbatch.

Finley & Teas, of Mason City, for Defendants-Appellants, Gibson Huntbatch and Alwilda Kramer.

Levinson & Enabnit, of Mason City, for Defendant-Appellant, Ida Mae Enabnit.

Philip F. DeMoss, of Hobson, Cady & Drew, of Hampton, for Plaintiffs-Appellees, Frank Fritz and Sarah Mullins.

Kennedy, Kepford, Kelsen & White, of Waterloo, for Defendants-Appellees, Robert Huntbatch, Elmer Huntbatch and Clifford Huntbatch.

Melvin H. Wolf, of Waterloo, for Defendant-Appellee, Marvin Ray Faust, Executor of the Estate of Bessie Ward.

Whitesell Law Firm, of Iowa Falls, for Defendants-Appellees, Lillie Bullock, George Huntbatch, Cora Sharpe, Charles Huntbatch and Sarah Mullins.

Daniel F. Wiechman, Jr., of Hampton, for Defendant-Appellee, Daniel F. Wiechmann, Jr., Guardian-ad-Litem for all unknown Claimants.

ALLBEE, C.J.

This appeal presents the issue whether the heirs of members of a class of will beneficiaries take the shares of those members of the class who predeceased the testator. The proceedings below were tried in equity, therefore our review is de novo. Rule 334, Rules of Civil Procedure. Weight is given to the findings of trial court but are not binding. Rules 344 (f)(7), R.C.P.; In re Estate of Lemke, 216 N.W.2d 186, 189 (Iowa 1974).

The testator, Minnie Benson, died April 3, 1973, a resident of Franklin County, Iowa. She owned personal property valued at $166,000 and 880 acres of land. She was not survived by a spouse or children.

Her will dated June 13, 1963, made specific gifts of cash and personal property to several charities and two churches. Item VII of the will directed the conversion of her real estate to cash and distributed in thirds: one-third to living first cousins on the Huntbatch side; one-third to the First Presbyterian Church of Ackley; one-third to the Geneva Methodist Church. This controversy arises from item VII(a) wherein the following language is used:

> a. One-third to my living first cousins on the Huntbatch side.

At her death Minnie Benson was survived by nine first cousins on the Huntbatch side. Three first cousins on the Huntbatch side had died between the time of making of her will in 1963 and her death in 1973. Appellants, heirs of the three deceased first cousins, assert that they are entitled to their ancestors' shares under the will either by reason of the anti-lapse statute, section 633.273, The Code, or by intention of the testator as gleaned from the will. No claim is made on appeal by the heirs of Thomas Huntbatch, a first cousin who died in 1961.

Trial court ruled the shares of predeceased class devisees were not preserved for their heirs by the anti-lapse statute and that the terms of testator's will did not manifest an intent that they should share in her estate. From examination of the entire record it is our judgment the findings and conclusions reached by trial court are supported and justified by the evidence. We also conclude trial court used as its guide and applied the established law of this state as laid down by decisions of our Supreme Court. Accordingly, we affirm trial court's decree.

All judges concur except SNELL, J., who dissents.

SNELL, J. (dissenting)

I respectfully dissent. The trial court and the majority, by adoption of that reasoning, determine the result by focusing on the word "first" as used by the testator. The trial court concluded:

> "It appears to the court that by the use of word "first", the testator intended to exclude all second cousins from the class and benefit only cousins of her own generation. The word "living" must be interpreted as meaning "living at my death." To hold otherwise the court would be ignoring the effect of the use of the word "first."

This reasoning is circular and results in ignoring the use of the word "living." The majority's finding that the testator intended to include only those first cousins who survived her may be what she meant to say but is not what is meant by what she did say. In this area, where there is no way of really knowing what the testator intended, intent is found by determining the legal meaning attached to the words used. It is what is meant by what is said that controls. In re Estate of Luke, 216 N.W.2d 186, 191 (Iowa 1974).

The question here is not whether the testator intended to devise to first cousins. The question is whether she devised to first cousins who were living when she executed her will or were living when she died. The answer is determined by the law developed from cases construing class gifts.

