IN THE COURT OF APPEALS OF IOWA

No. 1-448 / 00-1305
Filed November 28, 2001

IN THE MATTER OF THE ESTATE OF DEAN VENATOR,
Deceased,

RONALD VENATOR,
Appellant,

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Wapello County, E. Richard Meadows, Judge.

Ronald Venator appeals from a district court ruling on a petition to sell real estate. **AFFIRMED.**

Michael P. Brice and Zachery E. Simpson of Brice & Smith, L.L.P., Oskaloosa, for appellant.

Kenneth A. Duker of Johnson, Hester, Walter & Breckenridge, L.L.P., Ottumwa, for appellee-Linda Saaf.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Ronald Venator appeals a district court ruling on an executor's petition to sell real estate. He contends the court erred in interpreting his father's will by concluding the testator's children have a right of first refusal over the sale of the testator's real estate. Upon de novo review, we affirm.

I. Background Facts and Proceedings

Dean Venator died testate in February 1998, leaving two children, Ronald Venator and Linda Saaf. Dean's wife, Esther, predeceased him. His will gave one-half of his estate to Esther, with the remaining portion being equally divided between his two children. According to the terms of the will, if Esther predeceased Dean, the children would receive equal shares of the entire estate.

Dean's will included certain rights of first refusal if his legatees wished to sell their portion of the real estate. In the event either Ronald or Linda wanted to sell their interest in the real estate, Esther was to have a right of first refusal. In the event Esther wanted to sell her interest, Ronald and Linda were to have an opportunity to purchase it. If Esther and one of the children decided to sell their share of the real estate, the other child was to have an opportunity to purchase the property. The will, however, did not specifically provide for the contingency of Esther predeceasing Dean, the two children inheriting, and one of them wishing to sell their share of the property.[1]

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[1] The pertinent provision of Dean Venator's will provides:

> ...I hereby give, devise and bequeath my entire estate, consisting of both real estate and personal property as follows: One-half to my wife, Esther Venator, providing that she is alive at the time of my decease and one-fourth to my son, Ronald Gene Venator and one-fourth to my daughter, Linda Suzanne Simmons, with the provision that in event that my said wife, Esther Venator has

Shortly after Dean's death, Ronald and Linda were appointed as coexecutors of his estate. They were removed as executors in February 2000, for failure to timely perform their duties. The district court replaced them by appointing South Ottumwa Savings Bank as successor executor. In April 2000, the bank, acting as executor, petitioned the court for authority to sell the real estate because no income had been realized from farming the property and Ronald and Linda were unable to agree upon an equitable division of the 572 acres of farmland at issue.

At the hearing regarding the bank's petition to sell the land, Ronald and Linda stipulated that they do not get along and could not agree on a disposition of the property. The bank asked the district court for permission to sell the property at public auction to the highest bidder. Linda resisted this plan arguing that Dean's will should be interpreted to afford her the first opportunity to purchase Ronald's share of the farm at a reasonable and fair market price. She claimed she had a right of first refusal under the will which, if exercised, would prevent the executor from selling the farm at auction.

Ronald disagreed with Linda's interpretation of the will. He contended the plain language of the will did not create a right of first refusal in Linda under these

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predeceased me, I then direct that all of my said estate, subject to Paragraph One hereof, shall be equally divided between my said son, Ronald Gene Venator and my daughter, Linda Suzanne Simmons, share and share alike, and I further provide that in the event that my said wife should want to sell the interest in said real estate that she give the said children first opportunity to purchase same, at a reasonable market value cost and I further require that in event either of the children should want to sell their interest in said real estate that my said wife be given the opportunity to purchase said real estate at a fair and reasonable market value or that in event that my said wife and one child wants to sell that the other child be given the same opportunity to purchase at a reasonable and fair market value thereof.

circumstances. He argued the property should be sold in parcels at public auction to achieve the maximum value for the land.

