IN THE COURT OF APPEALS OF IOWA

No. 6-683 / 05-1701
Filed March 14, 2007

**IN THE MATTER OF THE ESTATE OF
CHARLES D. SPAHN, Deceased,**

**JEFFREY DEFOREST SPAHN, DOUGLAS
MONROE SPAHN, and MASON BAYLESS SPAHN,**
Appellants.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Three of the four children of the decedent appeal from a district court declaratory judgment ruling that concluded any interest of the decedent in certain stock will pass by way of the residuary clause of his will. **AFFIRMED.**

Arnold J. Van Etten of Kintzinger Law Firm, P.L.C., Dubuque, for appellants.

James M. Heckmann and Roger J. Kurt of Kurt Law Office, Dubuque, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Jeffrey Spahn, Douglas Spahn, and Mason Spahn, three of the four children of decedent Charles Spahn, appeal from a district court declaratory judgment ruling that concluded any interest of the decedent in certain stock will pass by way of the residuary clause in his will. The appellants assert that, pursuant to an agreement Charles entered into with his two brothers, Robert G. Spahn and Jared Spahn, any interest of the decedent in the stock would be distributed equally to his surviving children. We affirm the district court.

I. Background Facts and Proceedings.

In 1984 Robert J. Spahn, uncle of Jared, Robert G., and Charles Spahn, created the Robert J. Spahn Revocable Trust. It required that after Robert J.'s death trustee American Trust & Savings Bank (American Trust) provide the income to three lifetime beneficiaries. According to Article Third, paragraph 3, upon the death of the last surviving income beneficiary a portion of the trust—all remaining Spahn & Rose Lumber Co. stock—was to be distributed to Jared, Robert G., and Charles "in equal shares per capita." Article Third, paragraph 4 further provided the residue and remainder of the trust would be distributed in equal shares to three residuary beneficiaries: Trapestine Sisters of our Lady of the Mississippi Abbey, the Presentation Sisters, and St. Raphael's Priest Fund.

In 1985, following the death of Robert J. Spahn, Jared, Robert G., and Charles entered into an agreement to "resolve and settle any confusion" as to how the stock would be distributed should one or more of them predecease the last surviving income beneficiary. The brothers accordingly agreed, "[i]n consideration of the mutual promises of all parties," that they were to share

equally in the stock to be distributed upon the death of the last surviving income beneficiary, and that

> 2. In the event of the death of one or more of us prior to the distribution to us from the Robert J. Spahn Trust that the Trustee, American Trust . . . is hereby authorized and directed to make a one-third distribution of that portion of the trust to each of us who survive and a one-third distribution as directed by the Will of those of us deceased and in the absence of any direction then one-third equally to the deceased beneficiaries[’] surviving children.
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> 3. In the event the bank is unable or unwilling to make such a distribution, then we each agree that if any of us predecease said distribution, the remaining brother or brothers will make a gift of such a portion of the distribution as will be necessary so that each deceased brother has a one-third equal share to be distributed as directed in his will and in the absence of direction then divided equally among his children.

Charles died in 2002. He was survived by his wife, Diana; his children Jeffrey, Douglas, Mason, and Jennifer; his brothers Jared and Robert G.; and two of the three income beneficiaries of the Robert J. Spahn Trust. Charles’s will nominated Diana as executor, made some specific bequests to Diana, and bequeathed the residue of his estate to the Charles D. Spahn Revocable Trust. The will made no express mention of Charles’s interest in the Spahn & Rose stock. However, the Charles D. Spahn Revocable Trust, executed the same day as Charles’s will, specifically provided that Spahn & Rose stock should be set aside in a separate trust known as the “Family Trust.”

In 2005 Diana, as executor, filed a petition for declaratory judgment. She asked the district court, in relevant part, to declare that at such time as the Spahn & Rose stock and/or the proceeds of its sale became distributable by the Robert J. Spahn Trust, Charles’s one-third share would be distributed in accordance with the residuary clause of his will. American Trust, Jeffrey, Douglas, and Mason answered and resisted the petition, and requested the court to instead declare

that Charles's will did not contain directions for distribution of the stock, as required by the 1985 agreement, and thus that, at the appropriate time, one-third of the stock and/or its proceeds would be distributed equally among Charles's children.

The matter came before the district court in August 2005, on cross-motions for summary judgment. The court considered and rejected the contention of American Trust, Jeffrey, Douglas, and Mason that (1) the 1985 agreement was a power of appointment, in that it "granted to each [brother] . . . the power to direct by their [w]ill the disposition of one-third of the Spahn & Rose Lumber Company stock held by American Trust & Savings Bank, as Trustee," and that (2) the language of the residuary clause of Charles's will was not an effective exercise of the power.

The court agreed with the executor's contention that the 1985 agreement was a contract between Charles, Robert G., and Jared, which preserved to each individual brother the power to direct the distribution of his own one-third contingent interest in the stock. The court noted such an agreement could not constitute a power of appointment because a power cannot be incidental to one's own beneficial interest in property, but must flow to another individual or entity. The court then determined the residuary clause of Charles's trust was direction under his will as contemplated by the 1985 agreement. It accordingly entered summary judgment

> declaring that, if one of the Spahn brothers survives the last of the three life beneficiaries in the Robert Spahn trust, then the distribution, if any, accruing to Charles D. Spahn shall be made to the Charles D. Spahn Trust.

