STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0319

In re the Estate of: Hazel E. Bach, Deceased.

Filed November 1, 2021
Reversed and remanded
Frisch, Judge

Nicollet County District Court
File No. 52-PR-18-718

Kenneth R. White, Law Office of Kenneth R. White, P.C., Mankato, Minnesota (for appellant Lee Johnson)

Paul H. Tanis, Jr., Riley-Tanis & Associates, PLLC, St. Peter, Minnesota (for respondent Sylvia Perron)

Christopher E. Sandquist, Sandquist Law Office, LLC, Mankato, Minnesota (for respondents Neal Johnson and Thomas Johnson)

Considered and decided by Frisch, Presiding Judge; Johnson, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant challenges the district court's construction of the terms of a will. Because the district court's construction of the will conflicts with the intent of the testator as expressed in the plain language of the will, we reverse and remand for further proceedings.

FACTS

Appellant Lee Johnson (Lee) and respondent Sylvia Perron (Sylvia) are the co-personal representatives of the Estate of Hazel E. Bach. Bach died on September 28, 2018.[1] On October 18, 2017, Bach executed a Last Will and Testament, which was received into probate on November 28, 2018.

Article III of the will sets forth the terms of the devise of Bach's 208-acre farm. The first clause of Article III provides that eight acres of the property surrounding a building site were to be surveyed and given to Lee. The second clause of Article III sets forth the terms for distribution of the remaining 200 acres of the property:

> B. The remaining approximate two hundred (200) acres of land I do hereby grant to my nephews, NEAL C. JOHNSON and THOMAS D. JOHNSON, in equal shares as tenants in common. Provided, nevertheless, if either NEAL C. JOHNSON or THOMAS D. JOHNSON should predecease me, the deceased's share I do grant to the survivor. This bequest is conditioned upon NEAL C. JOHNSON and THOMAS D. JOHNSON, or the survivor of the two, making the following payments within one hundred twenty (120) days of my death:
>
> 1. The sum of $200,000.00 to my niece, SYLVIA E. PERRON . . . but only if she survives me.
>
> 2. The sum of $1,000.00 to my husband's niece, LEANN HERBST BUENDORF, but only if she survives me.
>
> 3. The sum of $1,000.00 to my husband's nephew, JOHN HERBST, but only if he survives me.

[1] On appeal, the parties do not dispute that Bach died on this date, and evidence exists in the record confirming the date of death as September 28, 2018. The record, however, at times indicates Bach's date of death as September 29, 2018. This one-day discrepancy has no effect on the merits of this appeal and, for the purposes of this appeal, we accept the representation that Bach died on September 28, 2018.

> If neither NEAL C. JOHNSON nor THOMAS D. JOHNSON survive me, then such real estate will become a part of the residue of my estate distributed under Article IV below, and the residue of my estate is to be used to first pay the cash amounts shown above to SYLVIA E. PERRON, LEANN HERBST BUENDORF and JOHN HERBST, if living.

Article IV of the will is a residuary clause and provides for the distribution of the residuary of the estate to all blood-related nieces and nephews who survive Bach, with the exception of one grandnephew.[2]

In November 2018, respondents Neal and Thomas Johnson became aware of the terms of the will and decided shortly thereafter to take action to accept the devise of the 200-acre parcel. Neal and Thomas began to make arrangements to pay Sylvia, Buendorf, and Herbst in accordance with the will. Neal and Thomas decided to pay Buendorf and Herbst $1,000 each. But Neal and Thomas decided to pay Sylvia only $50,000. Neal and Thomas decided to pay Sylvia only $50,000 following their discussions with Paul Tanis Jr., counsel for the estate, who learned from Sylvia that she did not require the immediate payment of the entire $200,000 and that she would instead accept installment payments over time. No one informed Lee of this arrangement, although Sylvia believed that Tanis had communicated the arrangement to Lee as co-representative of the estate.

On or around January 18, 2019, Neal and Thomas issued the above-described payments to the named beneficiaries. The $50,000 payment to Sylvia was accompanied by a letter from Tanis's law firm. The letter purported to represent the law firm's

[2] The record shows 11 potential beneficiaries of the residuary estate, including all parties to this appeal.

understanding that Sylvia, Neal, and Thomas had reached an "agree[ment] in principal [sic]" that the $50,000 payment would serve as a down payment on the $200,000 obligation and that the remaining $150,000 would be paid over the next five years in semi-annual intervals. However, a March 1, 2019 promissory note signed by Neal and Thomas sets forth a payment plan of five annual payments to Sylvia beginning in March 2020.

