



IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE ESTATE,)
OF D. ARA VETA JOHNSON,)
DECEASED)

JOY GEHRT)

Filed March 14, 1977

Appellant,)

vs.)

JOHN F. DORAN, EXECUTOR OF)
ABOVE CAPTIONED ESTATE,)
AMY BERQUIST, GENEVIEVE)
BRUNSON, ELEANOR SLATER,)
VIRGINIA MERRIHEW, BRUCE)
JOHNSON, WILLIAM P. JOHNSON,)
JEANNE GOOD, ORA HALVORSON)
MADGE SHUCK, JOHN COMBELLOCK,)
STEPHEN COMBELLOCK, BETHEL)
ELLIS, ANITA LOUISE JOHNSON)
SIMONSEN and CHERYL DIANE)
JOHNSON MILLER,)

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2-58344

Appellees.)

Appeal from Palo Alto District Court - Joseph P. Hand,
Judge.

Appeal by Plaintiff-beneficiary from trial court's
adverse ruling on declaratory judgment action to construe
provision of will. - Affirmed.

Rosemary Sackett of Sackett, Sackett & Hemphill of
Spencer, for appellant.

Dick Montgomery of James, Greer, Hover, Nelson & Bertell
of Spencer, for appellee.

John Doran of Prichard, Hanson, Doran & Borman of
Emmetsburg, for John Doran, Executor.

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

SNELL, J.

Plaintiff initiated this action seeking a declaratory judgment construing paragraph XIV of the will of D. Ara Veta Johnson. The action was tried in equity pursuant to § 633.33, The Code. Our review is de novo, rule 334, Rules of Civil Procedure. From an adverse ruling plaintiff brings this appeal.

D. Ara Veta Johnson died testate October 7, 1973. Her estate consisted of personalty worth approximately \$26,000 and over 900 acres of Palo Alto county real estate. Decedent's will makes several specific bequests, including a bequest to her sister, Bessie Combellick, of a one-fourth undivided interest in the remainder of the estate (paragraph XIII). The law suit concerns the meaning to be given paragraph XIV, which states:

"The remaining three-fourths of the remainder of my estate I hereby give and bequeath unto my following named nieces and nephews, per stirpes and not per capita, to wit:

Amy Bergquist
Genevieve Brunson
Eleanor Slater
Virginia Merrihew
Bruce Johnson
William P. Johnson
Jean Bruns
Ora Halvorsen

David Johnson
Madge Schuck
Joy Gehrt
John Combellick
Stephen Combellick
Bethel Ellis"

Plaintiff is Joy Gehrt, one of the fourteen named beneficiaries under paragraph XIV. Trial court held that the language of paragraph XIV is plain and unambiguous and that it is therefore unnecessary to resort to extrinsic evidence. The court held that the fourteen named persons are to share equally under the provisions of paragraph XIV. Plaintiff's claim is that the words "per stirpes and not per capita" result in a distribution to the named persons by family relationship. The result of this is that plaintiff, as the only child of one of the four families represented under paragraph

XIV, would receive one-fourth of the property bequeathed. The remaining three-fourths would be divided among the remaining thirteen named beneficiaries on a family (per stirpes) basis.

The basic rules governing our consideration of this will are (1) the testator's intent is the polestar and must prevail; (2) the intent must be gathered from a consideration of all of the language of the will, the scheme of distribution, and the facts and circumstances surrounding the making of the will; and (3) technical rules of construction should be resorted to only if the language of the will is clearly ambiguous or conflicting or testator's intent is for any reason uncertain. *Houts v. Jameson*, 201 N.W.2d 466; 468 (Iowa 1972).

The relationship of the fourteen named beneficiaries to decedent is as follows: the first six named beneficiaries, Amy Bergquist, Genevieve Brunson, Eleanor Slater, Virginia Merrihew, Bruce Johnson and William P. Johnson are the children of decedent's brother, Van Johnson, who is deceased. The following four named persons, Jean Bruns, Ora Halvorsen, David Johnson and Madge Schuck are the children of decedent's brother, Harry Johnson, who is deceased. Of these, David Johnson is also deceased, the parties agreeing that whatever his share is will go to his heirs. The next named person, plaintiff, Joy Gehrt, is decedent's half niece. The last three named persons, John Combellick, Stephen Combellick, and Bethel Ellis are the children of decedent's sister, Bessie Combellick, who is still living and is also a beneficiary of one-fourth of the remainder of the estate and of specific cash bequests under prior provisions of the will.

Plaintiff introduced testimony attempting to show testator's intent to favor her in paragraph XIV and have the distribution made along family lines. Of course, such testi-

mony is admissible only if the will is ambiguous. In re Estate of Winslow, 259 Iowa 1316, 1323, 147 N.W.2d 814, 818 (1967). We find no ambiguity in paragraph XIV.

As a general rule unless the will otherwise shows a different intention, a testamentary gift is to named individuals. They take per capita; but where the gift is to an individual or several named individuals and to others as a class, the latter takes per stirpes. The words "per stirpes and not per capita" are not strictly applicable to and are technically inappropriate when used in connection with named legatees who are primary takers. 96 C.J.S. *Wills* § 709. In this case, the words "per stirpes and not per capita" are not strictly applicable to and are technically inappropriate when used with the named individuals. We find it would be a strained interpretation when individuals are named to hold that it was not intended that they take equally, but take only as a representative of their family and on a per stirpes basis.

The meaning of the words "per stirpes and not per capita" is to provide for substitutional legatees in the event of the decease of the primary legatee which in fact happened, David Johnson having predeceased testator. We find nothing in paragraph XIV or in any other part of the will indicating a contrary intent. In fact, the other provisions of the will indicate the intent we find. Bessie Combellick is alive and takes under paragraph XIII and paragraph III of the will; while her three children who are alive take under paragraph XIV. Obviously, her three children were not intended to take under paragraph XIV representing a family when their mother takes separately. The indication is the testator was thinking in terms of individuals, not families. It is also apparent that if testator had intended plaintiff to take a

larger share under paragraph XIV than the other named legatees, she could simply have done so by specifically so providing. Testator did not see fit to do so and it is not for us to do after she is dead. In re Estate of Winslow, 259 Iowa 1316, 1324, 147 N.W.2d 814, 819 (1967).

In the case of In re Estate of Luke, 184 N.W.2d 42, (Iowa 1971) the court interpreted a similar provision. There the named legatees were found to share equally, notwithstanding the phrase "per stirpes and not per capita". On page 45 of 184 N.W.2d the court stated:

"Stated otherwise, the term 'per stirpes' as here employed by testatrix was not made applicable to the named legatees, being used only with regard to secondary or substituted beneficiaries in event of a primary legatee's death."

We recognize that the phrase was used after the list of named legatees in *Luke*, whereas in the case at bar the phrase was used before the list. We find that this difference in location in this case is not significant in determining testator's intention. The testator intended that the fourteen named legatees should share equally as the trial court found.

Judgment affirmed.