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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-652 / 90-461

DR. JOHN McLEAY, et al.,

Petitioners-Appellants,

vs.

MARVIN KLEIN, et al.,

Defendants-Appellees.

Appeal from the Iowa District Court for Harrison County, James M. Richardson, Judge.

Petitioners appeal from a district court judgment dismissing their petition to quiet title, for accounting and for partition of real estate. Petitioners claimed they were entitled to a portion of the real estate devised by the will of Phylis Grady as heirs of John Grady. **REVERSED AND REMANDED.**

Bartholomew L. McLeay and Robert D. Garman of Kutak, Rock & Campbell, Omaha, Nebraska, and Warren L. Bush, Wall Lake, for appellants.

J. C. Salvo and Richard C. Schenck of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for appellees.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

SACKETT, J.

This is an appeal from an order quieting title to real estate once owned by Phylis Barrett Grady who died testate in 1971. Phylis was survived by two heirs at law, her husband Joseph who died December 30, 1975, and her son John B., who never married and died childless in September 1980.

The dispute here is between petitioners-appellants Dr. John McLeay, et al., who are the heirs at law of John B., and defendants-appellees Marvin Klein, et al., who succeed to any share that would have gone to Robert B. or Ruth Barrett, both of whom are now deceased. The dispute concerns paragraphs 1, 2, and 3 of Div. I. of Phylis's will which provides in part as follows:

> This Division of my Last Will and Testament governs the disposition of my real estate:
>
> 1. I am the present owner of an undivided interest in and to farm lands in Harrison and Shelby Counties, State of Iowa . . . and an undivided interest in and to other real estate, including the family homestead owned by my father and mother . . . .
>
> 2. I hereby will, devise and bequeath unto my spouse, provided he survives me, a life estate in and to a one-half interest in the net income from the real estate as computed by the manager of said real estate.
>
> 3. During the lifetime of my spouse and while he is entitled to a one-half interest in the net income as set out in Paragraph 2 hereof, I hereby will, devise and bequeath unto my son, John Barrett Grady, providing he survives me, a life estate in and to a one-half interest in the net income from the said real estate as computed by the manager of said real estate.
>
> Thus, if both my said spouse and said son survive me, each will receive an undivided one-half interest in and to the net rentals from the real estate as computed by the manager and in the event my son pre-deceases my spouse, then my

> said spouse shall receive a life estate in the net income from said real estate the period of his natural life. In the event my said husband pre-deceases my son, John, the full title and ownership to all of the interests in the real estate shall then be the property of my son John Barrett Grady subject, however, to the understanding and agreement that he, my said son, is not to sell, convey or encumber any of the jointly owned real estate without the consent of the majority of interests in said real estate.
>
> Further, in the event my son, John, pre-deceases my said husband then it is my will that my interest in and to the real estate in which I now own an undivided interest as a tenant in common together with any other acquisitions I may make thereto by any manner whatsoever, subject to the life estate in my said husband shall pass to and become the property of any child or children of my son, John Barrett Grady, or the survivor of them in fee simple.
>
> In the event my son, John Barrett Grady, dies without issue then such interests as I may have in the real estate shall pass to and become the property of Robert B. Barrett and Ruth K. Barrett in equal shares or to the survivor of them. (emphasis added).

The trial court held the will conveyed to John B. a defeasible fee subject to divestiture. Appellants contend the will gave the real estate to John B. if he survived his father, and that because John B. did survive his father he had a fee. The facts are not in dispute. Therefore, we review to determine whether or not the correct law was applied. Iowa R. App. P. 4. Words of inheritance or perpetuity are not necessary to devise a fee. See In re Estate of Hogan, 146 N.W.2d 257, 259 (Iowa 1966). Iowa Code section 557.3 provides:

> Every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used.

Generally, the law favors constructing wills so as to vest an interest at the earliest possible time; any doubts as to whether a legacy is vested or contingent are to be resolved in favor of vesting. Houts v. Jameson, 201 N.W.2d 466, 470 (Iowa 1972); Johnston v. Boothe, 234 Iowa 201, 206, 12 N.W.2d 176, 178 (1943).

A testator cannot make an absolute devise of property in fee, and in a subsequent clause of his will defeat or destroy his gift or limit the enjoyment of the thing given. In re Estate of Roberts, 171 N.W.2d 269, 272 (Iowa 1969); Schmidt v. Claus, 250 Iowa 314, 317, 93 N.W. 592, 594 (1958); City State Bank v. Pritchard, 199 Iowa 676, 678, 202 N.W. 512, 513 (1925). However, the subsequent provisions of a decedent's will must be clearly in conflict with the specific gift provisions so that both cannot stand before a clear and obvious intent of a decedent can be disturbed. See Roberts, 171 N.W.2d at 273; In re Estate of Larson, 256 Iowa 1392, 1398-99, 131 N.W.2d 503, 506-07 (1964).

The will first gives John full title and ownership subject only to a restriction on transfer or sale. Secondly, it makes no reference to limiting the interest given to John. Additionally, the devise made if John dies without issue, clearly would only come into play if John had predeceased his mother. The paragraph making provision for the Barretts gives them only any interest Phylis

owned. When the fee vested in John, no interest remained for Phylis to give. The language relied on by the trial court to find a devisable fee (1) was not a part of the paragraph giving full title to John, and (2) was proceeded by a paragraph which made provision only if John did not survive his father.

We determine John took the fee. This result finds further support in Channell v. Aldinger, 121 Iowa 297, 299, 96 N.W. 781, 782 (1903); see also Estate of Johnson, 387 N.W.2d 329, 333 (Iowa 1986); In re Estate of Lewis, 248 Iowa 227, 230-31, 80 N.W.2d 347, 349-50 (1957).

We remand for the trial court to determine plaintiffs' request for partition and accounting. We do not retain jurisdiction.

REVERSED AND REMANDED.

Schlegel, J., concurs; Oxberger, C.J, dissents.

OXBERGER, C.J. (dissenting)

I respectfuly dissent. I would affirm the trial court.