IN THE COURT OF APPEALS OF IOWA

No. 7-865 / 07-0464
Filed December 28, 2007

**IN THE MATTER OF THE ESTATE OF
ANNA BART, Deceased,**

GALEN BART,
Appellant.

Appeal from the Iowa District Court for Emmet County, Frank B. Nelson, Judge.

Appeal from the district court order establishing testamentary trusts and ruling appellant had no standing to pursue a claim against the estate. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Lance Ehmcke and Joel D. Vos of Heidman, Redmond, Fredregill, Patterson, Plaza, Dykstra & Prahl, L.L.P., Sioux City, for appellant.

Joseph Fitzgibbons of Fitzgibbons Law Firm, Estherville, for appellee .

Paul E. Overson of Overson Law Office, Oakdale, Minnesota, and Jesse Linebaugh, Nicole Nicolino Nayima, and C. Jennifer Peterson of Faegre & Benson, L.L.P., Des Moines, for appellee .

Max O. Pelzer of Anderson, Pelzer & Hart, Estherville, for appellee .

Heard by Sackett, C.J., and Vaitheswaran and Baker, JJ.

PER CURIAM

The questions in this appeal by Galen Bart from an order closing the estate of his mother Anna Bart are whether the district court erred (1) in establishing trusts under the last will and testament of Anna after earlier trusts were closed and (2) in determining that Galen did not have standing to pursue a claim he had made in Anna's estate. We affirm in part, reverse in part, and remand.

SCOPE OF REVIEW. Review of matters tried in probate is ordinarily de novo, except for actions to set aside wills, for the involuntary appointment of guardians and conservators, and to establish contested claims. *In re Estate of Kirk*, 591 N.W.2d 630, 633 (Iowa 1999), *see also* Iowa Code § 633.33 (2007); *In re Estate of Todd*, 585 N.W.2d 273, 275 (Iowa 1998). Thus, our review of an order approving a final report in an estate is de novo.

BACKGROUND AND PROCEEDINGS. Anna, a widow, died testate on July 9, 2002. Her 1987 will was admitted to probate on August 8, 2002.[1] Galen, one of her two children, was appointed executor of the estate but was removed from the position on January 6, 2005. Attorney James Ladegaard was appointed temporary administrator[2] in his stead.

Anna's will provided that after her debts were paid trusts should be established for her two children. She provided that one-third interest in the rest, residue and remainder of her estate go to the Emmet County State Bank as

[1] During the pendency of this estate numerous problems have arisen. We have limited our rendition of the facts to those facts relevant to the issues we are asked to resolve.
[2] He apparently was later appointed as successor executor.

trustee[3] for the benefit of her daughter Mary Lou Haupert, and two-thirds of her estate go to the same bank in trust for Galen. The trustee was given certain powers to administer the trusts, including the power to make division or distribution of the assets. Anna's will further provided that the trust for the benefit of Mary Lou terminate at Mary Lou's death and the remaining assets be distributed to her estate. The will provided the trust for the benefit of Galen terminate at his death and the remaining assets be distributed to Mary Lou or, if she predeceased Galen, to the children of Mary Lou who survived Galen.

The assets of Anna's estate included personal property and real estate composed of a half-section of farmland in Emmet County, Iowa. On December 20, 2002, Galen filed an unliquidated claim in probate in Anna's estate.[4]

At some time during the administration of the estate Bank Midwest (Midwest) was appointed trustee and in May of 2005 filed a final report stating it had received $300,000, and of that amount $100,000 went to fund the Mary Lou Haupert Trust and $200,000 went to fund the Galen Bart Trust. Midwest subsequently filed a motion to withdraw and a request for hearing, contending a memorandum of agreement was executed in Anna's estate, and pursuant to the agreement the trust should be closed and the trustee discharged. The report indicated, among other things, that final distribution of the funds be made to the executor of Anna's estate pursuant to the memorandum of agreement. The trustee asked for fees for administrating the trust and for his attorney fees. On May 26, 2005, district court Judge Nancy Whittenburg signed an order approving

[3] This bank declined appointment as trustee.
[4] This was one of several claims, but it is the only one challenged on appeal.

the report and closing the trust, authorizing the payment of fees, and releasing Midwest's bond. The order further directed Midwest to:

> deliver the net funds to the Executor of the Estate of Anna Bart. That upon the filing of the Receipt of the Executor of the Anna Bart Estate this trust shall be terminated and the Trustee discharged and released of all liability herein and its bond exonerated.

On December 19, 2006, Ladegaard filed a final report in the estate. He requested among other things that a trustee be appointed under Anna's will to administer the Mary Lou Bart Trust and the Galen Bart Trust. He noted when Midwest resigned as trustee, he received the net proceeds from Mary Lou's trust of $76,906.71 and the net proceeds from Galen's trust of $195,719.86 as executor. Ladegaard contended the trusts and the real estate, as assets of Anna's estate, should be transferred to a new trustee or trustees. He also asked that Galen's claim filed on December 20, 2002, be ruled on by the court.

Galen objected to the report, contending, among other things, that there was no trust in existence nor could one be created because the trust was closed by a final order of May 26, 2005. He contended that distribution of the rest, residue, and remainder of Anna's estate cannot be made to any trust and consequently it should be distributed as though Anna died intestate, that is, to Galen Bart and Mary Lou Bart in equal shares.

On January 18, 2007, a hearing was held on Ladegaard's final report. In an order entered after the hearing on the final report, district court Judge Frank Nelson disagreed with Galen, finding the fact that the trusts with Bank Midwest was terminated did not mean the trusts could not be reestablished. Judge Nelson also found that one of the two banks or trust companies that had been

proposed by Ladegaard should be selected to reestablish the trusts as provided for in Anna's will. Judge Nelson also found Galen's unliquidated claim for an unspecified amount of money had no standing and disallowed it.

