IN THE COURT OF APPEALS OF IOWA

No. 1-827 / 11-0633
Filed November 23, 2011

LEROY M. THILGES, MARLENE ALTMAN, KAREN BERTE, EVELYN LICTEIG and KATHY LEGG,
Plaintiffs-Appellants,

vs.

MAXINE S. REDING, BERNARD J. THILGES, LUELLA M. BANWART, LEE ANN M. TRAUB, and ROBERT E. THILGES,
Defendants-Appellees.

Appeal from the Iowa District Court for Palo Alto County, Patrick M. Carr, Judge.

The district court dismissed a declaratory judgment alleging contractual wills by plaintiffs' parents, and asserting one codefendant sibling's purchase of farmland and subsequent forfeiture of the sale contract distinguished his right to buy the property at discount after his mother's death. **AFFIRMED.**

Eldon J. Winkel of Eldon J. Winkel Law Office, Algona, for appellants.

Matthew T.E. Early of Fitzgibbons Law Firm, Estherville, and Brian W. Thul of Thul Law Firm, Wittemore, for appellees.

Heard by Tabor, P.J., Mullins, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

TABOR, P.J.,

This case involves the interpretation of separate wills executed by a farm couple. In 1976, Felix and Eulalia Thilges executed wills that devised their farmland to their ten children. Both wills granted their son Robert a first option to purchase the land at a twenty percent discount. Felix died in 1981. In 1982, Robert entered into a contract with his mother and siblings to purchase eighty acres. Robert eventually forfeited the contract and conveyed the land back to the owners. In 2006, Elulalia executed a new will, excluding five of her children. The new will also included Robert's purchase option. Eulalia died in 2009.

In 2010, the five children excluded from their mother's will filed an action for declaratory judgment against the five children who remained beneficiaries of her estate. The action alleged that the parents had executed contractual or mutual wills in 1976, invalidating any later wills executed by Eulalia. The action also asserted that Robert's purchase of the farmland and subsequent forfeiture of the sale contract distinguished his right to buy the real estate at a twenty percent discount after his mother's death.

The district court dismissed both divisions of the declaratory judgment. The five disinherited siblings bring this appeal. Because the language used in the 1976 wills did not expressly communicate the Thilges' intent that their wills be construed as contractual or mutual, we affirm the district court's dismissal. We also conclude that Robert did not waive, abandon, renounce, or otherwise forego his right to purchase the farmland at twenty-percent below fair market value as provided in his mother's 2006 will.

I. Background Facts and Proceedings

Felix and Eulalia Thilges owned a 240-acre farm in Palo Alto County. They had ten children. Five of them—Leroy Thilges, Marlene Altman, Karen Berte, Evelyn Lickteig, and Kathy Legg—are the plaintiffs in this case. Five of them—Maxine Reding, Bernard Thilges, Luella Banwart, Lee Ann Traub and Robert Thilges—are the defendants. Eulalia excluded the plaintiffs from her will executed on May 3, 2006. Eulalia died on September 17, 2009.

The plaintiffs filed an action for declaratory judgment on September 21, 2010, seeking interpretation of the two wills executed by their parents on December 27, 1976. Specifically, the plaintiffs alleged the 1976 wills were "contractual and mutual," and obligated each of the parents to abide by certain provisions with respect to the disposition of their farm real estate. The plaintiffs sought a ruling that the contractual nature of the 1976 wills rendered void contrary provisions in their mother's 2006 will.

In the second division of the action, the plaintiffs sought to invalidate a provision of Eulalia's will granting her son Robert the first option to purchase any or all of the real estate owned by the decedent at the time of her death, at twenty percent below its appraised value. The plaintiffs alleged Robert was not entitled to this purchase option because after his father's death in 1981 he had entered a contract with his mother and siblings to purchase eighty acres of the farm, but forfeited the contract and quit claimed the property back to them.

The defendants filed a combined motion for a more specific statement and motion to dismiss. They alleged they were not provided with a signed copy of

Eulalia's 1976 will. They also moved to dismiss the second division of the declaratory judgment action, contending it "fails on its face to state a claim upon which relief may be granted." The defendants asserted:

> Robert Thilges, at the time of the attempted purchase on a contract of a portion of the Thilges Family Farm, had only a latent future option to purchase farmland at a 20 percent discount. The land in question was subject to a life estate interest of Eulalia Thilges and any 20 percent discount option was not mature nor could it have been exercised at the time the attempted purchase was made.

