IN THE COURT OF APPEALS OF IOWA

No. 0-363 / 09-1740
Filed July 14, 2010

LE ANN M. CUNNINGHAM and
ROGER E. LAWSON,
Plaintiffs-Appellees,

vs.

LONNIE J. LAWSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Davis County, Daniel P. Wilson, Judge.

A defendant appeals from a district court ruling imposing a constructive trust on property transferred to him by his mother before her death. **AFFIRMED.**

J. Terrence Denefe of Kiple, Denefe, Beaver, Gardner & Zingg, L.L.P., Ottumwa, for appellant.

Michael R. Brown of Brown Law Office, P.C., Fairfield, for appellees.

Heard by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

VAITHESWARAN, P.J.

The question we must answer is whether a surviving spouse may transfer land during her lifetime in contravention of a mutual will she executed with her husband.

I. Background Facts and Proceedings

Ralph and Ileta "Elaine" Lawson married in 1971. Following the marriage, Elaine's mother transferred 11.98 acres of land to Ralph and Elaine as joint tenants with rights of survivorship.

In 1987, Ralph and Elaine executed wills in which they promised to leave their entire estate, including the 11.98 acres, to whoever survived. The wills provided that on the death of the surviving spouse the property would be distributed to Ralph and Elaine's children from prior relationships. Specifically, Elaine's son Lonnie, who was adopted by Ralph, was to receive fifty percent of the estate and Ralph's children, Roger and Le Ann, were to each receive twenty percent. The remaining ten percent was to go to a church. Both wills afforded Lonnie an option to purchase the 11.98 acres and the house that was on it. The final provision of the wills stated the parties were

> each making a will at this time, and we have agreed between us that neither will change our will without the written consent of the other, and in consideration of the bequests contained in said Will of my said [wife/husband] to me and the promises of my said [wife/husband], I hereby state that I will not make a new will nor will I change my said Will without the written consent of my said [wife/husband], and direct that this Will be adjudged as a Contractual Will.

When Ralph died, his will was not admitted to probate. The 11.98 acres and house passed to Elaine. After several years, Elaine quitclaimed the land and

house to Lonnie, but reserved for herself "the right to reside on and occupy the above real estate as long as she is able to care for herself." Five days after signing the quitclaim deed, she executed a new will revoking all prior wills, designating a different church for the ten percent bequest, and deleting Lonnie's option to purchase, in light of the prior quitclaim deed.

Elaine died shortly after preparing these documents. Following her death, Roger and Le Ann sued Lonnie, alleging Elaine's transfer of the 11.98 acres and house to Lonnie was inconsistent with the 1987 wills executed by Elaine and their father. They requested that the property be impressed with a trust in their favor for their share of the property.

At a bench trial, the district court admitted the 1987 wills into evidence subject to Lonnie's objection. Following trial, the district court concluded that these wills were mutual and contractual. The court further concluded the quitclaim deed transferring the 11.98 acres and home to Lonnie "serves to frustrate, violate and render ineffective the provisions of the contractual wills between Elaine and Ralph." The court imposed a constructive trust on the property in favor of Roger and Le Ann.

Lonnie filed a motion for enlarged findings and conclusions, which the court denied. The court stated it "was not necessary that Ralph or Elaine's wills be probated to establish the wills' enforceability as a contract," and the authenticity of the wills "was not seriously contested. The evidence establishes them as valid and enforceable wills and contracts between them."

On appeal, Lonnie reiterates that the wills should not have been admitted. He also argues that his mother did not receive the property under Ralph's 1987 unprobated will, but through her survivorship rights as a joint tenant.

Because this case was tried as an equitable action, our review is de novo. Iowa R. App. P. 6.907; *Henning v. Sec. Bank*, 564 N.W.2d 398, 399 (Iowa 1997) ("Our review is governed by how the parties tried the case in the district court.").

II. Analysis

A. Admission of Wills

Lonnie contends the 1987 wills should not have been admitted into evidence because (1) there was "no foundation laid that [the wills] were properly executed," (2) there was "no testimony [from] subscribing witnesses with respect to the same," and (3) the period within which wills must be admitted to probate had passed for Ralph's will under Iowa Code section 633.331 (2007).

These arguments would be relevant if the 1987 wills were being admitted to probate. They were not. Instead, Roger and Le Ann sought to admit them as evidence in their independent action for breach of the mutual or contractual wills. *See In re Estate of Graham*, 690 N.W.2d 66, 70 (Iowa 2004) (using the terms "mutual" and "contractual" wills interchangeably). This was permissible, as a cause of action based on the failure of a mutual or contractual will may be considered outside probate proceedings. *See In re Estate of Prehoda*, 309 N.W.2d 516, 519 (Iowa Ct. App. 1981) ("Claims based on the contractual provisions of the prior will must be asserted, if at all, by a suit for damages or by impressing a trust on the testator's property passing under the second will for the benefit of those favored in the prior contractual will."); 20 Kurtis A. Kemper,

Cause of Action for Breach of Contract to Make Joint, Mutual, or Reciprocal Will, Causes Of Action 1 § 2 (1989) [hereinafter Kemper] ("When the surviving testator changes the agreement for the disposition of property under a joint, mutual, or reciprocal will by revoking the will and executing a new will, or by making inter vivos dispositions which defeat the agreement, the executor and/or beneficiaries under the joint, mutual, or reciprocal will may seek relief by maintaining an action for breach of the underlying contract to make such a will.").

