

IN THE COURT OF APPEALS OF IOWA

No. 0-720 / 90-631

FILED

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CLERK SUPREME COURT

IN THE MATTER OF THE ESTATE OF STEWART P. LOEHR, DECEASED
CHRISTINE LOEHR, DANIEL LOEHR and DENISE GRABER,

Appellees,

252

vs.

MARY A. SUMNER, Executor,

Appellant.

Appeal from the Iowa District Court for Polk County,
Dale B. Hagen, Judge.

Residuary legatee and executor appeals probate referee
ruling interpreting a specific bequest. **AFFIRMED.**

Lylea Dodson Critelli of Nick Critelli Associates,
P.C., Des Moines, for appellant.

John R. Hearn, Des Moines, for appellees.

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

SCHLEGEL, J.

Residuary legatee and executor, Mary A. Sumner, appeals probate referee and district court rulings finding that certain bonds should be distributed to the testator's children, appellees Christine Loehr, Daniel Loehr, and Denise Graber. Sumner challenges the interpretation given a specific bequest.

Stewart Loehr died in January 1989, survived by three children. Loehr's February 1987 will provided in Article IV:

I give, devise and bequeath my stocks and bonds or deposits I have at Hawkeye Bank, 24th and University, Des Moines, Iowa, any and [sic] funds which I may have at East Des Moines National Bank, Des Moines, Iowa, and any funds which I may have at American Federal Savings and Loan Association, to my children

In Article VI of his will, Loehr gave the residue of his estate to Sumner.

From 1984 through October 1988 the testator made five bond purchases solely in his name. He purchased the last four sets of bonds from an account in Hawkeye Bank in which he maintained the settlement proceeds for an injury he had suffered. Loehr and Sumner maintained a joint safety deposit box at Hawkeye Bank.

When Loehr died, the five sets of bonds at issue were not at the Hawkeye Bank, but rather in a box in Loehr and Sumner's home. Sumner, who was a frequent and almost exclusive user of the joint deposit box during the last two years of Loehr's life, testified that the bonds were never

kept there. Both sides agree that there were never any stocks.

Each of the Loehr children testified that their father had told him or her that they would be receiving almost \$100,000. Loehr's ex-wife also testified that Loehr had initiated a conversation in which he promised to leave \$100,000 for the children to divide. The Loehr children have received \$27,000 under the specific bequest in Article IV. The bonds are valued at approximately \$75,000.

The probate referee found that the testator intended the bonds and the deposits to be one item. The referee concluded that

[i]t would certainly be a strained construction to hold that [the testator] intended the bonds to pass to the children only if the bonds themselves were physically located in the Hawkeye Bank at the time of death, particularly in view of the fact that the testimony indicated he never had stocks and bonds in such safety deposit box.

On appeal, the district court was concerned primarily with the fact that the scrivener of the disputed will was representing Sumner in both her individual capacity and her capacity as executor of the estate. The court states only: "Although Mary Sumner had some disagreement with the Referee's Findings of Fact, the Findings of Fact are not clearly erroneous, and the Court accepts them."

The principles governing will construction are well settled. The intent of the testator is our polestar. In re Larson, 256 Iowa 1392, 1395, 131 N.W.2d 503, 505 (1968). We must ascertain from the entire will in context,

and nothing else, if the language is "plain and unambiguous." Id.; In re Syverson's Est., 239 Iowa 800, 805, 32 N.W.2d 799, 801 (1948). We presume that "the words of the will are used in their natural, usual, popular, and conventional meaning." Syverson's Est., at 807, 32 N.W.2d at 802. It is not our function to remake or improve a will, id. at 809, 32 N.W.2d at 803, rather, our sole purpose and justification for construing a will "'is the development of the intent of the testator,'" id. at 809-10, 32 N.W.2d at 803-04 (quoting Guilford v. Gardner, 180 Iowa 1210, 1224, 162 N.W. 261, 266 (1917)). "If a simple reading of the will, using the words in their ordinary and natural sense, does not unmistakably reveal the maker's intention, the court may resort to certain accredited canons of construction" In re Thompson, 164 N.W.2d 141, 146 (Iowa 1969). As enunciated in In re Zang, 255 Iowa 736, 739, 123 N.W.2d 883, 885 (1963), the canons of construction permit us to impute a meaning conforming to the testator's "probable intention" and being "most agreeable to reason and justice." Id. In so doing we must put ourselves in the testator's shoes as nearly as possible, taking "into consideration the situation of the testator and the facts and circumstances surrounding him at the time the will was executed." Id.

