IN THE COURT OF APPEALS OF IOWA

No. 0-694 / 10-0704
Filed November 10, 2010

IN THE MATTER OF THE ESTATE OF ESTHER RUTH MYRTUE LARSON, Deceased,

MARIE TIBERG, ETHEL TIBERG, and NORMA JEAN GENCARELLI,
Intervenors-Appellants,

vs.

THE SECURITY NATIONAL BANK OF SIOUX CITY, IOWA,
Executor-Appellee.

Appeal from the Iowa District Court for Monona County, Jeffrey A. Neary, Judge.

Appellants appeal from the probate court's ruling distributing the assets of an estate. **REVERSED.**

Joel D. Vos of Heidman Law Firm, Sioux City, for intervenors-appellants Marie Tiberg, Ethel Tiberg, and Norma Jean Gencarelli.

Carol J. Johnson, Odebolt, for the estate.

Robert Meis and Jason B. Gann, of Berenstein, Moore, Heffernan, Moeller & Johnson, L.L.P, Sioux City, for appellee.

John S. Moeller, Sioux City, for intervenor Aislinn Woodward.

Considered by Sackett, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

Esther Ruth Myrtue Larson executed her last will and testament on December 24, 2008. Esther died on September 11, 2009. Her will was admitted to probate on October 13, 2009. Esther's will made a specific bequest of certain assets to her husband, "Howard V. Larson, per stirpes." Howard Larson predeceased Esther. Howard was survived by four children from a previous marriage: Cinda Lasinski, Gail Kelsey, Keith Christopherson, and Louise Christopherson ("his children"). Esther's will provided that the residue of her estate pass to Security National Bank of South Dakota as trustee of the Esther Ruth Myrtue Larson Trust for the benefit of Aislinn Woodward, Marie Elizabeth Tiberg, Ethel Ann Tiberg, and Norma Jean Gencarelli.

On December 23, 2009, the executor filed an application to determine the distribution of assets, requesting an order directing that the specific bequests to Howard be distributed in equal shares to his children. Appellants filed a partial resistance to the application, asserting that under relevant provisions of the Iowa Code, the specific bequests to Howard lapsed and should be distributed to Security National Bank of South Dakota under the residuary clause of the will.

After a hearing, the district court determined that Esther's will clearly and explicitly communicated her intent that the bequest to Howard not lapse. Accordingly, the district court ruled that the items of specific bequest to Howard be distributed to his children.

Marie Tiberg, Ethel Tiberg, and Norma Jean Gencarelli, three of the beneficiaries of the residuary trust, appeal. They argue the district court erred in finding the specific bequests to Howard did not lapse.

II. Standard of Review

We review the ruling of the probate court de novo. *In re Estate of Serovy*, 711 N.W.2d 290, 293 (Iowa 2006). We give weight to the fact findings of the district court, but we are not bound by them. Iowa R. App. P. 6.14(6)(*g*); *Estate of Serovy*, 711 N.W.2d at 293.

III. Merits

At common law, when a bequest was made to someone who had predeceased the testator, the bequest lapsed and the property fell into the residuary estate. *Jensen v. Nelson*, 236 Iowa 569, 576, 19 N.W.2d 596, 600 (1945). In order to "preserve the devise for those who would presumably have enjoyed its benefits had the deceased devisee survived the testator and died immediately thereafter," Iowa enacted an antilapse statute. *In re Estate of Micheel*, 577 N.W.2d 407, 409 (Iowa 1998). This statute provides that a bequest made to someone who predeceased the testator will pass to the devisee's issue per stirpes unless the will expresses a clear and explicit intent to the contrary. Iowa Code § 633.273(1) (2009). However, there is a spousal exception to the antilapse statute that states,

> The devise to a spouse of the testator, where the spouse does not survive the testator, shall lapse notwithstanding the provisions of [the antilapse statute], unless from the terms of the will, the intent is clear and explicit to the contrary.

Id. § 633.274.

We must determine whether Esther's will evidenced a clear and explicit intent that her devise to her spouse, Howard, go to his children rather than to the residuary estate. This contrary intent must arise from the terms of the will itself. *Micheel*, 577 N.W.2d at 410. Appellants argue that no such intent was expressed in the will. The executor-appellee argues that such intent is clear from Esther's use of "per stirpes" in making a specific bequest to Howard and from the distribution scheme of the will as a whole.

Esther's will bequeaths certain property to her "husband, Howard V. Larson, per stirpes." We cannot find that Esther's use of "per stirpes" in this context evidences a clear and explicit intent that her devise to Howard not lapse. "Per stirpes" is defined as "[p]roportionally divided between beneficiaries according to their deceased ancestor's share." Black's Law Dictionary 1164 (7th ed. 1999). Thus, the phrase "per stirpes" directs how a bequest should be distributed among a designated class, but it does not designate such a class. This finding is consistent with relevant case law from other jurisdictions, which we find persuasive. *See In re Estate of Walters*, 519 N.E.2d 1270, 1273 (Ind. Ct. App. 1988) ("We perceive that the term per stirpes and its companion, per capita, have application only to the mode of distribution of a bequest among a designated class. The terms have no function in the establishment of the class who shall take."); *In re Estate of Winslow*, 934 P.2d 1001, 1006 (Kan. Ct. App. 1997) ("The legal phrase 'per stirpes' does not designate who will share in the estate, but rather, how the estate will be divided among those who do take."); *Varns v. Varns*, 610 N.E.2d 440, 442 (Ohio Ct. App. 1991) (stating the addition of

the phrase “per stirpes” does not designate who will share in the estate but rather how the estate will be divided among those who do take).

Because the phrase “per stirpes” only operates to direct how a bequest should be distributed among a designated class, it is meaningless if there is no class designated to which the bequest is to be distributed. Here, Esther failed to designate such a class; thus, the use of the phrase “per stirpes” is meaningless. On its own, the phrase does not operate to demonstrate an intent that the bequest pass to Howard’s children because they were not an identified class. Esther’s will made a specific bequest to Howard with no provision as to what would happen if Howard predeceased her. Esther’s use of the phrase “per stirpes” alone does not demonstrate a clear and explicit intent that the bequest to Howard not lapse if he predeceased her.

Further, we conclude that the distribution scheme of the will in its entirety fails to express an intent that the spousal exception to the anitlapse provision not apply. In other paragraphs of her will, Esther used the legal terms “per capita” and “per stirpes” to distinguish between the alternate distribution schemes among class members, and once to make a gift to another individual per stirpes. She did not use the term “per stirpes” consistently, and its use does not shed light on her intentions regarding the devise to her spouse.

But, Esther demonstrated an understanding in her will of how to make an alternate gift when a beneficiary did not survive to the point of distribution, when a class member predeceased her, and when no members of a class remained living. Esther’s failure to mention an alternate class if Howard predeceased her, when she had demonstrated an understanding of how to make a substitute class

gift, supports our conclusion that her will as a whole did not demonstrate an intent that the spousal exception to the antilapse statute not apply.

Esther's will supplies no evidence, let alone clear and explicit evidence, that she intended for Howard's specific bequest to pass to his children if he predeceased her. Accordingly, Esther's bequest to Howard lapsed when he predeceased her, and the property bequeathed to Howard should be distributed to the residuary trust.

REVERSED.