

**IN THE COURT OF APPEALS OF IOWA**

No. 2-087 / 11-0392  
Filed June 13, 2012

**JENIFER LALK,**  
Plaintiff/Counterclaim Defendant,

**vs.**

**KAREN BERNABE, Individually and  
KAREN BERNABE, as Executor of the  
Estate of Doris E. Grimm,**  
Defendant-Counterclaimant.

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**KAREN BERNABE,**  
Third-Party Plaintiff-Appellee,

**vs.**

**JENNIFER LALK,**  
Third-Party Defendant-Appellee,

and

**GREG PORTEE, Individually and GREG  
PORTEE as Executor of the Estate of  
PATRICIA PORTEE,**  
Third-Party Defendant-Appellant.

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Appeal from the Iowa District Court for Howard County, Richard D. Stochl,  
Judge.

Greg Portee appeals from the district court's declaratory judgment ruling,  
concluding Jennifer Lalk and Karen Bernabe were the remainderman distributees  
under the testamentary trust created by Wesley Haskovec. **AFFIRMED.**

Kevin E. Schoeberl of Story & Schoeberl Law Firm, Cresco, for appellant.

Andrew Van Der Maaten of Anderson, Wilmarth & Van Der Maaten,  
Decorah, for appellee Karen Bernabe.

Matthew D. Gardner, West Des Moines, for appellee Jennifer Lark.

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

**DANILSON, J.**

Third-party defendant, Greg Portee, appeals from the district court's ruling on a cross-petition for declaratory judgment, concluding that Jennifer Lalk and Karen Bernabe were the remainderman distributees under the testamentary trust created by Wesley Haskovec. Portee contends the district court abused its discretion in denying his motion to continue. He also asserts the court erred in applying the provisions of the Iowa Trust Code, chapter 633A (2009). Finding no abuse of discretion or error of law, we affirm.

**I. Background Facts and Proceedings.**

*A. Wesley Haskovec's will.* Wesley Haskovec died testate on June 13, 1987, survived by his wife, Doris E. Grimm, and his two daughters, Patricia Portee and Karen Bernabe. At the time of his death, Haskovec owned real estate in Howard County. Haskovec's will distributed one-half of the Howard County real estate to Grimm, his wife, at his death, and conveyed the other one-half interest in the real estate into a trust, naming Grimm as the income beneficiary and his daughters, Patricia Portee and Karen Bernabe, as the residual beneficiaries.

*B. Doris Grimm's will.* Doris Grimm died on December 27, 2008. Karen Bernabe and Jennifer Lalk were appointed co-executors of Grimm's estate. Lalk is Patricia Portee's daughter and Grimm's granddaughter. Under Grimm's will, distribution of her assets went in equal shares to Lalk and Bernabe.

On March 3, 2010, Lalk filed a petition in equity asserting various claims against Bernabe, including that an annuity had been purchased upon the sale of "certain farmland owned by Doris E. Grimm," in which Lalk claimed an interest.

C. *Declaratory judgment action.* In a cross-petition for declaratory judgment, Bernabe asserted that under the terms of Haskovec's will, Bernabe was entitled to the entire remainder interest of the trust assets upon Grimm's death because "Patricia Portee, did not survive the lifetime beneficiary of the trust, Doris E. Grimm, as required by Wesley T. Haskovec's Last Will and Testament." Patricia Portee had died intestate in 2003.

In answer to the petition for declaratory judgment, Lalk asserted that "proper interpretation based upon Iowa law does not require the [Haskovec] Trust assets be distributed to [Bernabe]." Lalk cited Iowa Code section 633A.4701(3).<sup>1</sup> She claimed she was the only issue of Patricia Portee and was entitled to one-half of the remainder interest.

On August 30, 2010, the district court noted Greg Portee<sup>2</sup> had been served with the petition for declaratory judgment. The court ordered that upon completion of necessary discovery, "an interested party may request the scheduling of hearing on Third-Party Plaintiff's Petition for Declaratory Judgment."

On October 18, 2010, Lalk filed a request that a hearing be scheduled. The court set the matter for hearing on November 22, 2010.