TRUSTS UNDER ANNA'S WILL. Galen argues that a trust cannot be reestablished and Judge Nelson erred in doing so. He argues that because the Iowa Trust Code, Iowa Code Chapter 633A, does not contain any provisions to authorize the district court to reopen a terminated trust, the court was not authorized to revive a trust that had been administered and terminated by the court. He proceeds to argue that the result of the termination of the trust results in the property being distributable to the heirs of the estate under the laws of intestate distribution.

In supporting his position Galen puts substantial reliance on the *In re Estate of Barnes,* 256 Iowa 1043, 128 N.W.2d 188 (1964). In *Barnes* the court addressed the ultimate disposition of a trust set up by decedent in his will to pay his secretary[5] and sister a specific sum during their natural lives. *Barnes*, 256 Iowa at 1048, 128 N.W.2d at 190. The trust was to terminate upon their deaths or the exhaustion of the trust estate whichever event occurred first. *Id*. If any trust assets were remaining they were to revert and be paid into the general trust, yet the decedent's will gave no direction for the disposition of the general trust. *Id.* The court in *Barnes* found the undisposed corpus at the termination of the general trust constituted an estate in reversion and it was undisposed by will. *Id.* at 1058, 128 N.W.2d at 195. Therefore, because there was no disposition of the corpus of the general trust the undisposed of corpus of that trust constituted an

[5] The secretary's trust also ceased upon her remarriage.

estate in reversion or a reversionary interest that passed to the testator's heirs. *See id*. We do not find *Barnes* instructive.

We do agree with Galen that Judge Whittenburg's order, entered by agreement, was a final order as to the issues before her. Those issues were Midwest's application to withdraw and close that trust and discharge the trustee and release it from liability and exonerate its bond. However, we find no support for Galen's argument that Judge Whittenburg's order created an intestate estate. To do so would end in a result that failed to honor the specific directions in Anna's will. Her right to dispose of her property and place it in trust for any legal purpose has legal sanction. *Id.* at 1043, 128 N.W.2d at 188, 193; *In re Estate of French*, 242 Iowa 113, 120, 44 N.W.2d 706, 710 (1950).

In interpreting the language of testamentary trusts, the intent of the testator governs. *First Nat'l Bank v. Mackey*, 338 N.W.2d 361, 363 (Iowa 1983); *In re Work Family Trust*, 260 Iowa 898, 901, 151 N.W.2d 490, 492 (1967). The meaning accorded to the language used is to be its usual and ordinary meaning. *In re Trust Known as Spencer Mem'l Fund*, 641 N.W.2d 771, 775 (Iowa 2002), *In re Manahan's Estate*, 255 Iowa 1060, 1066, 125 N.W.2d 135, 138 (1963). Courts have no authority to make or remake the will of a testator. *In re Estate of Zang*, 255 Iowa 736, 738, 123 N.W.2d 883, 884 (1963). In cases of will interpretations, it is well-settled that the testator's intent is the polestar. *See In re Estate of Larson*, 256 Iowa 1392, 1395, 131 N.W.2d 503, 504-05 (1964). The rule is well established that a testator's intention must be gathered from the language of the instrument where such language is reasonably clear and unambiguous. *In re Estate of Lamp*, 172 N.W.2d 254, 256 (Iowa 1969). Of course, the question is

not what the testator meant to say but what he meant by what he did say. *Id*. A court may not, under the guise of ambiguity, add to the provisions of a will. *In re Estate of Kiel*, 357 N.W.2d 628, 630-31 (Iowa 1984). A court may not, under the guise of ambiguity, make or remake the will of a testator. *Id*. at 631. A court may not, under the guise of ambiguity, implement broad principles of equity and justice. *Id*.; *In re Estate of Fairley*, 159 N.W.2d 286, 288 (Iowa 1968). Wills are to be construed, if possible, to avoid intestacy. *See Lamp*, 172 N.W.2d at 257. If the language of a will is clear and unambiguous, however, we cannot, under the guise of construction, rewrite it to do for the testator that which she failed to do on her own behalf. *Fairley*, 159 N.W.2d at 291.

The specific provisions of Anna's will required that the property be given to a trustee to manage for the beneficiaries and, at the time of the death of the named beneficiaries of the trust, further provision is made for disposition of the property. Nothing has invalidated these provisions of Anna's will. Nothing in the order terminating the trust relieved the executor of following the specific provisions of Anna's will and, on closing the estate, transferring the property in trust according to the will provisions. Judge Nelson's decision directed the property be distributed in a manner that conforms as nearly as possible to the intention of Anna as she clearly stated in her will. We affirm on this issue.

CLAIM. The district court found that Galen had no standing to pursue his claim but gave no reasons for its finding. Galen contends he filed a claim on December 20, 2002, within the time allowed for claims, the claim was restated under Iowa Code section 633.444, the Executor gave notice of the disallowance of the claim on January 25, 2005, and Galen filed his request for hearing on

February 14, 2005. The appellee agues the district court did not err in ruling Galen was without standing, but cites no authority to support this argument and argues the district court was within its discretion in refusing to conduct an evidentiary hearing because Galen does not even raise a justiciable issue. The executor in his final report noted a hearing should be held on this claim. We are unable to determine why Galen is without standing to bring this claim. The record is not sufficient for us to determine whether this claim raises a justiciable issue. We reverse the dismissal of the claim and remand for further proceedings on this issue. We render no opinion as to how the issue should be resolved, nor do we retain jurisdiction.

We affirm in all respects except we remand for further proceedings on the December 2002 claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.