FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

44

KARL H. GREINER,

Plaintiff-Appellant,

vs

THE ESTATE OF KATHRYN E. SULLIVAN, POSSIBLE HEIRS, BENEFICIARIES OR THEIR SUCCESSORS, IN THE ESTATE OF KARL H. GREINER,

Defendants-Appellees.

Filed April 22, 1987

7-92
86-1321

Appeal from the Iowa District Court for Muscatine County (D3701-386), J L Burns, Judge.

Plaintiff appeals from the judgment adverse to him in an action seeking to set aside a clause of a will. **AFFIRMED.**

Stephen J. Creasy of Goedken & Creasey, Muscatine, for plaintiff-appellant.

Julie A. Abell of Muscatine Legal Services, Muscatine, for defendants-appellees.

Considered by Snell, P.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

Under the terms of her last will and testament, plaintiff's mother, Kathryn E. Sullivan, made the following disposition of her real estate:

> To my son, Karl H. Greiner, I give, devise and bequeath my home at 811 Hershey Court, Muscatine, Iowa, for his use and benefit during his natural life with the express stipulation that he shall not mortgage or sell the said premises during his lifetime. At his death, this property shall go to the appointee or appointees (including his estate) whom my son shall nominate, and in the manner and proportions as my son may direct, by his will made at any time, making specific reference to this power. In the event that my son does not exercise this power of appointment, then this real estate goes unto his heirs and be [sic] administered by the laws of Iowa governing descent and distribution.

The will also made Karl the residuary legatee and devisee.

By his petition in equity, filed on July 17, 1986, Karl seeks a determination that the provision which stipulates that he shall not mortgage or sell the real estate during his lifetime be declared void, as a restraint on alienation.

This matter was submitted to the court upon a stipulation of facts, wherein the parties agreed that the will containing the foregoing provision was probated, that plaintiff (Karl) possesses a life estate in and a general testimentary power of appointment over the real estate referred to in the provision of the will. Further, the parties stipulated that plaintiff sought to move into a new residence, will derive no future benefit from possessing the house, and wished to sell it. Following a hearing, the court denied Karl's petition to set aside the clause set out in the will of his mother.

On appeal, Karl's sole contention is that the clause in his mother's will, quoted above, is an improper restraint on alienation, and is therefore void. He contends that since he is the residuary legatee, his violation of the provision, by the sale or mortgage of the real estate, would result in the property reverting to and becoming part of the residue of the estate. Thus, he contends, his life estate merges with the estate's reversionary interest, since he is the residuary

legatee, and hence, his ownership interest is of the fee. Karl also argues that the devise of a life estate together with a general power of appointment is, in fact, the devise of an estate in fee simple. In support of his positions, Karl cites McCleary v. Ellis, 54 Iowa 311, 6 N.W. 571 (1880). That case, however, does not control this case. In McCleary, levy was made against farm land to which the defendant had been devised a life estate. The court held that he had an interest in the land which was subject to levy for the payment of a judgment. The case did not hold that the defendant was possessed of the fee simple title. The defendants here, suggest that in McCleary, the judgment creditor may have levied on and sold, only the devisee's life estate. Such seems to be the correct assumption.

The trial court, in this case, held that the provision of the testator's will was clear and unambiguous, and that her intent from the provision was clear. We agree, and affirm.

In considering provisions of a will, the testator's intent is the polestar. In re Estate of Spencer, 232 N.W.2d 491, 495 (Iowa 1975); Schau v. Cecil, 257 Iowa 1296, 1299-1300, 136 N.W.2d 515, 518 (1965). "The intention of the testator must be gathered from the words of the will itself, if their meaning as a whole is clear, unambiguous and unequivocal . . . . All rules and canons of construction serve no purpose when the testamentary intention fairly and clearly appears from the testator's words in the will itself." Id.

In Bussing v. Hough, 237 Iowa 194, 197, 21 N.W.2d 587, 588 (1946), the court stated:

> This court has frequently determined whether certain provisions of a will created a life estate or a fee. Although in most cases the will interpreted differs from all other wills, certain rules of interpretation are generally recognized. Two of said rules, quoted in Law v. Douglas, 107 Iowa 606, 610, 78 N.W. 212, 213 [(1899)], are as follows:

> "First. If the primary gift conveys and vests in the first taker an absolute interest in personal, or an absolute fee simple in real property, it exhausts the entire estate, so that there can be no valid remainder. Second. A life estate expressly created will not be converted into a fee, absolute or qualified, or into any other form of estate greater than a life estate, merely by reason of there being coupled with it a power of disposition, however general or extensive . . . . (Emphasis added.)

See also Tague v. Tague, 248 Iowa 1258, 1264, 85 N.W.2d 22, 26 (1957), where the court specifically held: "The giving of an unlimited right of disposal during the life of the life tenant does not convert a bequest of a life estate into an absolute gift of the entire estate in fee." Accordingly, Karl's life estate is not converted to a fee, or anything greater than a life estate, merely by reason of the inclusion of a general power of appointment in the will. Likewise, a restriction on the sale of the fee is not a restraint on the alienation of the interest devised to Karl. Since he is not possessed of the fee, he suffers no such restraint.

We agree with the trial court that the intent of Kathryn is very clear.

> She wanted to let Karl use the property during his life time. She was even willing to let Karl decide where the property would go at the end of his life estate. She, however, did not want him to dispose of the property during his lifetime.

The clause is valid, and is upheld. Karl's effort to set it aside was properly denied

AFFIRMED.