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<sup>1</sup>Section 633A.4701(3), on which Lalk relies, provides:

If a beneficiary dies prior to becoming entitled to possession or enjoyment of the beneficiary's interest and no alternate beneficiary is named in the trust, and the beneficiary has issue who are living on the date the interest becomes possessory, the issue of the beneficiary who are living on such date shall receive the interest of the beneficiary.

<sup>2</sup> Greg Portee was Patricia Portee's husband at the time of her death and was the administrator of her estate. He is not Lalk's biological father.

On November 19, 2010, Portee filed an answer to the petition for declaratory relief. He also filed a motion to continue the November 22 hearing, asserting in part:

3. At the time that the Petition for Declaratory Relief was set for hearing, the issues to be decided by the Petition for Declaratory Relief appeared to be narrow in focus.

4. It now appears to the undersigned as attorney for the Third Party Defendants Portee that the issue(s) are more complicated, as the Petition references the proceeds from the sale of certain real estate that the Patricia Portee Estate had an interest in. Said sale was completed without any notice and or authority of Greg Portee as the Executor of the Patricia Portee Estate.

5. There may be other causes of action that the Patricia Portee Estate and Gregory Portee, as an individual may have against the parties who sold the real estate.

6. This case is currently set for trial in April, 2011 and the undersigned states that his clients need additional time to complete discovery as to additional claims.

7. The Petition for Declaratory Relief involves proceeds from the sale of real estate and the Third Party Defendants Portee anticipate filing a Quiet Title Action as to the title of the  $\frac{1}{4}$  interest in the real estate sold which involves the parties herein and the purchaser of the real estate.

8. It is anticipated that despite this Court's ruling on Petition for Declaratory Relief as to what should be done with the proceeds from the sale of real estate[ , t]here is a question as to the legality of the current title of the real estate which can only be resolved by a Quiet Title Action.

The district court denied Portee's motion to continue and the matter proceeded to hearing. Bernabe contended because Patricia Portee did not survive Grimm, upon Grimm's death Bernabe was the sole remainderman and should receive the entire remainderman interest under Haskovec's will. She also asserted if the trust code was applicable, the "share and share alike" language of

Haskovec's will were words of survivorship governed by section 633A.4701(8),<sup>3</sup> citing *Redinbaugh v. Redingbaugh*, 203 N.W. 246, 247 (Iowa 1925). She argued Portee's contentions related to Patricia's estate were irrelevant to the declaratory relief requested.

Lalk argued that by virtue of section 633A.4701(3) of the trust code, Patricia's interest in the remainder of the Haskovec trust passed to Lalk as Patricia's issue. She too claimed that Portee's claims were irrelevant to the trust's construction.

Portee argued that at the time of Patricia's death, Patricia had a vested interest in the remainder of the trust, which should pass to him as her husband. He asserted the trust code was inapplicable as it was enacted after the establishment of the testamentary trust and its application would "substantially interfere with the effective conduct of the proceedings or rights of the parties or other interest persons," citing Iowa Code section 633A.1106(3). He also argued he and Lalk had entered into a stipulation in the proceedings involving Patricia's estate pursuant to which he and Lalk acknowledged the estate was insolvent, the only substantial asset of the estate was an undivided one-fourth remainder interest in a 200-acre farm, and they agreed to how the proceeds from the sale of that property would be distributed between them.

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<sup>3</sup> Iowa Code section 663A.4701(8) states that subsections 2-7 "do not apply to any interest subject to an express condition of survivorship imposed by the terms of the trust." The provision goes on to state:

For purposes of this section, words of survivorship including but not limited to, "my surviving children", "if a person survives" a named period, and terms of like import, shall be construed to create an express condition of survivorship. Words of survivorship include language requiring survival to the distribution date or to any earlier or unspecified time, whether those words are expressed in condition precedent, condition subsequent, or any other form.

