FILED
FEB 14 1977
CLERK SUPREME COURT



IN THE COURT OF APPEALS OF IOWA

JOHN E. BALDRIGE, Executor of the Estate of PEARL SOWASH, Deceased,

Appellee,

and

HOWARD GREINER, Intervenor,

Appellee,

vs.

JERRY F. GREINER,

Appellant.

Filed February 14, 1977

28
2-57897

---

Appeal from Washington District Court - Harlan W. Bainter, Judge.

Defendant appeals from an adverse ruling on plaintiffs' Motion for Declaratory Judgment to construe a will. - Reversed and Remanded.

John Owen, of Washington, for intervenor-appellee.

John E. Baldrige, of Washington, for plaintiff-appellee.

G. Gifford Morrison and Robert Bates, of Washington for defendant-appellant.

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

119

OXBERGER, J.

Pearl Sowash died testate. The executor of her estate filed an action in equity seeking an accounting of personal property held in a partnership between Pearl Sowash and defendant Jerry Greiner. This appeal by defendant results from an adverse ruling on a Motion for a Declaratory Judgment to construe the wording of the will. The trial court held that the devise of "all my interest in the farm" did not include personal property on the farm. Accordingly, the defendant was ordered to deliver possession of all such assets to the executor. We reverse.

The devise to Jerry Greiner occurs in section D of Item III of the will:

> "D. To Jerry Greiner, I devise all of my interest in the farm upon which he is now tenant, and consisting of approximately 239 acres in Section 23, Township 75 North, Range 9 West of the 5th P.M., which my husband and I hold as tenants in common."

The will was executed August 17, 1971. Roy A. Sowash predeceased testatrix and she subsequently received his undivided one-half interest in the farm. Therefore, at Pearl Sowash's death she was seized with a fee simple absolute interest in the farm realty and a one-half interest in the farm partnership with Jerry Greiner.

Jerry contends that the words of the will included Pearl Sowash's partnership interest in the farm personalty as well as the farm realty. He resisted the plaintiff's motion and asked for a hearing to produce testimony of his brother as to a conversation with Pearl Sowash which would corroborate his position. The trial court, sitting in equity, received his proffered testimony subject to timely and proper objection of the plaintiffs.

The executor and the intervenor - Howard Greiner, the residuary legatee who takes the partnership assets if they do not pass with the farm - contend that by the plain words of the will only the farm realty passed to Jerry Greiner.

Since this appeal involves a Motion for a Declaratory Judgment to construe a will, it was statutorily triable as in equity. Section 633.33, The Code. Our review is de novo. Rule 334, Rules of Civil Procedure; Houts v. Jameson, 201 N.W.2d 466, 468 (Iowa 1972); In Re Estate of Miguet, 185 N.W.2d 508, 513 (Iowa 1971). We give weight to the findings of fact of the trial court but we are not bound by them. Rule 344(f)(7), Rules of Civil Procedure. In Re Estate of Thompson, 164 N.W.2d 141, 146 (Iowa 1969).

We agree with the trial court that Pearl Sowash's intent must be ascertained from the will itself if its language is plain and unambiguous. In Re Estate of Syverson, 239 Iowa 800, 32 N.W.2d 799 (1948). Further, we agree that the language of the Sowash will in the devise to Jerry Greiner "would not by plain meaning establish that this included personal property that was the subject of a partnership agreement between the testator (sic) during her lifetime and the devisee." We do not agree, however, that the trial court was therefore constrained by *Syverson* to rule that the personal property did not pass to Jerry Greiner.

Rather, we find that *Syverson* requires that we decide whether the language of the will is ambiguous. *Syverson* involved a will bequeathing a "home farm . . . including therewith all livestock, machinery, grain and other personal property and equipment located thereon at the time of my death . . ." 239 Iowa at 803-04, 32 N.W.2d at 801. The defendant, the testator's son, argued that livestock and grain located on an adjoining farm should pass under the will. The court in *Syverson* held the defendant son received only that personal property "located" on the "home farm" at the time of the testator's death. The court in *Syverson* found "the intention of the testator was obviously manifest from the will itself." 239 Iowa at 806, 32 N.W.2d at 803.