Following the hearing, the district court ruled Dean's will granted Linda the right of first refusal based on the doctrine of gift by implication. Therefore, the court found that Linda had a right of first refusal to purchase Ronald's share of the farmland. In the alternative, the court found Esther's express right of first refusal, specifically established by Dean's will, passed as a property right to Ronald and Linda. The court found that because Ronald intends to sell his entire share of the property, including the portion of the property he inherited from his mother, Linda retains her right to exercise refusal.

Ronald appeals. He contends the court erred in interpreting Dean's will by implying a right of first refusal in Linda. In her appellate brief, Linda notes the trial court also found that Esther's right of first refusal passed to Linda. She claims since Ronald did not address or dispute that portion of the district court's order in his appellate brief, we should consider the issue waived.

II. Standard of Review

A probate proceeding to construe a will is tried in equity. Iowa Code § 633.33; *In re Estate of Anderson* [illegible] 2d 479, 480 (Iowa 1984). Our review is therefore de novo. Iowa R. App P. 4

III. The Merits

We first address Ronald's contention that the trial court erred in relying on the doctrine of gift by implication in granting Linda a right of first refusal to purchase Ronald's share of the farmland.

The principles governing will construction are well settled. The intent of the testator is our polestar. *In re Estate of Orht,* 550 N.W.2d 181, 184 (Iowa Ct. App. 1996). "In determining intent, the question is not what the testator meant to say, but what is the meaning of what the testator did say." *In re Estate of Rogers,* 473 N.W.2d 36, 39 (Iowa 1991). We presume "the words of the will are used in their natural, usual, popular, and conventional meaning." *In re Estate of Syverson,* 239 Iowa 800, 807, 32 N.W.2d 799, 802 (Iowa 1948). Although the court relies primarily on the language contained in the will, the substance and intent, rather than the words, are controlling. *In re Estate of Redenius,* 455 N.W.2d 295, 297 (Iowa Ct. App. 1990). We analyze each fact situation separately. *In re Estate of Ruhland,* 542 N.W.2d 417, 420 (Iowa 1990).

When interpreting a will, "the instrument must be considered as a whole and each part given meaning and effect, if possible." *Rogers,* 473 N.W.2d at 39. It is not our function to remake, improve, or otherwise modify the clear provisions of the will of a competent testator. *In re Estate of Hamilton,* 467 N.W.2d 801, 803 (Iowa Ct. App. 1991).

Our courts have adopted the doctrine of gift by implication:

> When a testator's will clearly reveals a general plan or intention as to the disposition of his property, and a situation arises that is not within the express language of the will, such general plan may be regarded as existing but incompletely expressed, and the failure to provide for the situation inadvertent rather than intentional, and a gift may be implied for the purpose of the general plan.

In re Estate of Fawcett, 370 N.W.2d 837, 838 (Iowa Ct. App. 1985) (citations omitted). The doctrine of gift by implication applies in cases where the probability

of the implication is strong. *Russell vs. Johnston,* 327 N.W.2d 226, 230 (Iowa 1982).

We conclude, as the district court did, that the general plan of Dean Venator's will is evident from the language used. It is apparent that Dean wanted Esther, Ronald, and Linda to each have an opportunity to purchase the family farm in the event that any of them decided to sell. In spite of an incomplete expression, the clear language of the will demonstrates the testator's desired scheme of distribution. Dean intended to grant all surviving legatees an opportunity to purchase the farmland before another legatee could offer his or her share to the general public. We conclude the district court correctly determined that before Ronald could act upon his stated desire to auction off his share of the property, Linda must first be given the opportunity to purchase the land at a reasonable market value.

Linda contends we should affirm the trial court even if we conclude the court erred in interpreting Dean's will by implying a right of first refusal in his legatees. She points out that Ronald has not challenged the district court's alternative finding that a right of first refusal passed as a property right to Dean's children through paragraph two of his will. Because Ronald's brief fails to address this issue on appeal, Linda asks us to consider it waived. Iowa R. App. P. 14(a)(3). In view of our conclusion that the district court's gift by implication ruling is correct, we find it unnecessary to address Linda's waiver argument.

We affirm the decision of the district court.

AFFIRMED.

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