On February 11, 2011, the court ruled the stipulation in Patricia Portee's estate proceedings "has no bearing whatsoever on the actual beneficiary rights under the trust." The court concluded the trust code was applicable; section 633A.4701(3) directs the distribution of the trust assets following the death of one of the named beneficiaries; the "share and share alike" language did not create a survivorship contingency as argued by Bernabe; Patricia's interest in the trust transferred to Lalk upon her death; and Lalk and Bernabe "shall be the remainderman distributes under the testamentary trust created by Wesley Haskovec and shall each enjoy a one-half interest in the assets of that trust."

Greg Portee appeals.<sup>4</sup> He contends the district court erred in denying his motion to continue, and in ruling the trust code applies to the Haskovec testamentary trust.

## **II. Motion for Continuance.**

*A. Scope and standard of review.* Trial courts have broad discretion in ruling on motions for continuances. See *Michael v. Harrison County Rural Elec. Co-op.*, 292 N.W.2d 417, 419 (Iowa 1980). "For us to find an abuse of discretion in a trial court ruling, it must be shown by the complaining party that the trial court's action was unreasonable under the attendant circumstances." *Id.*

*B. Merits.* Portee contends the court abused its discretion in denying his motion to continue. Lalk argues the motion to continue was grounded upon Portee's counsel's failure to appreciate the issues, and consequently it was not an abuse of the district court's broad discretion to deny the motion. We agree.

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<sup>4</sup> Bernabe does not appeal.

“A continuance may be allowed for any cause not growing out of the fault or negligence of the movant, which satisfies the court that substantial justice will be more nearly obtained.” Iowa R. Civ. P. 1.911(1); see *State ex rel. Miller v. New Womyn, Inc.*, 679 N.W.2d 593, 595 (Iowa 2004) (noting the party “challenging such a ruling carries a heavy burden”). The motion to continue was grounded upon Portee’s contention that “[i]t now appears to the undersigned as attorney for the Third Party Defendants Portee that the issue(s) are more complicated” than previously thought. This statement is in error, as the sale of the farmland is not relevant to the issues in this action and does not meet the standard required by rule 1.911. See *Countryman v. McMains*, 381 N.W.2d 638, 640 (Iowa 1986). We find no abuse of discretion.

### **III. Declaratory Judgment.**

*A. Scope and standard of review.* “A declaratory judgment to construe a will is tried in equity.” *In re Will of Ulchtorff*, 693 N.W.2d 790, 793 (Iowa 2005). Our review is therefore de novo. Iowa R. App. P. 6.907.

*B. Merits.* The district court was asked to construe the terms of Haskovec’s will, specifically the provision in the will creating the remainderman interest in the testamentary trust. That provision reads:

Upon the death of my wife, this said trust shall terminate and all of the remaining trust assets, including any undistributed income, I give, devise and bequeath to my two children, Patricia Portee and Karen Bernabe, to be their property in equal shares, share and share alike.

The district court ruled that pursuant to Iowa Code section 633A.4701(3), Patricia Portee’s share passed to her sole issue—Lalk. Portee objects, arguing the vested one-half remainderman interest of Patricia Portee passed to him as



surviving husband and to Lalk as surviving issue by virtue of Iowa Code section 633.212 (a rule of intestacy succession in the probate code). We reject Portee's contentions.

We begin with the premise that

[t]he law of descent and distribution in this jurisdiction is purely statutory. In other words, in Iowa the right to dispose of property by will and the designation of those who may inherit in case of intestacy, as well as the extent thereof, is entirely statutory.

*In re Estate of Davis*, 114 N.W.2d 314, 315 (Iowa 1962).

Portee argues the trust code is not applicable here for several reasons. First, because the trust code was enacted subsequent to the establishment of the trust under Haskovec's will. He also notes section 633A.1106(3) provides that the trust code does not apply if the "court finds that application of a particular provision of this trust code would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons," and applying section 633A.4701(3) would interfere with Portee's intestate rights and would interfere with the Patricia Portee estate proceedings.

1. *Trust code applies to all trusts.* Contrary to Portee's claim the trust code is not applicable<sup>5</sup> because it was enacted after the Haskovec testamentary trust, Iowa Code chapter 633A<sup>6</sup> is applicable to all trusts within its scope

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<sup>5</sup> We observe Greg Portee has only relied upon his interpretation of Iowa Code section 633A.1106 in arguing the trust code is inapplicable.