Therefore, our first question is whether for any reason Pearl Sowash's language is uncertain. If her devise to Jerry Greiner is susceptible of but one interpretation, it is the duty of this court to so find. *Syverson,* 239 Iowa at 805, 32 N.W.2d at 802.

Howard posits his whole case on the plain meaning of the word "farm". He argues it is beyond refutation that "farm" means only realty.

Jerry argues that farm inevitably takes its meaning from surrounding circumstances. He urges us to view the will in its entirety, construe it in the light of the existing partnership, and rule that Pearl Sowash devised to him all her interest in the farm partnership and the farm realty which supported that partnership.

We turn first to ordinary meaning and usage for guidance. The dictionary entries invariably describe "farm" as land coupled with an agricultural use. Webster's New International Dictionary defines "farm" as: "5a: a piece of land held under lease for cultivation b: any tract of land whether consisting of one or more parcels devoted to agricultural purposes generally under the management of a tenant or the owner: any parcel or group of parcels of land cultivated as a unit." Black's Law Dictionary 734 (4th ed. 1968) describes "farm" as "A tract of land devoted to agricultural purposes." In ordinary usage the word "farm" means land and the use to which that land is devoted. That is, it simultaneously refers to the operation which produces agricultural commodities and to the raw land asset which supports such production.

The word "farm" standing alone does not connote land only, just as without more it does not connote equipment or land plus equipment. It is only by recourse to the context of its use that

we can know with any degree of certainty what the devise of a farm includes. Indeed, in this case the contribution of the tenant partner was solely that of work effort, devotion of profits, and continuing investment in equipment and improvements to the farm realty. We are mindful that in this case the farm signifies far more than the land which may be tilled with negligible capital investment. The agreement provided for a 50-50 division of profits between the tenant and the landlord. Clearly in common experience a farm is no longer a proposition of 95% investment in land and 5% investment in equipment and other personalty. For good or ill, we no longer scratch the earth with stick and ox.

Turning to the Iowa cases, we are unable to conclusively establish a fixed meaning for farm. In *Syverson,* 239 Iowa 800, 32 N.W.2d 799 (1948), the court was called upon to decide which personalty was described by the devise of farm equipment located on the "home farm". In *Gisler* the court was asked to determine which parcels of land were passed in a devise of "my farm known as the home farm" and "my farm known as the Gavin farm", In Re Estate of Gisler, 242 Iowa 933, 48 N.W.2d 866 (1951). In Newbury v. McCammant, 182 N.W.2d 147 (Iowa 1971), the court was asked to decide whether a bank "farm account" should pass as a general estate asset and therefore be subject to ademption or whether the cash balance should pass with the remaining unpaid identifiable proceeds of a sale of the farm realty to the devisees of the proceeds. *Newbury* does not include the wording of the questioned devise; however, the court stated, "Testatrix . . . directed certain described real property to be sold by the executor and proceeds realized therefrom distributed. . . . " 182 N.W.2d at 148. Only slight reference is made to the farm account. Apparently the question of whether the devise included both proceeds from the realty and the cash account was not pur-

sued with any alacrity on appeal. Therefore, we find no Iowa case directly dispositive of our question.

Pearl Sowash did not say "To Jerry Greiner I devise the *land* upon which he is now tenant and consisting of approximately 239 acres . . . " nor did she say, "To Jerry Greiner I devise the *farm realty* and my partnership interest in the farming operation known as . . . ", rather she said, "I devise all my interest in the farm. . . . "

Since the challenged words do not "unmistakeably reveal the maker's intention" the court must turn to certain accredited canons of construction for aid in resolving any doubt created by the language used in the will. In Re Estate of Thompson, 164 N.W.2d 141, 146 (Iowa 1969) citing In Re Estate of Zang, 255 Iowa 736, 739, 123 N.W.2d 883, 885 (1963). *Zang* identified two canons as fundamental to will construction: (1) the law imputes to a testator's word his probable intention, with the court's inquiry governed by reason and justice, and (2) the court determining the testator's intent must place itself as nearly as possible in his position. If these canons of construction do not clearly resolve the ambiguity, extrinsic evidence may be received in order to arrive at a reasonable and just determination of the testatrix's intent. Thompson, 164 N.W.2d at 149.

