IN THE COURT OF APPEALS OF IOWA

No. 3-511 / 92-1510

FILED
DEC 29 1993
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IN THE MATTER OF THE ESTATE OF JULIUS W. KURASH, Deceased,

BEVERLY OPOLKA,

Plaintiff/Appellant,

vs.

THOMAS W. LANGLAS, As Executor of the Estate of Julius W. Kurash,

Defendant/Appellee.

Appeal from the Iowa District Court for Black Hawk County, John Bauercamper, Judge.

The petitioner appeals a judgment of the district court denying her petition for specific performance and restitution against the deceased's will. **AFFIRMED.**

Michael M. Pedersen of Martin, Nutting, Miller, Keith, Pedersen & Kelsen, Waterloo, for appellant.

Jon Fister of Beecher, Rathert, Roberts, Field, Fister, Walker, & Morris, Waterloo, until his withdrawal, and then Thomas C. Verhulst of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellee.

Heard by Schlegel, P.J., Hayden, J., and McCartney, S.J.*

*Senior judge from the 2nd judicial district serving on this court by order of the Iowa Supreme Court.

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HAYDEN, J.

Beverly Opolka appeals the district court's denial of her claims for specific performance and restitution against the estate of Julius Kurash. Beverly's claims are based on an alleged oral promise by Julius to make a will which would give "big money" to her in his will if Beverly conveyed back to him a one-half interest in the house in which he resided.

On July 11, 1973, Julius and Leona Kurash had executed wills which, upon the death of the survivor, left all their property to the children of the petitioner, Beverly Opolka. Beverly was the daughter of Leona from a prior marriage. Leona and Julius told other individuals they had left Beverly out of the will based on their belief Beverly had enough money of her own and the property should go to the grandchildren.

Leona passed away in October 1987. At that time, Beverly took Julius to see a lawyer, Thomas W. Langlas, regarding the drafting of a new will. Beverly did not know her mother's will excluded her except as to her duties as executor. Beverly also took Julius to the John Deere Credit Union in order to place Julius's home and bank account in her name as a joint tenant with Julius. On November 5, 1987, Julius executed a will in which Beverly was the sole beneficiary. The next day Julius executed a deed establishing joint ownership of his home with him and Beverly as joint tenants. He also placed Beverly's name on his credit union account.

Shortly after Beverly left Iowa and returned to her home in Michigan, Julius changed his will, bequeathing his estate to Beverly's children. Julius did not name Beverly as a beneficiary in this will. Some time later, Julius discovered Beverly had full authority to write checks on his account at the John Deere Credit Union. Julius withdrew Beverly's name from these accounts.

In March 1988 Beverly again returned to Iowa and took Julius to Mr. Langlas's office. Julius executed another will at that time. This fourth will reinstated Beverly as an equal beneficiary with her children.

After receiving his 1988 tax bill, Julius wished to get Beverly's name off the house as a joint tenant because she was not paying any taxes or helping with maintenance expenses. In the fall and winter of 1989, Attorney Langlas wrote Beverly a series of letters expressing Julius's desire to have Beverly deed her joint interest back to him. Beverly did not cooperate in deeding back the property. In December 1989 Julius executed a fifth will. This will excluded Beverly from everything except her grandmother's wedding band, if she did not deed the property back to him. The will further provided Beverly would receive $50,000 if she transferred her interest in the house back to Julius. Beverly testified at trial she told Julius she would deed her joint share in the property back to him and then he allegedly indicated he would leave her "big bucks" in his will for the conveyance.

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Early in 1990 Julius had to move into a nursing home due to his deteriorating health. Beverly finally brought the signed deed to Julius in April 1990. Beverly asked Langlas, who was present at the transfer, if this meant she was now in for "the big money." Beverly claims Langlas confirmed she was. Langlas testified there was a discussion regarding whether Beverly would receive more money under the will. Julius then asked Beverly to help him sell the house. Beverly negotiated the sale of the house to a friend for $8000. The net proceeds of the sale was $7826.20.

On July 3, 1990, Julius again changed his will. This final will did not include Beverly and provided any and all wills and codicils made before were revoked.

Julius subsequently passed away, and Beverly did not attend his funeral. When Beverly learned she would receive nothing from the will, she filed the present petition seeking specific performance of the clause in the December 1989 will leaving her $50,000. In the alternative, she sought restitution for the value of her one-half interest in the house.

Following trial, the district court entered its judgment dismissing Beverly's claims for specific performance and restitution. The district court noted the pattern surrounding when Julius changed his will and the nature of the changes. Numerous witnesses testified Julius was angry with Beverly for always trying to get all of his

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money and taking things from the house without permission. The witnesses also stated Julius was angry he had to pay Beverly to attend her own mother's funeral. Beverly filed a rule 179(b) motion which the district court denied. Beverly has appealed.