<sup>6</sup> The legislature enacted the trust code in 1999, but it did not become effective until 2000. See 1999 Iowa Acts ch. 125, § 109; see generally Martin D. Begleiter, *In the Code We Trust—Some Trust Law for Iowa at Last*, 49 Drake L. Rev. 165 (2001) (Begleiter I). Originally, it was part of the probate code (chapter 633), but in 2005, the trust code was moved to its own chapter and recodified at chapter 633A. 2005 Iowa Acts ch. 122; see Martin D. Begleiter, *Son of the Trust Code—The Iowa Trust Code after Ten Years*, 59 Drake L. Rev. 265, 273-74 (2011) (Begleiter II).

“regardless of whether the trust was created before, on, or after July 1, 2000, except as otherwise stated in this trust code.” Iowa Code § 633A.1106(1).<sup>7</sup>

A trust is defined as “an express trust . . . wherever and however created,” except certain arrangements not pertinent here. *Id.* § 633A.1102(18).

And pursuant to section 633A.4701(1),

Unless otherwise specifically stated by the terms of the trust, the interest of each beneficiary is contingent on the beneficiary surviving until the date on which the beneficiary becomes entitled to possession or enjoyment of the beneficiary’s interest in the trust.<sup>8]</sup>

Patricia Portee’s remainderman interest in the Haskovec trust became possessory only upon Grimm’s death. Under the terms of the statute, Patricia Portee’s interest was contingent until she survived her mother, Grimm. Nothing in the trust “specifically stated” otherwise. *Cf. In re Will of Uchtorff*, 693 N.W.2d 790, 799 (Iowa 2005) (noting “the new Iowa Trust Code completely reverses the common law preference for vested interests and deems all interests contingent upon survival to the time of possession unless specifically stated otherwise,” but concluding that such a specific statement existed).<sup>9</sup>

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<sup>7</sup> We also observe, pursuant to the terms of the trust as established in Wesley Haskovec’s will, the trust was a non-court supervised trust and does not fall within the exception that requires application of the probate code in lieu of the trust code where they conflict. See Iowa Code § 633A.1107(2).

<sup>8</sup> According to Begleiter, the “basic rule” of section 633A.4701 of the trust code is that “all beneficiaries must survive until the beneficiary becomes entitled to possession or enjoyment of their interest.” Begleiter II, 59 Drake L. Rev. at 371.

<sup>9</sup> In *Uchtorff*, the will stated: “In the event that my son, Richard E. Uchtorff shall survive me, I appoint the trust fund to the said Richard E. Uchtorff as an indefeasibly vested interest in fee.” 693 N.W.2d at 792. The court found Richard’s interest vested upon the testator’s death and the specifically granted “indefeasibly vested interest in fee” to Richard was a specific statement he need not survive the life estate beneficiary. *Id.* at 794. *But see* Begleiter I, 59 Drake L. Rev. at 377-78 (disagreeing with court’s discussion of trust code and stating, “What section 633A.4701 requires, and what was intended by the drafter of the section, is an explicit statement such as ‘to Richard E. Uchtorff, whether or not he survives my wife.’ The requirement of an explicit statement was

But Patricia Portee did not survive Grimm. What then? According to the trust code,

[i]f a beneficiary dies prior to becoming entitled to possession or enjoyment of the beneficiary's interest and no alternate beneficiary is named in the trust, and the beneficiary has issue who are living on the date the interest becomes possessory, the issue of the beneficiary who are living on such date shall receive the interest of the beneficiary.

Iowa Code § 633A.4701(3). On the date Patricia Portee's interest became possessory—at Grimm's death—Lalk was “the issue of the beneficiary who [was] living on such date.” *Id.* Consequently, she was entitled to receive the interest of Patricia Portee. *Id.*

Section 633[A].4701, by providing the court with substitute takers that would presumably be desired by most grantors, solves the implied condition of survival problem while retaining the flexibility of grantors to provide as many alternate takers as desired. It also makes the question of whether the remainder interest is vested or contingent irrelevant, as it should be.