Because Roger and Le Ann proceeded to enforce the wills through an action outside probate, they were not required to establish the testators' compliance with the statutory formalities for executing a will. *See* 20 Kemper, 1 § 4; *see also Estate of Lidbury v. Comm'r of Internal Revenue*, 800 F.2d 649, 652 (7th Cir. 1986) (stating it is not necessary that a mutual will "be admitted into probate, because the issue here is whether the document was a valid contract"). Accordingly, we conclude the district court acted appropriately in admitting the 1987 wills.

B. Elaine's Transfer of Property to Lonnie

Mutual or contractual wills are wills "executed in pursuance of a compact or agreement between two or more persons to dispose of their property, either to each other or to third persons, in a particular mode or manner, each in consideration of the other." *Father Flanagan's Boys' Home v. Turpin*, 252 Iowa 603, 608, 106 N.W.2d 637, 640 (1961). To have a mutual will there must be sufficient evidence "to show a binding agreement as to disposal of the property of the makers in a certain way." *Id.* "No will shall be construed to be contractual or

mutual, unless in such will the testator shall expressly state the intent that such will shall be so construed." Iowa Code § 633.270.

There is no question that Ralph and Elaine expressed an intent to have their wills construed as contractual or mutual wills, as each of their 1987 wills stated "this Will be adjudged as a Contractual Will." The question, then, is the effect of this designation on Elaine's ability to transfer property while she was alive.

Lonnie suggests that there was no effect because the wills did not specifically prevent her "from disposing of real estate held by her during her lifetime." We disagree. Each 1987 will contained the following provision: "I hereby state that I will not make a new will nor will I change my said Will without the written consent of my said [wife/husband]." This language prevented Elaine from making a new will. If that were not sufficient, Elaine's will also stated this limitation was "in consideration of the bequests contained in said Will of my said husband to me and the promises of my said husband." Those bequests included a bequest of Ralph's "entire estate, consisting of both real estate and personal property and wheresoever located, unto" Elaine. Finally, under both 1987 wills, Lonnie was only entitled to fifty percent of the estate and an option to purchase the 11.98 acres "after" the death of the surviving spouse. He was not entitled to have the land gifted to him during the life of the surviving spouse.

Based on the language of the 1987 contractual wills, we conclude Elaine could not alienate the land to Lonnie during her lifetime without consequences. As the district court found,

> Although neither Elaine nor Ralph's 1987 wills specifically prohibited inter vivos transfers of property, that intent is clearly mandated by the provisions of those wills. This is particularly true since both Ralph and Elaine specifically referred to the "12 acres of ground on which I live on Route 3 Bloomfield, Iowa." They were each clearly thinking of their house and 12 acres at the time they executed their will in July of 1987.

In reaching this conclusion, we have considered the two opinions cited by Lonnie in support of a contrary result. *See McCuen v. Hartsock*, 159 N.W.2d 455 (Iowa 1968); *In re Estate of Lenders*, 247 Iowa 1205, 78 N.W.2d 536 (1956). Although the court in those cases permitted lifetime transfers of property notwithstanding the existence of mutual wills, both opinions contain qualifying language that is applicable here.

In *Lenders*, the Iowa Supreme Court stated it would not find an intent to restrict the disposition of property during a testator's lifetime "unless a plain intention to this effect is expressed in the will or in the contract pursuant to which it was executed." *Lenders*, 247 Iowa at 1215, 78 N.W.2d at 542. As noted, the 1987 wills of Ralph and Elaine express a "plain intention to this effect."

Similarly, in *McCuen*, the court approvingly cited an earlier opinion stating "'[g]ifts which are reasonable, not testamentary in effect, and which are not made to circumvent the contract or have that effect may be made.'" *McCuen*, 159 N.W.2d at 461 (quoting *Hatcher v. Sawyer*, 243 Iowa 858, 868, 52 N.W.2d 490, 495 (1952)). Here, Elaine's deed of the property to Lonnie contravened the express dispositional provisions of the contractual wills. The fact that Elaine executed a new will just five days after she conveyed the property to Lonnie cements our conclusion that the transfer was an effort to circumvent the provisions of the 1987 wills. For that reason, we are not bound by the ultimate

holding of *McCuen* permitting disposition of certain property during the testator's lifetime.

We recognize that in *McCuen*, the court suggested a lifetime disposition was permissible because the property was not transferred by will but was held in joint tenancy. *Id.* at 462. We are not persuaded that this fact makes a difference because, in a prior opinion, the Iowa Supreme Court stated, "[t]he fact that a large part of the property was held by testators in joint tenancy does not prevent application of the contractual theory." *Jennings v. McKeen*, 245 Iowa 1206, 1214, 65 N.W.2d 207, 211 (1954). Indeed, the *Jennings* court went on to state "[t]hat [the fact] the survivor became owner by virtue of the joint tenancy is immaterial so long as she received benefits under the will sufficient to constitute a consideration to support the contract." *Id.*

Here, under the mutual wills, Elaine received the benefit of a mutual promise. *See In re Estate of Chapman*, 239 N.W.2d 869, 872 (Iowa 1976) (stating "the mutual promises alone of this husband and wife to dispose of their jointly owned property in a manner satisfactory to each of them is good consideration to support the contract pursuant to which they executed their mutual wills"). The manner in which Elaine held title was immaterial. *Id.*

We conclude the district court acted equitably in enforcing the provisions of the mutual wills and in impressing a trust upon the property Elaine deeded to Lonnie in favor of Roger and Le Ann. Accordingly, we affirm the court's decision.

AFFIRMED.