In attempting to determine the testator's probable intention we use the guidelines set forth In Re Roberts, 171 N.W.2d 269, at 271 (Iowa 1969) which states:

> "Our position in will construction cases was summarized in In Re Estate of Larson, 256 Iowa 1392, 1395, 131 N.W.2d 503, 504, and citations. We said the law is well settled (1) the testator's intent is the polestar and must prevail; (2) his intent must be gathered from a consideration of (a) all the language contained in the four corners of his will, (b) his scheme of distribution, (c) the circumstances surrounding him at the time he made his will, and (d) the existing facts; and (3) technical rules or canons of construction should be

> resorted to *only* if the language of the will is clearly ambiguous or conflicting or the testator's intent is for any reason uncertain." (cites omitted)

Looking first at the four corners of the will, we believe the word "and" in the devise is significant. The devise reads " . . . farm upon which he is now tenant, and consisting of approximately 239 acres in Section 23 etc . . . " "In construing wills, meaning and effect should, if reasonably possible, be given to every provision, clause and word." Houts v. Jameson, 201 N.W.2d 466 (Iowa 1972).

The testatrix had adequately pinpointed the farm about which she was speaking by the description, "farm upon which he is now a tenant." If she wanted to merely further identify the farm she would have left the word "and" out, and said " . . . farm upon which he is now tenant, consisting of approximately 239 acres . . . "

Webster's New International Dictionary defines "and" as "2. used as a function word to express (6) reference to either or both of two alternatives [choose between him and me] esp. in legal language when also plainly intended to mean or [bequeathed to a person and her bodily issue] [property taxable for state and county purposes.]

Therefore, when Pearl Sowash added the legal description, she did so in recognition that the word "farm" could mean either or both land and personalty. She added the legal description to make it certain that she was including both components: the land and the personal property, and especially the land.

Next we look at the other factors set forth in *Roberts*. Mrs. Sowash died without relatives. Obviously she intended to reward valued and faithful partners and tenants. This is exemplified by giving $5000 to the church, $5000 to her lawyer, John E. Baldrige, all of her stock to A. E. Baldrige and to the three tenants all the farms with the remainder to Howard Greiner. In

reading the entire will it appears that there is no intent visible, even inferentially that she intended to limit her generosity as it relates to the tenants and business associates."

The court made it quite clear in *Thompson* that in order to place itself in the position of the testator at the time the will was executed, as required by *Zang*, the court should be aware of the "evident facts known by the testator at that time." *Thompson*, 164 N.W.2d at 149; *Zang*, 255 Iowa at 739, 123 N.W.2d at 885. Pearl Sowash executed her will in 1971; at that time she and her husband had participated since 1964 in a landlord-tenant partnership with Jerry Greiner renewed at will annually for each year following the expiration of the original agreement in 1966.

The mere fact of a successful partnership between the Sowashes and Jerry Greiner does not conclusively establish Jerry Greiner's claim to the farm personalty. Neither, however, does the will itself disclose any relationship between the testatrix and Howard Greiner, the residuary legatee, which would require a finding that he is to be preferred at the expense of the defendant. See *Thompson*, 164 N.W.2d at 149. We are persuaded in construing the Sowash devise to Jerry Greiner that it is not likely, given the character of their business relationship, that Pearl Sowash's generosity would have extended to a gift of the land only. Jerry Greiner was not a relative of Pearl Sowash; he was a trusted partner. We conclude that a just and reasonable determination of her intent is that she desired that he be enabled to continue operating the farm.