Upon learning that Neal and Thomas had not made the $200,000 payment to Sylvia within 120 days of Bach's death, Lee refused to sign the deed transferring the 200 acres to Neal and Thomas and notified Tanis that "the interests of other beneficiaries vested." Because Lee would not sign the deed, Tanis filed a motion on behalf of Sylvia to invoke the jurisdiction of the district court to resolve the dispute between the co-representatives regarding ownership of the 200-acre parcel. The district court determined that the 200-acre parcel belonged to Neal and Thomas. Lee then filed a motion for amended findings and a new trial, which the district court denied. This appeal follows.

DECISION

Lee argues that the express and unambiguous terms of the will provide that Neal and Thomas must make a $200,000 payment to Sylvia within 120 days of Bach's death to receive the devise of the 200-acre parcel. Neal, Thomas, and Sylvia argue that Neal and Thomas were entitled to the devise upon their expression of acceptance of the terms of the will, which thereby created a legal obligation to pay Sylvia $200,000 at some point in the future. Neal, Thomas, and Sylvia also argue that, even if the will required payment to Sylvia be made within 120 days, Neal and Thomas met this requirement by agreeing to a payment plan with Sylvia within the specified time period.

We review de novo the legal construction of an unambiguous written document. *In re Tr. Created by Hill*, 499 N.W.2d 475, 482 (Minn. App. 1993), *rev. denied* (Minn. July 15, 1993). "The primary purpose of construing a will is to discern the testator's intent." *In re Est. & Tr. of Anderson*, 654 N.W.2d 682, 687 (Minn. App. 2002), *rev. denied* (Minn. Feb. 26, 2003). "[W]e determine the testator's intent from a full and complete consideration of the entire will." *In re Est. of Lund*, 633 N.W.2d 571, 574 (Minn. App. 2001); *see also In re Shields*, 552 N.W.2d 581, 582 (Minn. App. 1996) ("In construing a will, the cardinal rule is that the testator's intention is to be gathered from the language of the will itself." (quotation omitted)), *rev. denied* (Minn. Oct. 29, 1996). Extrinsic evidence of the meaning of a will is admissible only when the text of the will is ambiguous. *In re Trs. Created by Hartman*, 347 N.W.2d 480, 483 (Minn. 1984). Here, the parties agree the will is unambiguous. We therefore consider the plain language of the will to determine the intent of the testator.

I. The plain language of the will requires Neal and Thomas to make payment to three named persons within 120 days of Bach's death in order to receive the 200-acre parcel.

When evaluating the plain language of a will, words should be given their ordinary and accepted meaning, without enlargement or restriction. *Crosby v. Atmore* (*In re Crosby's Will*), 28 N.W.2d 175, 179 (Minn. 1947). Lee argues that the plain language of Article III requiring that Neal and Thomas make specific payments to Sylvia, Buendorf, and Herbst within 120 days of Bach's death functioned as a condition precedent to receiving the gift of the 200-acre parcel. We agree.

A condition precedent is an event that must occur before a party is required to perform a particular duty. *See Minnwest Bank Cent. v. Flagship Props. LLC*, 689 N.W.2d 295, 299 (Minn. App. 2004) (defining a condition precedent in the context of a contracts case); *see also In re Trusts A & B of Divine*, 672 N.W.2d 912, 917 (Minn. App. 2004) (referencing principles of contract law to determine testamentary intent). In the context of a probate dispute, "[a] future gift is vested when the right to receive it is not subject to a condition precedent." *First & Am. Nat'l Bank of Duluth v. Higgins*, 293 N.W. 585, 594 (Minn. 1940). "Where the right to receive the gift is postponed until after and is made to depend on the happening of a named event or condition, the gift is contingent and vests in the future." *Id.*

Here, Bach devised the 200-acre parcel to Neal and Thomas. But this devise was conditional. In the same provision of the will, Bach explained that "[t]his [devise] is conditioned upon [Neal and Thomas] . . . making the following payments within one hundred twenty (120) days of my death . . . ." This express use of conditional language, the specification of a finite time period for payment, and the inclusion of both the devise and conditional language in the same provision of the will demonstrates Bach's clear and unambiguous intent to condition the devise of the 200-acre parcel to Neal and Thomas on the making of payments to three persons within a specified and finite time. We cannot ignore such clear and explicit language.