The defendants also attached an affidavit from Robert Thilges, describing how he farmed his family's acreage for many years. He attested that his contract to purchase the land in 1982 did not involve a twenty percent discount. He further stated he did not consider his right to purchase the farmland at twenty percent below market value to be operative until after his mother's death.

The plaintiffs amended their petition, attaching a signed copy of Eulalia's 1976 will, and resisted the motion to dismiss division two of their action. The defendants then withdrew their motion for a more specific statement, but moved to dismiss the first division of the declaratory judgment action. The defendants denied that the will attached to the amended petition was "what it purported to be." The defendants also asserted their parents' 1976 wills did "not state that the testators mutually agree to anything nor do they say that each in consideration of a promise of the other are executing their will for the devise of property in a certain manner." Accordingly, the defendants argued the petition did not state a claim upon which any relief could be granted. *See* Iowa R. Civ. P. 1.421(1)(*f*).

On November 30, 2010, the district court granted the defendants' motion to dismiss the first division of the plaintiff's petition.[1] The court concluded:

> The 1976 wills contain absolutely no language indicating that they are mutual or contractual. Neither will refers to the other, and there is no language indicating a binding agreement between Felix and Eulalia. The Court acknowledges that no specific language is required to create mutual and contractual wills, but there is no language in these two wills that suggests they create any sort of agreement between Felix and Eulalia.

The court considered the second division of the plaintiff's petition at a hearing on February 23, 2011. The record consisted of five exhibits: the 1976 wills of Felix and Eulalia, the real estate contract executed in May 1982, an agreement to cancel the installment sale contract dated November 1986, and the quit claim deed signed by Robert Thilges. On March 25, 2011, the district court issued an order dismissing the second division of the plaintiff's action. The court found "no indication at all from any party, either sellers or buyers, to waive, abandon, renounce, or vacate by accord and satisfaction Robert's option rights." The court added:

> In considering whether a surrender of performance, estoppel or promissory estoppel may have occurred, in addition to the total absence of evidence of intent to do so by Robert, the Court also considers that he had no right to exercise any option at all with respect to all or any part of the Thilges family farm until after his mother died. It appears also that the right to exercise the option was personal to him. It is thus arguable that he was required to survive his mother's death in order to exercise the option.

On April 21, 2011, the plaintiffs filed a notice of appeal.

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[1] For the purposes of its ruling, the district court accepted the copy of Eulalia's 1976 will as true and accurate. We will do so as well for our review of the dismissal ruling.

II. Issues on Appeal

The plaintiffs frame their assignments of error as follows: (1) should the district court have impressed a trust in favor of the plaintiffs against the farm real estate owned by Eulalia subject to the option granted to purchase the property at a twenty percent discount? and (2) should the district court have decreed that Robert gave up his right to purchase at a twenty percent discount the undivided interest in the Felix Thilges estate he previously purchased and thereafter conveyed back to the plaintiffs?

III. Scope and Standard of Review

Although we normally review actions in equity de novo, Iowa R. App. P. 6.907, we review decisions on motions to dismiss for correction of errors at law. *Mlynarik v. Bergantzel*, 675 N.W.2d 584, 586 (Iowa 2004). A motion to dismiss under rule 1.421(1)(*f*) is sustainable "only when it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts that could be proved in support of the claims asserted." *Id.* (citation omitted).

We will affirm such a dismissal only if the petition "on its face shows no right of recovery under any state of facts." *Klobnak v. Wildwood Hills, Inc.,* 688 N.W.2d 799, 800 (Iowa 2004). The district court's factual findings are binding upon us if they are supported by substantial evidence in the record, but "we are not bound by the district court's application of legal principles or its conclusions of law. Ultimately, our decision to overrule or sustain a motion to dismiss must rest on legal grounds." *Id.*

IV. Analysis

A. On the issue of contractual or mutual wills, did the petition fail to state a claim upon which any relief could be granted?