American Trust, Jeffrey, Douglas, and Mason filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). They asserted, in relevant part, that the court had misapplied the law to the facts of the case because the 1985 agreement was not an attempt by each brother to give a power to himself, but rather had created a power that ran from Robert G. and Jared as surviving brothers with existing beneficial interests to the now-deceased Charles whose beneficial interest had been extinguished upon his death. Noting that its reasoning and conclusions were proper, the court denied the motion.[1] This appeal followed.

II. Scope and Standards of Review.

We review the district court's summary judgment ruling for the correction of errors at law. Iowa R. App. P. 6.4; *Grinnell Mut. Reins. Co. v. Jungling*, 654 N.W.2d 530, 535 (Iowa 2002). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Grinnell Mut. Reins. Co*., 654 N.W.2d at 535. Although summary judgment is improper where reasonable minds could differ on resolution of the matter before the court, *Dickerson v. Mertz*, 547 N.W.2d 208, 212 (Iowa 1996), no fact issue exists if the dispute is over legal consequences flowing from undisputed facts. *City of West Branch v. Miller*, 546 N.W.2d 598, 600 (Iowa 1996).

[1] The court did grant the motion to the extent it sought to correct a factual inaccuracy. However, that aspect of the motion and ruling are irrelevant to the issue on appeal.

III. Discussion.

A. Justiciability and Notice. As a preliminary matter we note two questions this court raised at oral argument upon submission of this appeal: (1) whether the issue(s) presented are justiciable, or instead an advisory opinion is sought, and (2) whether notice of the underlying proceeding was given to the three residuary beneficiaries of the Robert J. Spahn Trust. The parties express no concern regarding the first question. We therefore resolve any doubt in favor of proceeding to the merits.[2] *See, e.g.*, *McCubbin v. Urban*, 247 Iowa 862, 865, 77 N.W.2d 36, 38 (1956) (resolving doubt concerning existence of a justiciable issue rather than a mere advisory opinion in favor or appellees where the question was not raised by a party). As to the second question, the parties acknowledge that no notice of the proceeding was given to any of the three residuary beneficiaries. Accordingly, those beneficiaries are not bound by the decisions reached in this case.

B. Merits. The appellants concede the 1985 agreement could not create a power in each of the three brothers to appoint, by will, the objects of his own individual one-third interest in the stock. As the district court correctly noted, "[a] power of appointment is authority, *other than as an incident of the beneficial ownership of property*, to designate recipients of beneficial interests in property." Restatement (Second) Property § 11.1, at 9 (1984) (emphasis added). Instead, they contend the 1985 agreement created a general power of appointment in any brother predeceasing the income beneficiaries, and that the power was not

[2] In addressing the merits we specifically note that no party cites any provision or provisions of Iowa Code chapter 633, Division XXI, the Iowa Trust Code, as having any bearing on the result in this case.

created, either in whole or in part by the deceased brother, but rather by any brother who survives the last surviving income beneficiary of the Robert J. Spahn Trust. They further contend the residuary clause of Charles's will is not an effective exercise of this power.[3]

We question whether the first contention is properly before us on appeal, as the record indicates it was raised for the first time in the appellants' rule 1.904(2) motion. The purpose of a such a motion is to provide the district court an opportunity to resolve an issue, claim, or other legal theory that has been properly submitted for adjudication, but which the court has failed to address. *See Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002). It is not a vehicle for advancing a wholly new legal theory in support of a claim.

However, even if the claim were properly before us, we would conclude it is without merit. We agree with the executor that the 1985 agreement is no more than a contract between Jared, Robert G., and Charles to treat their contingent interests in the Spahn & Rose stock in a certain manner, which they believed differed from the distribution that would occur under the Robert J. Spahn Trust. By its plain language, the agreement simply provides that each brother shall

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[3] The appellants also appear to contend the 1985 agreement created a power of appointment in American Trust that, upon the death of Charles, rendered American Trust the donor of a power to Charles to be exercised by his will. There are several flaws with this contention. First and foremost, to the extent this legal theory was raised before the district court, it was not ruled on by the court, and the appellants did not bring this omission to the court's attention in their post-ruling motion. Thus, error has not been preserved. *See Meier v. Senecaut*, 641 N.W.2d 532, 538-39 (Iowa 2002). Moreover, even if we assume the 1985 agreement created a power in Charles to designate distribution by will, such power was created by the three brothers. Under the plain language of the agreement, American Trust's role is limited to distributing the stock in accordance with a decedent's testamentary directions and, absent any such direction, equally to the decedent's surviving children. *Cf*. Restatment (Second) Property § 11.2 cmt. a, at 14 (noting a "donee of a power of appointment may be authorized to create a power of appointment in an object of the power at the time the power is exercised").

receive one-third of any Spahn & Rose stock to be distributed to the brothers under the Robert J. Spahn Trust upon the death of the last income beneficiary; and further instructs American Trust that, in the event a brother predeceases the last income beneficiary, any interest he might have in the stock should be passed according to the terms of the agreement. It is not an effective transfer of an interest that manifests an intent to create a power of appointment. *See* Restatement (Second) Property § 12.1, at 24.

IV. Conclusion.

The district court correctly concluded the 1985 agreement did not create a power of appointment. We accordingly need not address the appellants' further contention, that the residuary clause of Charles's will was not an effective exercise of that purported power of appointment. The district court's declaratory ruling is affirmed.

AFFIRMED.