Several things are readily apparent from a reading of the operative language "I give . . . my stocks and bonds or deposits I have at Hawkeye Bank." First, the words

themselves are plain and unambiguous; no one disputes the definition of "bond" or "deposit." Second, the component gifts in this specific bequest are in a series, to wit, stocks and bonds or deposits at Hawkeye Bank, and funds at East Des Moines National Bank, and funds at American Federal. Third, the use of the words "my" and "any" tend to denote that a description of a gift follows, and the use of a geographic location followed by a comma tends to denote that the gift description is ended.

We can conclude from this that the testator most likely intended to make three gifts in this specific bequest, specifically, "stocks and bonds or deposits" plus two sets of funds at specified banks. Because we think it likely that "stocks and bonds or deposits" is one gift, we are left in doubt, however, about what the phrase "at Hawkeye Bank" modifies. In determining this, we are also in doubt about whether the word "or" should be read as a disjunctive or a conjunctive.

If, as we have posited, this is one of three separate gifts in this specific bequest, there are at least four ways to read the gift:

1. The gift poses a choice between (a) bonds located anywhere and (b) deposits at Hawkeye Bank; or
2. The gift includes both (a) bonds located anywhere and (b) deposits at Hawkeye Bank; or
3. The gift poses a choice between (a) bonds located at Hawkeye Bank and (b) deposits at Hawkeye Bank; or
4. The gift includes both (a) bonds located at Hawkeye Bank and (b) deposits located at Hawkeye Bank.

We are not persuaded that the phrase is more susceptible of any one of these four meanings than another of them. This is a patent, as opposed to latent, ambiguity because the ambiguity "arises from the phraseology or the defective, obscure, doubtful or uncertain language." In re Lepley, 235 Iowa 664, 670, 17 N.W.2d 526, 529 (1945).

When a patent ambiguity exists, we may look to extrinsic evidence to explain the testator's intention. Thompson, 164 N.W.2d at 147. From evidence of the testator's investment activities and his conversations with the children, we find that the testator had embarked upon a estate plan whereby he could give his deposits and financial instruments to his children. His plan was flexible, as evidenced by the numerous devices in which he could invest, and perhaps incomplete, as evidenced by the fact that he held no stocks in his name alone when he died. The testator also had a pattern of investing money in Hawkeye Bank in bonds and certificates of deposit and of not depleting it for personal needs. From this we conclude that it was highly unlikely that the testator intended his children to make a choice between financial instruments and deposits. We note that the bulk of the remaining "deposits" at Hawkeye Bank was in a certificate of deposit, which might further indicate that the testator did not entirely expect to have deposits at Hawkeye Bank when he died. Thus, we hold that it was the testator's intent to give the fruits of his investment activity that began with deposits at Hawkeye Bank to his children.

The only remaining question is whether the testator intended that only stocks and bonds physically located at the Hawkeye Bank should pass under the specific bequest to his children. As we have indicated, based on the extrinsic evidence, the testator's pattern of investment and his conversations show an intent to give to his children whatever remained of the damages he had received as an injury compensation (which he held at Hawkeye Bank) and in whatever form. The evidence shows both that he anticipated acquiring other financial instruments and that the financial instruments he had acquired from this pool of funds were kept at home. Given all this, we conclude that it was not the testator's intention to place a geographical restriction on "stocks and bonds."

We hold that the probate referee did not err in finding that the testator intended to give the bonds to the children. We therefore affirm the decisions of the probate referee and the district court.

AFFIRMED.