FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ERGEN BRITSON, IONE BEAL, GLADYS ANDERSON, CARROLL JOHNSON, STEVEN JOHNSON, ESTHER HANSEN, SARAH RAUCH, HAZEL DAWSON, VIOLA MORRIS, NORMA DEAR, SYBIL FULLER and LORETTA PALMER,

Plaintiff-Appellants,

vs.

REUBEN BRITSON, FRANCES BRITSON and EDWARD J. BRITSON, JR.,

Defendant-Appellees.

Filed February 5, 1980

271
2-62530

Appeal from Story District Court - Milton D. Seiser, Judge.

Plaintiffs appeal adverse declaratory judgment concerning passing of property under a will. Affirmed.

Donald L. Nelson of Nelson, Cahill & Cahill, Nevada for plaintiff-appellants.

Robert L. Huffer, Story City for defendant-appellees.

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

DONIELSON, J.

Plaintiffs appeal adverse declaratory judgment concerning property passing under a will. On appeal, plaintiffs contend: Trial court erred in finding the referee in a partition action did not hold legal title to the devised land even though all parties stipulated this fact; will provision devising property was a nullity since testator did not have legal title to the property; and devised property is adeemed and the proceeds from its sale pass to the residuary legatees. We affirm.

I.

Isabelle O. Britson received an undivided two-thirds interest in the 200-acre family farm from her husband on his death. The remaining one-third interest was bequeathed to Isabelle's children. In 1963 a decree of partition regarding this property was entered and Donald L. Nelson was appointed referee, with authority to sell the property. However, pursuant to Isabelle's request the property not be sold, the referee did not sell the land until after Isabelle's death in June 1977. On January 3, 1978, the court approved sale of the property to Reuben Britson.

Isabelle's 1973 will contained the following provisions relating to the land:

> II. I hereby declare that I am the owner of a two-thirds (2/3) interest in and to the [Legal Description] with the other one-third (1/3) owned by my thirteen children or their heirs.
>
> I hereby specifically give and devise all my interest in the said farm to Reuben Britson in Trust, as Trustee, for the use and benefit of Edward Jennings Britson and Reuben Britson during the life of each of them.

The residuary clause left the remainder of Isabelle's estate equally to her children.

Plaintiffs petitioned for declaratory judgment on how the proceeds from the sale of the property passed under the will. A joint stipulation of facts contained the statement: "As the duly appointed and qualified Referee, Donald L. Nelson, is the legal titleholder of the above described real estate and has been the legal titleholder since entry of the Decree of Partition in September of 1968." The trial court, however, stated this stipulation was an incorrect conclusion of law and the partition action did not divest Isabelle's title to the property. The court held Isabelle had a two-thirds share in the proceeds of the partition sale and this interest passed under Paragraph II of her will. Plaintiffs appeal that judgment.

II.

Plaintiffs contend the trial court erred in finding the referee in the partition action did not hold legal title to the property subject to the partition decree, although this was admitted in the pleadings and jointly stipulated by the parties. They argue the trial court was bound by their joint stipulation of this ultimate fact, and, as a result, should have held Paragraph II to be a nullity because Isabelle no longer owned the real estate, but that her interest was personal property that passed under Paragraph III, the residuary clause, of her will.

We agree an allegation of property ownership, title, or interest is a statement of ultimate fact. Hagensen v. United Telephone Company, 164 N.W.2d 853, 858 (Iowa 1969); see Bogan v. Hynes, 65 F.2d 524, 525 (9th Cir. 1933), cert. denied, 290 U.S. 690, 54 S. Ct. 126, 78 L. Ed. 594 (1933); Biescar v. Czechoslovak-Patronat, 145 Cal. App. 2d 133, 148, 302 P.2d 104, 114 (1956); In re Estate of Wood, 23 Cal. App. 2d 187, 190, 72 P.2d 258, 260 (1937); Fouts v. Largent, 228 Ind. 547, 552-54, 94 N.E.2d 448, 450 (1950); Kerfoot v. Kessener, 227 Ind. 58, 76, 84 N.E.2d 190, 198 (1949). Contra, C.I.T. Corp. v. Elliott, 66 Idaho 384, 397-98, 159 P.2d 891, 897 (1945). Since the parties were bound by their pleadings and stipulation regarding this ultimate fact, the trial court erred in finding itself not to be bound by it. Bartels v. Hennessey Brothers, Inc., 164 N.W.2d 87, 91 (Iowa 1969). However, this error is not grounds for reversal.

In construing stipulations the trial court should attempt to ascertain and give effect to the parties' intention. Hawkins/Korshoj v. State Board of Regents, 255 N.W.2d 124, 126 (Iowa 1977). Achieving such a result can only be accomplished by interpreting the stipulation with reference to its subject matter and in light of surrounding circumstances and the whole record, including the pleadings and issues involved. Id.; Bartels v. Hennessey Brothers, Inc., 164 N.W.2d 87, 91 (Iowa 1969); Norman v. Dougan, 201 Iowa 923, 927, 208 N.W. 366, 368 (1926). In light of these principles, the trial court's construction of the will was correct and proper since the controlling issue here did not turn solely on who had legal title to the property.

The issue was whether or not Isabelle possessed an interest in the property that would pass under Paragraph II of her will. If she did, the proceeds pass under Paragraph II. If she did not the proceeds pass under the residual clause in Paragraph III.

Since the term "interest" is broad enough to include any right, title, or estate in real property, Black's Law Dictionary 950 (4th ed. 1968), the question of legal title is not conclusive since Isabelle could have possessed an interest in the property and still not have had legal title. Moreover, the legal title the referee possessed was limited to the capability to convey legal title under Iowa law. Iowa R. Civ. P. 297. Thus, the trial court's error is not grounds for reversal since the finding of possession of legal title ownership would not be sufficient grounds to establish plaintiffs' claim.

The issue then becomes whether the trial court erred in finding Isabelle had an interest in the property that would cause the proceeds to pass under Paragraph II of the will. We conclude the trial court's conclusion Isabelle did possess an interest was reasonable and supported by substantial evidence in the record. We also believe this holding is consistent with the polestar of will construction—the intention of the testatrix. In re Estate of Larson, 256 Iowa 1392, 1395, 131 N.W.2d 503, 504 (1964). In a partition action, the sale and transfer of an interest in property is not final until approved by the supervising court. Iowa R. Civ. P. 289(a). Since the sale here was not consummated through court approval until after Isabelle's death, she retained an interest in the property. Although her interest was not absolute because of the partition decree, which granted the referee certain rights, her interest included the right to receive the proceeds from sale of the property. See Iowa R. Civ. P. 276. This construction achieves Isabelle's intent in passing her interest in the farm, in whatever form, to the parties who took under Paragraph II.

Plaintiffs have also argued that since the property specifically devised in the will was not part of Isabelle's estate on the date of death it is adeemed, and neither the proceeds nor similar property passes to the beneficiaries. In the light of our foregoing discussion, we hold this argument to be inapplicable. Isabelle's interest was not limited to absolute title in the property, but included her interest in the sale proceeds that were subject to the partition but were not adeemed.

For these reasons, we affirm the trial court's judgment.

AFFIRMED.