The conditional devise is also consistent with the will as a whole. A will should be read in its entirety to determine the testator's intent. *In re Wyman*, 308 N.W.2d 311, 315 (Minn. 1981); *see also Hartman*, 347 N.W.2d at 482-83. Where words in a will are used

in one situation and omitted in another, we ordinarily assume that the testator acted with purposeful deliberation. *First Tr. Co. of St. Paul v. Cochrane* (*In re Warner's Will*), 61 N.W.2d 840, 844 (Minn. 1953). Here, Bach only included conditional language in the devise of the 200-acre parcel; Bach did not include any conditional language in the devise of land to Lee or any other bequest in the will.

We note that the district court improperly extrapolated the intent of the testator from extrinsic evidence and in contravention of the unambiguous language in the will itself. Instead of construing the language of the will, the district court determined that the 120-day timeline was not intended to be strictly enforced, citing to Neal and Thomas's long history of farming, their farming of the land prior to Bach's death, and the potential hindrance of the farming operation if the land were to be divided among the heirs. The district court relied on these considerations in concluding that payment was not in fact required within 120 days and that the land was only to be distributed to the residuary if Neal and Thomas did not survive the testator. The language of the will does not support this interpretation. *See Hartman*, 347 N.W.2d at 484 ("Intention which the testator may have had, but did not express in his will, cannot be considered." (quotation omitted)). The district court therefore erred by relying on extrinsic evidence to construe, and contradict, the terms of an unambiguous will.

Neal, Thomas, and Sylvia urge us to set aside the unambiguous language of the will and, instead, construe Minnesota caselaw to conclude that the devise of the 200-acre parcel vested immediately upon their expression of acceptance of the terms of the will. They cite to *Miller v. Klossner* (*In re Miller's Estate*), 160 N.W. 1025 (Minn. 1917), and its progeny,

Lundquist v. First Evangelical Lutheran Church, 259 N.W. 9 (Minn. 1935), and *Quarnstrom v. Murphy*, 281 N.W.2d 847 (Minn. 1979), arguing that these cases allow their expression of acceptance of the conditional devise to substitute for the unambiguous and express requirement of the "making" of certain "payments." Putting aside that this position is contrary to the bedrock principle that we determine the intent of the testator from the language of the will itself, the cited cases are inapposite.

In *Miller*, a testator executed a will which devised a farm and other real property to his son. 160 N.W. at 1025. In the following section of the will, the testator left cash legacies to each of his two daughters and mandated that payment of the legacies be made by the son; the devise of the farm, however, was not explicitly conditioned on payment being made. *Id.* While the testator was still alive, he conveyed all the real property set forth in the will to the proper beneficiaries. *Id.* After the testator died, the son argued that because the property had not been transferred pursuant to the will, he was relieved of the charge to pay his sisters the legacies set forth in the will and that their legacies should be paid from the residuary of the estate. *Id.* The supreme court rejected this argument, ruling that the testator intended to require the son to pay the legacies despite the conveyance of the property prior to the testator's death. *Id.* The court then held:

> The law is well [settled] that where real estate is devised to a person with direction that he pay a legacy or an amount of money to a third party the devisee takes the land charged with the payment of the legacy, and also that by accepting the devise he assumes a personal liability to pay the same.

Id. at 1026.

Relying on *Miller*, the supreme court in *Lundquist* reached a similar result. In *Lundquist*, a father executed a will which contained a clause gifting $2,000 to a local church. 259 N.W. at 10. In the following provision, the father directed that this payment was to be made by his two sons. *Id.* Lastly, in a later provision, the father left the entirety of his residuary estate to his two sons, "subject however to the payment by them" of the $2,000 bequest to the church. *Id.* The sons made various arguments as to why they should not be required to make the payment to the church, including an argument that such an obligation violates their rights under the Minnesota Constitution to not be compelled to support or maintain a religious institution. *Id.* The supreme court rejected their arguments, characterizing the terms of the will as creating a lien on the property and personal liability for the beneficiary if the beneficiary accepts the devise. *Id.* It reasoned that the sons could have declined to accept the devise of the residuary estate and would have relieved themselves of the obligation to pay the church if they truly felt that acceptance of the devise would contravene their religious convictions. *Id.*