Appellants claim they are entitled to a share of the one-third portion under Item VII either from a determination that testatrix's language showed that intent or through legally established intent supplied by the anti-lapse statute. The anti-lapse statute, § 633.273, The Code, provides:

> "If a devisee die before the testator, his heirs shall inherit the property devised to him, unless from the terms of the will, the intent is clear and explicit to the contrary."

In the absence of statute, a devise to one who dies before testator lapses upon his death, and the property will pass under the residuary clause, or, if there be none, to testator's heirs, unless the will shows a clear intention that the devise shall pass to the heirs of such devisee. In re Estate of Freeman, 146 Iowa 38, 124 N.W. 804 (1910). In a gift to a class, the surviving members of the class would take the lapsed interest. *See* Gunn v. Wagner, 242 Iowa 1001, 48 N.W.2d 292 (1951).

The purpose of the anti-lapse statute is to preserve the devise for those who would presumably have enjoyed its benefits if the deceased devisee had survived the testator and died immediately thereafter. In re Estate of McCarthy, 256 Iowa 66, 72, 126 N.W.2d 357 (1964).

Appellants assert the purpose of the anti-lapse statute is best served by applying it to gifts to a class as well as gifts to individuals. They note that this is the rule in most jurisdictions. However, the Iowa Supreme Court has long since determined the Iowa law. In Redinbaugh v. Redinbaugh, 199 Iowa 1053, 203 N.W. 246 (1925), the court held the statute did not apply to a devise to grandchildren where one grandchild was alive when testator executed his will but predeceased testator leaving a child surviving. *Accord,* In re Estate of James Carter, 203 Iowa 603, 213 N.W. 392 (1927).

In construing class gifts, testamentary intent is found from considering the circumstances apparent at the time of execution of the will. In Downing v. Nicholson, 115 Iowa 493, 88 N.W. 1064 (1902), testator bequeathed property ". . . to be divided equally between all my nephews and nieces." A niece died before testator made his will. A grandnephew claimed her share by substitution. The court rejected the claim by finding contrary testamentary intent.

> "But where the gift is to a class, of which there are many members, it is reasonable to suppose that the testator had in mind only those of that class who were living at the time he made his will.

*See also,* Parish v. Welton, 194 Iowa 1274, 190 N.W. 947 (1922), where the will provided the property ". . . shall be divided up with all my children equally." At the time the will was executed three of testator's children were deceased. The claim by the granchildren was rejected.

In the case at bar, testatrix's first cousin, Thomas Huntbatch, died before she executed her will. She is presumed under the law to know this circumstance. In re Estate of Thompson, 164 N.W.2d 141 (Iowa 1969). Clearly an heir claiming through Thomas was excluded by testator's use of the word "living." Absent the word "living" that heir would be excluded, notwithstanding, by Thomas having predeceased the testator. Gunn v. Wagner, supra.

> "Where there is an immediate gift to a class of persons, it vests in the members of that class who are existent at the time of the testator's death, unless a different intention appears from the context of the will." In re Estate of Gordon, 213 Iowa 6, 9, 236 N.W. 37 (1931).

*See also,* Johnston v. Boothe, 234 Iowa 201, 206, 12 N.W.2d 176 (1943).

If the word "living" was not used, all first cousins who did not survive the testator would similarly be excluded. This is the same result reached by appellees with the word "living" included.

We should not construe this will in a manner that gives no meaning to the use of the word "living." "In construing wills, meaning and effect should, if reasonably possible, be given to every provision, clause and word." Houts v. Jameson, 201 N.W.2d 466, 469 (Iowa 1972). Meaning is given to the word "living" as used by testator by including in the class all first cousins on the Huntbatch side who were living at the time she executed her will. *Compare* In re Estate of Gordon, supra, and Johnston v. Boothe, supra.

The class having been determined and closed at that time, the anti-lapse statute would apply to preserve the disposition to those first cousins who predeceased testator. *See* Gunn v. Wagner, supra.