

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

IN THE MATTER OF THE)
ESTATE OF MYRTLE L.)
SHEPHERD, Deceased.)

JOHN R. SHEPHERD and)
ELAINE K. SHEPHERD,)
Co-Executors-Appellants.)

8-584
88-471

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Appeal from the Iowa District Court for Johnson County
(No. 18572), Van D. Zimmer, Judge.

Co-executors appeal the decision of the probate court
concerning the intended distribution of stock in a
closely-held corporation. **AFFIRMED.**

James C. Larew and C. Peter Hayek of Hayek, Hayek,
Hayek & Holland, Iowa City, for appellants.

David P. Poula, Iowa City, for appellees.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

DONIELSON, J.

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This case involves the interpretation of Myrtle Shepherd's will. At the time of her death in 1982, Myrtle held stock shares representing total ownership of a closely-held corporation. She was also the grandmother of ten children born of her predeceased son's two marriages: six from his first marriage, four from the second. At issue here is whether she intended ownership of the stock shares to pass to all of her grandchildren, as the probate court ruled, or whether, as the co-executors reported, she took measures before her death to assure that the shares would go only to the six offspring of her son's first marriage and their mother.

The relevant section of Myrtle's will reads as follows:

ITEM II. (A.) I give, devise and bequeath all the rest, residue and remainder of the real property in my estate and wherever situated and whether now or hereafter acquired to my ten grandchildren: James Arthur Shepherd II, Ned Allen Shepherd, John Roger Shepherd, Todd Andrew Shepherd, Scott Douglas Shepherd, Jeff Kennard Shepherd, Virginia Elizabeth Shepherd, Jennifer Ann Shepherd, Rebecca Lynn Shepherd, and Kurt Garrett Shepherd. Those minor grandchildren's portion are to be kept in separate, individual funds until they reach twenty-one years of age, but may be released early if they are able to substantiate the need to the executor(s).

(B.) I give, devise, and bequeath all the rest, residue, and remainder of my personal property to the executors of my estate to divide, supervise, and direct the distribution of said personal property.

Actions to establish a contested claim are triable as law actions. Iowa Code § 633.33 (1987). We review the

matter on error. Iowa R. App. P. 4. The findings of fact by the court are binding upon the appellate court if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

I. The first issue presented for review is whether the probate court erred in its determination that the fifty-three shares of stock owned by Myrtle L. Shepherd as described in a November 11, 1981, corporate document, did not constitute jointly-owned personal property (or, in the alternative, a life estate interest) and did not pass directly to her duly named joint tenants (or, in the alternative, named remainderman) upon her death.

In its conclusions of law, the trial court ruled that insufficient evidence exists to show the creation of a joint tenancy by Myrtle. The creation of joint tenancy in property requires a clear expression of the owner's intent. Larson v. Anderson, 167 N.W.2d 640, 644 (Iowa 1969). Life estates and vested remainders also require a clear expression of the owner's intent. According to the trial court, the language used by Myrtle was "so vague as to be virtually meaningless."

In the corporate minutes dated November 11, 1981, and notarized November 28, 1981, Myrtle indicated: "Second name on each share becomes owner of share in case original owner should fail, refuse, or cease as such."

She then listed her son's first wife and six grandchildren with the shares of stock as follows:

Myrtle L. Shepherd, (Elaine K. Shepherd) - thirty (30) shares

Myrtle L. Shepherd, (James A. Shepherd, II) - four (4) shares

Myrtle L. Shepherd, (Ned A. Shepherd) - four (4) shares

Myrtle L. Shepherd, (John R. Shepherd) - four (4) shares

Myrtle L. Shepherd, (Todd A. Shepherd) - four (4) shares

Myrtle L. Shepherd, (Scott D. Shepherd) - four (4) shares

Myrtle L. Shepherd, (Jeff K. Shepherd) - three (3) shares

The trial court found that instead of creating a joint tenancy, it is more reasonable to construe Myrtle's choice of words to show she did not intend to pass any present interest in the shares. Her words indicate a future event, "becomes," "in case," and do not establish jointly-held property prior to death. Furthermore, Myrtle did not use terminology referring to the right of survivorship which is the best way to express the creation of joint tenancy. Instead, she included three alternative conditions, only one of which indicates death. Myrtle has not clearly expressed her intent to transfer her property during her life. Therefore, we agree with the trial court that the shares must pass under Myrtle's will as personal property.

II. As we have determined that the fifty-three shares must pass under Myrtle's will, we must next consider

whether the probate court erred in its decision regarding distribution. The executors allege the court erred by using the beneficiaries listed in Item IIA, which expressly concerned real property. Instead, they argue, Myrtle's intended distribution of the stock is found in Item IIB of her will.

The probate court did not rule on the fifty-three shares of stock under Item IIA. Instead, the court found that Item IIB failed to indicate to whom the executors were to distribute the shares. The court construed Item IIB to require the executors to distribute the stock equally among Myrtle's ten grandchildren who were listed in Item IIA.

With regard to wills, the testator's intent is the polestar and must prevail. In re Larson's Estate, 256 Iowa 1392, 1395, 131 N.W.2d 503, 504 (1964). The intent must be gathered from a consideration of (a) all the language contained in the four corners of the will, (b) the scheme of distribution, (c) the circumstances surrounding the will, (d) the existing facts and (e) technical rules or canons of construction should be resorted to only if the language of the will is ambiguous or conflicting or the testator's intent is for any reason uncertain. Id. at 504-05.

The probate court distributed the shares to all ten grandchildren as being "consistent with both the other language in Myrtle's will and with her scheme of

distribution." Furthermore, the court found this result a more reasonable construction of the will than allowing the executors absolute discretion in distributing the property.

No error of law was committed by the probate court. We agree that the fifty-three shares were intended to be distributed equally among the ten grandchildren. This result is bolstered by the fact that the result would be the same under the partial intestacy statute. Iowa Code § 633.272. The will has been correctly construed with regard to the fifty-three shares.

III. Finally, the executors claim the probate court erred in its determination that the seven shares of stock described in the November 11, 1981, document and the minutes of the annual meeting held on December 26, 1981, were subject to distribution under the terms of Myrtle's will. The co-executors first claim the shares were inter-vivos gifts and should not have been subject to the will. Secondly, they argue that, if not gifts, then the shares should have been distributed to the second-named individuals.

The burden of proof is on those asserting a gift was made. Jensen v. Schreck, 275 N.W.2d 374, 382 (Iowa 1979). The probate court found that the co-executors did not establish a gift of the seven shares of stock by clear, convincing, and satisfactory evidence as required. Therefore, the seven shares had to pass under the will like

the fifty-three shares. We agree with this result. No error has occurred. The decision of the probate court is affirmed.

AFFIRMED.