Iowa Code section 633.270 (2009) marks the starting point for our analysis of the 1976 wills. That probate provision states: "No will shall be construed to be contractual or mutual, unless in such will the testator shall expressly state the intent that such will be so construed." We do not entertain extrinsic evidence of the testator's intent; instead we look only within the four corners of the will. *In re Estate of Graham*, 690 N.W.2d 66, 71 (Iowa 2004).

Courts will construe wills as mutual or contractual[2] only if "there is evidence sufficient to show a binding agreement as to disposal of the property of the makers in a certain way." *Id.* at 70. Evidence is sufficient only if it is clear and convincing. *In re Estate of Ryder,* 219 N.W.2d 552, 554 (Iowa 1974). "A mere preponderance of the evidence is not sufficient." *Graham*, 690 N.W.2d at 70. Our supreme Court has explained that a "more exacting quantum of proof is required" due to "the serious and far-reaching consequences of such an agreement, which may have the effect of preventing the surviving spouse from altering his or her estate plan to suit intervening changes in circumstances." *Id.* A mutual will is in essence a "contract as to irrevocability." *See Father Flanagan's Boys' Home v. Turpin,* 252 Iowa 603, 610, 106 N.W.2d 637, 641 (1960).

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[2] Our supreme court indicated that a mutual will is "more transparently referred to as a 'contractual will.'" *Graham*, 690 N.W.2d at 70.

In this case, the district court granted the defendants' motion to dismiss, concluding that there was "no state of facts under which the Plaintiffs would be entitled to recover." The court analyzed the petition for legal sufficiency, accepting all allegations in the petition as true and construing them in the light most favorable to the plaintiffs. *See Turner v. Iowa State Bank & Trust*, 743 N.W.2d 1, 3 (Iowa 2007).

The plaintiffs—who were disinherited from Eulalia's 2006 will—allege the wills executed by Felix and Eulalia in 1976 qualify as mutual or contractual because of the inclusion of the word "requirement" in the following passage concerning Robert's first option to purchase the farmland:

> ITEM III. I hereby will, devise and bequeath to my beloved wife, Eulalia M. Thilges, an undivided one-half of the rest, residue and remainder of my estate to be hers absolutely and in fee simple, and I also will, devise and bequeath to my said wife a life estate in and to the other undivided one-half of my estate, with the remainder interest thereto passing to my beloved children equally and to share and share alike . . . ; subject, however, to the condition and *requirement* that my son, Robert E. Thilges shall have a first option to purchase any or all farm real estate passing to my said children herein provided upon the latter death of myself or my said wife; . . . .

(Emphasis added.) The item went on to state Robert would have the option to purchase all or part of the real estate for "20% below said fair market appraisal."

Eulalia's 1976 will contained a similar provision, devising all of her property to Felix in fee simple and, if Felix died first, to her children equally "subject . . . to the condition and requirement" of Robert's right of first purchase.

The plaintiffs argue the word "condition" alone was sufficient to communicate Robert's purchase option and so the extra word "requirement" must

mean something more. They suggest the word "requirement" was included "to give further meaning to the Wills of both testators." The plaintiffs then turn to the passage in both 1976 wills which provides that if Robert does not buy all of the farmland, he must structure his purchase "in such a manner that it will not unreasonably cut up the remaining real estate he does not purchase." They urge us to read this proviso as proof the wills are contractual: "If the provision in respect to the farm real estate is not considered contractual, what could cut up the farm real estate more unreasonably than Robert only being able to buy an undivided one-half (1/2) interest?"

The defendants dispute the plaintiff's interpretation of the 1976 will provisions: "There is no merit in Appellant's argument that the provision preventing a partial purchase of the farm real estate from cutting up the remaining real estate obligates the surviving testator to dispose of the land in a certain manner." They also argue that by bequeathing his wife half of his estate "to be hers absolutely and in fee simple," Felix expressed his intent his wife could do as she pleased with that property.

The defendants have the stronger argument. The parents' 1976 wills do not mention an agreement between them regarding how to dispose of their property. *See Father Flanagan's Boys' Home,* 252 Iowa at 608, 106 N.W.2d at 640. Neither will cross references the other document. Neither includes language revealing the testators' intent to bind the other to dispose of their property in a certain way. *See In re Estate of Prehoda*, 309 N.W.2d 516, 520 (Iowa Ct. App. 1981) (finding such intent communicated by the language "the

survivor shall neither sell nor change the will as to this home farm"); *see also Graham*, 690 N.W.2d at 71 (pointing to phrases "mutually agree" and "each in consideration of the promise and act of the other"). The testators here did not expressly state their mutual agreement or promise not to change their wills.

