IN THE COURT OF APPEALS OF IOWA

No. 2-580 / 12-0028
Filed November 15, 2012

IN THE MATTER OF THE ESTATE OF MERVIN FRYE, Deceased.

DAVID FRYE and SCOTT FRYE,
Executors-Appellants.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge.

Appeal from the declaratory judgment concerning the elective share of a surviving spouse. **REVERSED.**

Joseph Sevcik of Snow, Knock, Sevcik & Hinze, Cedar Falls, for appellants.

Michael Buckner of Ball, Kirk & Holm, P.C., Waterloo, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

EISENHAUER, C.J.

The co-executors of Mervyn Frye's estate and trustees of the Mervyn Frye living trust appeal from the declaratory judgment of the district court. The court concluded the election of Mervyn's surviving spouse, Maria, to take against his will was valid and reached the real property the couple transferred by warranty deed into the trust. They contend the court erred in determining Maria had not relinquished her right to the property through the deed, which included language relinquishing "all rights of dower, homestead and distributive share in and to the real estate." We reverse.

The facts are not in dispute. The 1974 marriage of the parties was Mervyn's second and Maria's first. He had children from his first marriage. On June 22, 2007, Mervyn created a revocable inter vivos trust with his children as beneficiaries. On June 26, 2007, Mervyn and Maria executed a warranty deed transferring five parcels into the trust. Four of the parcels had been in Mervyn's name alone; one was in joint tenancy with right of survivorship. The deed included the provision: "Each of the undersigned hereby relinquishes all rights of dower, homestead and distributive share in and to the real estate."

In November 2008 Mervyn died and his will was probated. Defendant Lincoln Savings Bank, as Maria's guardian and conservator, filed an election to take the elective share of Mervyn's estate and trust. The executors filed a petition for declaratory judgment, seeking a decree the election filed by the bank was invalid as it related to Mervyn's estate and his trust. The petition alleged Maria was not entitled to make an election to the real property in the trust

because of the language in the deed relinquishing her rights in the property. It further alleged procedural irregularities in the election.

After a hearing on the petition, the court issued its order. The court found, in part:

> The executors herein argue that by joining in the warranty deed transferring said real estate into the inter vivos trust, Maria has relinquished her right to the elective share pursuant to Section 633.238(1). The warranty deed executed by Mervyn and Maria Frye provided "each of the undersigned hereby relinquishes all rights of dower, homestead and distributive share in and to the real estate." Said deed does not relinquish any rights to the elective share pursuant to Section 633.238. This court therefore determines that Maria has not relinquished her right to the elective share pursuant to 633.238, and she is therefore entitled to one-third in value of all the legal or equitable estates in real estate possessed by Mervyn at any time during the marriage including that real estate contained in the Mervyn K. Frye living trust dated June 22, 2007.

The sole issue before us is whether the warranty deed provision relinquishing "all rights of dower, homestead and distributive share in and to the real estate" qualifies as an "express written relinquishment" in Iowa Code section 633.238(1) (2007). That section provides the elective share of the surviving spouse is limited, in addition to other property, to

> a. One-third in value of all the legal or equitable estates in real property possessed by the decedent at any time during the marriage which have not been sold on execution or other judicial sale, and to which the surviving spouse has made no *express written relinquishment of right*.
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> d. One-third in value of the property held in trust not necessary for the payment of debts and charges over which the decedent was a grantor and retained at the time of death the power to alter, amend, or revoke the trust, or over which the decedent waived or rescinded any such power within one year of the date of death, and to which the surviving spouse has not made *any express written relinquishment*.

(Emphasis added.)

Our review is de novo. Iowa R. App. P. 6.907; *In re Estate of Spurgeon*, 572 N.W.2d 595, 597 (Iowa 1998).

The executors and trustees contend the court erred in concluding the surviving spouse did not make any express written relinquishment pursuant to Iowa Code section 633.238(1)(d). Paragraph (d) was added in 2005. 2005 Iowa Acts, ch. 38, § 14. It resolved the question in Iowa whether property in a revocable trust was subject to a surviving spouse's election to take against the decedent's will. Our supreme court recognized the split of authority on the issue in other jurisdictions in *Sieh v. Sieh*, 713 N.W.2d 194, 196 (Iowa 2006). Paragraph (d) represented a compromise between competing needs—to enable spouses to utilize the benefits of revocable trusts in estate planning, yet to continue protection for surviving spouses.

The statutory language quoted above reveals subtle, but significant differences in how the legislature expressed the waiver requirement in paragraph (a) and the new paragraph (d). Paragraph (a), specifically addressing real property, requires an "express written relinquishment *of right.*" (Emphasis added.) Standard warranty deeds, such as the one used in this case, provide an express written relinquishment of "all *rights* of dower, homestead and distributive share in and to the real estate." (Emphasis added.) In contrast, paragraph (d) only requires a spouse to make "any express written relinquishment" of the *property* held in the revocable trust. The legislature could have used the identical language in paragraph (d) it used in paragraph (a) or it used in Iowa Code section 633.211 defining the spousal elective share for surviving spouses of intestate decedents. Instead, the legislature chose not to require a

relinquishment *of right* concerning the surviving spouse's dower rights, but merely to require a surviving spouse to make *any* express written relinquishment *of the property*.

Having a different relinquishment requirement was both purposeful and necessary. Had the legislature used identical language in both paragraph (a) and (d), the new paragraph would not have provided an effective way for spouses to use revocable trusts in estate planning. Trustors and their revocable trusts are often considered the functional equivalent of each other. Any property placed in a revocable trust would still be "owned in substance" by the trustor. *See* Restatement (Third) of Property: Wills & Other Donative Transfers § 9.1 (2003). When spouses attempt to waive their dower interest in property placed in a trust, such interest would automatically reattach to the asset because the revocable trust was the alter ego of the trustor. The legislature, in paragraph (d), made a policy choice to define a spouse's elective share in revocable trust assets so that dower rights would not reattach after the transfer of the property into a trust if the spouse made an express written relinquishment of the property. The legislature did not require any "magic formula" for relinquishment; *any* express written relinquishment of the property is sufficient.

We conclude the language in the warranty deed executed by the Fryes satisfies the express written relinquishment requirement of section 633.238(1)(d). The property conveyed to the trust by the warranty deed is not subject to the surviving spouse's elective share.

REVERSED.