Beverly seeks specific performance of an alleged oral promise by Julius to bequeath to her "big money" from his estate. Alternatively, she requests restitution for the value of an interest in the house she conveyed back to Julius.

Our review of a specific performance action, which is equitable in nature, is de novo. Becker v. Central States Health & Life Co., 431 N.W.2d 354, 356 (Iowa 1988), overruled on other grounds by Johnston Equip. v. Industrial Indem., 489 N.W.2d 13, 17 (Iowa 1992) (citing Decker v. Juzwik, 255 Iowa 358, 367, 121 N.W.2d 652, 657 (1963)); Janssen v. North Iowa Conference Pensions, Inc. of Methodist Church, 166 N.W.2d 901, 903 (Iowa 1969) (citation omitted). In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7).

Beverly argues overwhelming evidence shows Julius made a promise to her if she deeded her one-half interest in the house to him, he would leave her a significant amount of money. She claims her interest in the estate is upwards of $50,000. The house sold for only $8000. Beverly also

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contends she provided consideration therefore the estate is liable for the fair value of her performance, even if the value is ambiguous.

Beverly appears to be basing her claims on a statement Julius allegedly made in April 1989 and on one of Julius's wills, dated December 1989. Beverly testified she called Julius in April and told him she would sign the deed and return it to him. The record indicates she made this statement before Julius made any alleged statement about leaving her "big money" in his will. She stated once Julius made the alleged statement, she still did not know the amount of money to which he was referring. The December 1989 will was revoked by a later will, which Julius executed in July 1990.

Beverly testified on direct examination as to the terms of the alleged agreement regarding Julius's alleged promise she would receive "the big money" from his estate if she conveyed back her one-half interest in the house to Julius.

> Q. Did he [Julius] say anything to you about leaving you money? A. Yes.
> Q. And what was that? A. Well, he didn't give me a dollar amount.
> Q. What was his term of reference? A. That I'm in for the big money.

When questioned about Julius's intentions, Beverly stated:

> Q. And it is fair to say you don't know for sure what was in Joe's [Julius] mind? A. I guess that's what we are here to establish.

She admitted she was asking the court to determine what Julius meant by "big money." Beverly claims Julius meant

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he would leave her, at a minimum, $50,000 of his estate; however, she strongly argued he meant she would receive his entire estate.

A party seeking specific performance on a contract which is based on parol evidence must prove by clear and convincing evidence the terms of the contract. In re Estate of Beaver, 206 N.W.2d 692, 698 (Iowa 1973); Gildea v. Kapenis, 402 N.W.2d 457, 459 (Iowa App. 1987) (citation omitted).

> A court cannot enforce a contract unless it can determine what it is. In order to be binding, an agreement must be definite and certain as to its terms to enable the court to give it an exact meaning. Although vagueness, indefiniteness and uncertainty are matter of degree, their existence as to any of the essential terms to an agreement is adequate reason for refusal to direct specific performance.

Davis v. Davis, 261 Iowa 992, 1001, 156 N.W.2d 870, 876 (1968) (citations omitted).

> A court of equity will not decree the specific execution of a contract unless it is fair and the consideration is adequate. There must be at least an honest consideration. . . .
>
> Page on Wills, 2nd Ed., states in Sections 109 and 110: The general principles of equity which control specific performance apply to a contract to make a will. . . . Equity will not enforce a contract of this sort unless it is fair and reasonable."

In re Estate of Johnson, 233 Iowa 782, 788, 10 N.W.2d 664, 667 (1943) (citations omitted).

> "A will made in conformity with an alleged contract is strong confirmatory proof that such an agreement was entered into; . . . but the subsequent execution of another will, not in conformity with the alleged contract, is strong evidence of the absence of such an agreement."

Davis, 156 N.W.2d at 875 (quoting 94 C.J.S. Wills § 113(2) (1956)).

Beverly has failed to prove by clear and convincing evidence the existence of a valid contract. The terms of the alleged agreement between Beverly and Julius are too indefinite to be given effect by the equitable remedy of specific performance. Beverly testified Julius did not indicate to her a dollar amount when he used the phrase "big money." She stated she was requesting the court interpret the term "big money." The trial court properly denied Beverly's claim for specific performance.

Beverly also testified she understood once she conveyed her one-half interest in the home to Julius, the proceeds from any future sale of the home would go Julius. Beverly seeks a judgment of at least $50,000. The net proceeds from the sale of the home totaled only $7826.20. Due to the nature of this initial transaction of the home, the trial court also denied Beverly's claim for restitution.

We affirm the decision of the trial court in denying Beverly's claims for specific performance and restitution.

Costs of this appeal are assessed to Beverly Opolka.

AFFIRMED.