Begleiter I, 49 Drake L. Rev. at 289 (footnotes omitted).

Portee does not argue the district court erred in its interpretation of section 633A.4701(3). He appears to concede that, if applicable, Lalk—as surviving issue of Patricia Portee—is a remainderman beneficiary of the Haskovic testamentary trust.

2. *No exclusion to application of trust code.* Portee argues, however, that the trust code is *not* applicable, citing section 633A.1106(3). That section provides:

This trust code applies to all trust proceedings commenced before July 1, 2000, unless the court finds that application of a

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intended to do away with any connection between vesting and survival because, correctly understood, no such connection exists.” (footnote omitted)).

particular provision of this trust code would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons. In that case, the particular provision of this trust code at issue shall not apply, and the court shall apply prior law.

Iowa Code § 633A.1106(3).

Reading only the latter half of the first sentence, “unless the court finds that application of a particular provision of this trust code would substantially interfere with . . . the rights of the parties or other interested persons,” Portee contends the trust code does not apply here because its application would interfere with his intestate rights.

Portee’s strained reading of section 633A.1106(3) completely ignores the predicate phrase, “This trust code applies to all trust proceedings commenced before July 1, 2000, unless . . . .” The phrase “the proceedings” in the second half of the first sentence refers back to the predicate phrase “all trust proceedings commenced before July 1, 2000.” The second sentence qualifies the first sentence: “In that case, the particular provision of this trust code at issue shall not apply, and the court shall apply prior law.”

Here, we are not concerned with “trust proceedings [that] were commenced before July 1, 2000.” We also do not believe the term “trust proceedings” is equivalent to trust administration as the legislature could have easily used the term “administration” rather than proceedings. Moreover, subchapter VI of the trust code relates to “Proceedings Concerning Trusts” and pertains to legal actions, not trust administration. See *id.* §§ 633A.6101-.6308. Because this action was filed after July 1, 2000, section 633A.1106(3) is irrelevant and section 633A.1106(2) applies. *Id.* § 633A.1106(2) (stating “[t]he

trust code applies to all proceedings concerning trusts within the scope of this trust code commenced on or after July 1, 2000”).

Even if we were to assume Portee’s strained reading made the subsection applicable, again we begin with the premise that “in Iowa the right to dispose of property by will and the designation of those who may inherit in case of intestacy, as well as the extent thereof, is entirely statutory.” *Estate of Davis*, 253 Iowa at 975, 114 N.W.2d at 315. Our task is to determine who takes under Haskovec’s will. Greg Portee is not a named beneficiary under the terms of the will. Patricia Portee *is* a named beneficiary of a testamentary trust, but her interest did not become possessory until Grimm’s death.

Iowa Code section 633.212 states if a decedent dies intestate leaving a surviving spouse and issue not the issue of the surviving spouse, “the surviving spouse shall receive” “[o]ne half in value of all the legal or equitable estates in real property *possessed by the decedent at any time during the marriage . . . .*” (Emphasis added.) Patricia Portee never possessed an interest devised under Haskovec’s will and, therefore, Greg Portee had no intestate rights through Patricia under section 633.212.

Nor can we find merit to Portee’s claim that interference with his stipulation in Patricia Portee’s estate can come within the exception that applying the trust code “would substantially interfere with the effective conduct of the proceedings.” Iowa Code § 633A.1106(3). “The proceedings” at issue concern the interpretation and construction of Haskovec’s will. We refuse to broaden the scope of that phrase to include any proceedings possibly related to or affected by

the court's interpretation of the decedent's will. To do so would recognize in strangers the power to alter the testator's intent.

**IV. Conclusion.**

The district court did not err in concluding the trust code was applicable to the Haskovec testamentary trust and that, pursuant to section 633A.4701(3), Lalk was entitled to one-half of the remainder interest as surviving issue of Patricia Portee. We therefore affirm.

**AFFIRMED.**