Accordingly, we look at the testimony of Dennis Greiner regarding a conversation with Pearl Sowash made during the summer of 1971, a month prior to the execution of the will. He testified the following conversation occurred in July of 1971:

"Q. Tell the court what she said to you at that time and place. A. She was worried about Jerry leaving their farm. She wanted him to stay there. She wanted assurance from me whether if he was or not aiming to leave the farm. I assured her that he was planning to stay there. He liked them. He wanted to stay there. She told me that he would use good judgment if he did stay there. Again, I assured her that he was going to stay there. She told me that all he had to do was to stay with her and Roy until their death and everything there was his. That would be his reward." X. 17.

Dennis Greiner was carefully examined by counsel for both parties regarding his disinterested status. He testified that he was not a beneficiary under the will, not an heir-at-law of Pearl Sowash and was of no relation to Pearl Sowash. He testified he had no personal or financial stake in the outcome of this litigation. On cross-examination he further testified he had no part in his brother's cultivation or livestock activities on the Sowash farm. We find his testimony is admissible as an exception to the hearsay rule to show intent and a state of mind. *Thompson*, 164 N.W.2d at 151; Edler v. Fick, 252 Iowa 1367, 1370-71, 110 N.W.2d 665, 667 (1961).

We conclude that the Sowash devise to Jerry Greiner was unclear and that a judicial construction of the devise is necessary. Further, both the canons of construction, stated in *Zang* and *Thompson*, and extrinsic evidence are properly considered to determine the testatrix's intent. So considered, we conclude that Pearl Sowash intended to and did grant Jerry Greiner the farm realty and the personalty associated with their farm operation. Our opinion is limited solely to items of personalty associated with the farm partnership operation.

The trial court's order sustaining the plaintiff's Motion for Declaratory Judgment is set aside and this cause is remanded for judgment in accordance herewith.

Reversed and Remanded.

Allbee, C.J. and Donielson, J. concur. Carter and Snell, JJ. dissent.

CARTER, J. (dissenting)

I dissent. I cannot say with certainty what disposition Mrs. Sowash wished to make of the personal property belonging to her farm partnership with Jerry Greiner. I am fully satisfied, however, that said property cannot be said to pass under Item III D of her last will and testament.

While the word "farm" may not always connote only the real estate upon which a farming operation is carried out this is the fair meaning to be accorded the words used in the clause we are construing. What is actually devised is "the farm upon which he [Jerry Greiner] is now tenant, and consisting of approximately 239 acres in Section 23, Township 75 North, Range 9 West of the 5th P.M., which my husband and I hold as tenants in common." To me this language clearly denotes the real estate and more significantly it does not indicate any intention to convey anything more than the real estate. I find nothing in the words "all of my interest in" which supports a contrary construction. I believe these words have reference to the fact that at the time the will was executed Mrs. Sowash owned only an undivided one-half interest in this farm. In any event, it is the words which follow "all of my interest in" to which we must look to ascertain the quantum of estate devised.

The majority states the issue as being whether Jerry Greiner is to receive a farming operation, being the land and the necessary implements and assets accumulated to work that land, or the land only. I construe the will to give him only the land (and buildings). But I also submit that the majority opinion may be giving him far more than the necessary implements and assets to work the land. It is giving him Mrs. Sowash's half of all of the partnership

assets which consists of some farm equipment, livestock, feed, seed, grain and bank accounts.

Strictly speaking no livestock is necessary to work the land, but assuming the majority means to give him the means to continue an existing livestock operation this does not necessarily involve all of Mrs. Sowash's interest in the livestock owned by the partnership at the time of her death. At any point in time some of the livestock may represent undistributed partnership income. So may the grain and bank accounts. At certain points in time this could involve substantial sums of money and at other times considerably less. This constantly fluctuating situation is another reason why I cannot conclude, in the absence of language in the will specifically so providing, that it was intended that the farm partnership assets accompany the devise of the farm. I would affirm the trial court.

Snell, J., joins this dissent.