The inclusion of the word "requirement" in these wills and their directive that a partial purchase by Robert should not unreasonably "cut up" the farmstead do not signal the express intent of the testators to create mutual or contractual wills. The well-pleaded facts of the petition fail to show that the parents intended their 1976 wills to bind one another as to the disposal of their property. The district court was correct in concluding that plaintiffs' petition failed to state a claim upon which any relief can be granted.

B. Did Robert give up his right to purchase the farm real estate at a twenty percent discount because he previously purchased part of the farm and conveyed the property back to his siblings?

The plaintiffs next claim Robert "relinquished" his first-option-to-purchase right by unsuccessfully attempting to buy eighty acres of the farm after his father's death in 1981. Their argument is premised on the fact that Robert did not wait to exercise his option to purchase the real estate at a twenty percent discount, but instead

> decided to purchase 80 acres, one-half (1/2) of which was willed to the ten (10) children of Felix and life estate for Eulalia when Felix died. All ten (10) children and their spouses and Eulalia executed the contract as sellers and Robert and his wife as buyers. The contract was dated May 6, 1982 with possession given immediately and provision for escrowed deeds.

The plaintiffs point out that by contracting to purchase part of the real estate early, Robert gained an advantage of paying less for the property. They note the eventual cancellation of the purchase contract "relieved Robert from all obligations and responsibilities." The plaintiffs assert Robert could have "specifically reserved the right to buy this real estate at the 20% discount" but did not do so.

In the district court, and now on appeal, the plaintiffs advance six legal theories to back their contention Robert no longer has the first option to purchase the farmland at twenty percent below the appraised value. Those theories include waiver, abandonment, renunciation, implied surrender, promissory estoppel, and accord and satisfaction. These theories do not support the plaintiffs' position. On the theory of waiver, the plaintiffs cite only Iowa Civil Jury Instruction 2400.11, which provides:

> **Waiver of Performance.** The right to insist on performance can be given up. This is known as a "waiver." A waiver may be shown by actions, or you may conclude from (name)'s conduct and the surrounding circumstances that a waiver was intended. The essential elements of a waiver are the existence of a right, knowledge of that right, and an intention to give it up.

Robert's right to purchase at a discount did not exist in 1982 when he entered the contract to purchase the eighty acres. Accordingly, the plaintiffs cannot show Robert waived his right to insist on performance of that will provision. The plaintiffs are no more persuasive in arguing that Robert abandoned, renounced, or surrendered his option to purchase. Abandonment is "the relinquishment, renunciation or surrender of a right." *See Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376, 380 (Iowa 1983) (discussing the abandonment of a contract). To

determine abandonment, courts examine the party's intention and acts evidencing intention to abandon. *Id.* "The act of relinquishment must be unequivocal and decisive." *Id.* Robert's act of purchasing the eighty acres before the death of his mother and without the twenty percent discount provided in the wills was not an unequivocal or decisive abandonment of his option under her will. Finally, the concepts of estoppel and accord and satisfaction do not apply to the circumstance of this case.

The district court noted the "common theme" among the plaintiffs' theories was the "claimed intention" Robert was giving up his option rights under the will. After examining the documents presented at the February 23, 2011 hearing, the court found neither the buyers nor the sellers expressed any belief that Robert's purchase of the eighty acres after his father's death would invalidate the will provision giving him first option to purchase any or all of the farm real estate after the death of his mother.

The defendants argue there is no evidence Robert or the siblings excluded from their mother's will "did anything that would divest Robert of his interest." We agree. Robert's entry into a contract to purchase land from his mother and nine siblings before his mother's death did not indicate a purpose to abandon his option to later purchase the land at a discount. *See Larson v. Smith*, 174 Iowa 619, 631, 156 N.W. 813, 817 (1916) (finding no abandonment of option to purchase in a lease where the term for which the option was granted had not expired). The district court correctly concluded Robert retained his right

to purchase the entire farm, including the eighty-acre tract, at a discount under the provision of his mother's valid 2006 will.

AFFIRMED.