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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WALTER TOBIASON, NETTIE GILLETTE,	)	
WALLACE RAMBERG, TOM TOBIASON,	)	Filed October 19, 1978
RALPH TOBIASON, BETH JANE KASEN,	)	
FLORENCE CARLSON, & JESSIE NELSON,	)	
	)	
Appellees,	)	
	)	581
vs.	)	<u>2-60892</u>
	)	
CHRIS A. NELSON,	)	
	)	
Appellant.	)	

Appeal from Winnebago District Court - B. C. Sullivan, Judge.

Defendant appeals from the granting of plaintiffs' motion for summary judgment which determined a tenancy in common was created by a 1933 deed instead of a joint tenancy. - Reversed.

Edward R. Boyle, of Boyle, Schuler & Stanton, Clear Lake, and Terry Branstad, of Branstad & Schwarm, Lake Mills, for Appellant.

Frank Sinnard, of Cooper, Sinnard & Beebe, Forest City, for Appellees.

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

PER CURIAM

This case concerns whether a 1933 deed created a joint tenancy or a tenancy in common. The action is for a declaratory judgment. The trial court held for plaintiffs granting their motion for a summary judgment which determined a tenancy in common was created. Plaintiffs were nephews, nieces, and a foster niece of Norman Tobiason and sole beneficiaries under his will. Defendant, Chris A. Nelson, is the grantee of a deed from Stella Tobiason, widow of Norman Tobiason.

The deed containing the language in question is to a quarter section of land. It was executed in Illinois in 1933 by the receiver of the Chicago Joint Stock Land Bank who designated parties of the second part as "Norman Tobiason and Stella Tobiason, husband and wife, as joint tenants". The granting and hadendum clauses, however, referred to "said parties of the second part, their heirs, successors and assigns forever". Stella elected to take under her husband's will which gave her nothing. Paragraph III of the will stated that testator made "no bequest in favor of my wife as we have discussed the disposition of our property and mutually agree upon the disposition here provided". As executor she filed a final report claiming the real estate as the surviving joint tenant. All of the plaintiffs received notice of the final report and did not file objections. The final report was approved in 1970 and the estate closed.

On January 31, 1976, Stella conveyed the real estate as a gift to defendant, Chris A. Nelson. On May 5, 1976 she died. On November 12, 1976, plaintiffs filed their petition for declaratory judgment asserting that Norman Tobiason, at the time of his death, was the owner of an undivided one half interest in the real estate, as a tenant in common. They claim this one half interest passed to them as beneficiaries under his will. The trial court held the words "their heirs, successors, and assigns forever" were wholly inconsistent with an intention to create a joint tenancy, and, therefore, a tenancy in common was created.

Our review is de novo. Rule 4, Rules of Appellate Procedure. We start from the statutory direction of § 557.15, The Code. "Conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed."

Thus, to prevail, defendant must establish an intent by the parties to create a joint tenancy.

We are not here concerned with any repugnancy between the hadendum clause and the granting clause since they do not vary in material matters. The question is whether the words "their heirs, successors and assigns forever" are determinative of intent and whether an intent to create a joint tenancy is established.

Although the phrase "as joint tenants with full rights of survivorship and not as tenants in common" most clearly creates a joint tenancy, such terminology is not exclusive. See Engelbrecht v. Engelbrecht, 323 Ill. 208, 153 N.E. 827 (Illinois 1926). "Any language which clearly shows an intent to make the grantees in a written instrument of conveyance or ownership joint tenants is sufficient." *In re Estate of Miller*, 248 Iowa 19, 20, 79 N.W.2d 315 (1956). A joint tenancy can be created even without using those words. *Wood v. Logue*, 167 Iowa 436, 149 N.W. 613 (1914).

It has long been the general rule that repugnancy matters are discounted when intention can be found. "The strictness of the ancient rule as to repugnancy in deeds is much relaxed so that in this as in other cases of construction, if clauses or parts are repugnant, the intention is to be gathered from the whole instrument instead of from particular clauses." 13 Sykes C.Y.C. 618. In *Wood v. Logue*, supra at page 438-39:

But such narrowness of construction is hardly consonant with that other well-settled principle that, in construing a written instrument, the intention of the parties is to be looked for, and when ascertained, is to be given effect unless forbidden by some established rule of law.

See also 26 C.J.S. § 127, page 429.

In 1964 the supreme court noted in *Crecelius v. Smith*, 255 Iowa 1249, 125 N.W.2d 786 (1964):

Precedents are usually not of great value in construing deeds such as these. Each must be read and grantor's intent determined, from the instrument itself. But there are certain rules of law which become applicable. The entire instrument must be considered and intent of the grantor determined as made manifest there.

In *Switzer v. Pratt*, 237 Iowa 788, 23 N.W.2d 837 (1946), the court stated:

The tendency of modern decisions is to disregard technicalities and to treat all uncertainties in a conveyance as ambiguities subject to being cleared up by resort to the intention of the parties as gathered from the instrument itself, the circum-

stances attending and leading up to its execution, and the subject matter and the situation of the parties as of that time.

Applying these principles to the instant case we note that both the granting and hadendum clauses designate the grantees as "parties of the second part." Those persons are immediately defined in the beginning sentence of the deed as Norman Tobiason and Stella Tobiason, husband and wife, as joint tenants." Thus by reference to said parties the joint tenants designation is incorporated into the granting and hadendum clauses.

We also note that the words joint tenants are typed in the deed. Section 622.21, The Code, states: "When an instrument consists partly of written and partly of printed form, the former controls the latter, if the two are inconsistent." The words "heirs, successors and assigns forever," are in printed form in both the granting and hadendum clauses. Although typed rather than written we deem it appropriate to give greater weight to those words that are typed than to the printed words. *Baron v. Crossroads Center of Iowa, Inc.*, 165 N.W.2d 745, 752 (Iowa 1969).

Words of inheritance such as "and her heirs forever" being no longer necessary to the creation of a fee are not given special importance. Cf. *In re Estate of Fleck*, 261 Iowa 434, 154 N.W.2d 865 (1967), where the court said: "We attach no special significance to the use of the words 'and her heirs forever' in the original grant to Ruth." But cf. *Albright v. Winey*, 226 Iowa 222, 284 N.W. 86 (1939), where use of the word "jointly" was deemed inadequate and any intent to create a joint tenancy was negated by the provision "to said grantees, their assigns, heirs and devisees forever."

We find that the use of the phrase "as joint tenants" is sufficiently indicative of an intent that the grantees hold the property in joint tenancy. There appears to be no other purpose served by use of those words in the deed. To give meaning to the use of those words and considering the intent of the parties as gathered from the entire instrument, we hold a joint tenancy was created

REVERSED..