Lastly, in *Quarnstrom*, the testator executed a will devising his real property to his son. 281 N.W.2d at 847. The will included a provision explaining that the devise was conditioned on the son caring for the testator's wife for the remainder of her life with any inheritance the son acquired from the estate. *Id.* at 848. The supreme court characterized this language as creating a personal obligation for the son and giving the testator's wife a security interest in the charged property. *Id.*

The language in Bach's will is markedly different from the language used in the instruments in the cases cited by respondents. None of the instruments in the cited cases

conditioned the transfer of the devise upon the "making" of "payments" to specified beneficiaries within a specified time. By contrast, Bach's will *expressly conditioned* the transfer of the 200-acre parcel to Neal and Thomas upon the making of payments within a limited time period to certain beneficiaries. In other words, the devise of the farmland to Neal and Thomas was *dependent* upon the making of certain payments, whereas the obligations in the cases cited by respondents were *independent* of the bequests to the named beneficiaries.

We therefore reject respondents' argument that *Miller* and its progeny allow Neal and Thomas to avoid their obligation to make payments in accordance with the express language of the will and a condition to the devise of the 200-acre parcel. The will required the "making" of "payments" within 120 days of Bach's death in order for the devise of the 200-acre parcel to Neal and Thomas to vest.

II. Neal and Thomas did not make the three required payments within 120 days of Bach's death.

Neal and Thomas argue that even if they were required to pay the three legacies set forth in Article III of the will within 120 days of Bach's death, they in fact made timely payment. The parties do not dispute that Neal and Thomas timely paid $1,000 each to Buendorf and Herbst. The parties also agree that Neal and Thomas paid Sylvia $50,000 within 120 days of Bach's death. The parties dispute whether Neal and Thomas made a "payment" of $200,000 to Sylvia in accordance with the terms of the will. Again, the parties agree that the terms of the will are unambiguous.

As a threshold matter, the parties agree that Sylvia did not receive and still has not received a payment of $200,000. Neal, Thomas, and Sylvia argue that the execution of a promissory note and mortgage agreement by Neal and Thomas setting forth a plan to pay Sylvia in the future the remaining $150,000 qualifies as the "making" of "payment." We need not decide whether a promissory note and mortgage agreement are a payment because neither were executed within 120 days of Bach's death. Both documents are dated March 1, 2019, and the record shows that these documents were drafted by counsel for the estate (Tanis) in late February, well outside of the 120-day time period set forth in the will for making the required payment. The will required payment to have been made before January 26, 2019—120 days after Bach's death. Thus, even if the execution of the promissory note and mortgage agreement could have constituted the making of payment under the terms of the will, they were not completed within the 120-day window required by the will.

Neal, Thomas, and Sylvia also argue that even if the promissory note and mortgage agreement were completed after the 120-day deadline, a January 18, 2019 letter sent to Sylvia by Tanis's law firm indicated that an agreement to pay Sylvia the remainder of the money owed to her had been reached between Neal, Thomas, and Sylvia prior to the expiration of the 120-day window. But this letter, at most, indicates that Neal, Thomas, and Sylvia had agreed that Neal and Thomas made a "promise to pay" Sylvia sometime in the future. The note was not executed within the deadline for "payment." A promise to pay sometime in the future is not "making" payments. *See, e.g.*, *Stewart v. Stewart*, 400 N.W.2d 157, 159 (Minn. App. 1987) ("Moreover, the execution of a renewal note

evidences a new promise to pay the same debt. It does not constitute discharge of the original note; it merely extends the time for payment."). Thus, any agreement that may have been reached between Neal, Thomas, and Sylvia prior to January 26, 2019, regarding a promise to make payment to Sylvia in the future does not qualify as making a payment under the will.[3]

The will unambiguously required Neal and Thomas to make payment to three individuals within 120 days of Bach's death in order to receive the 200-acre parcel. Neal and Thomas fully completed two of these payments within that time frame, but only partially completed the third. Because Neal and Thomas did not satisfy the condition precedent as set forth in the plain language of the will, the gift to Neal and Thomas fails.

We emphasize that it appears from the record that actions taken by Neal, Thomas, and Sylvia were made in good faith and that they followed the advice of counsel in contravention of the express terms of the will.[4] Despite their apparent good intentions,

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[3] Any agreement reached between Neal, Thomas, and Sylvia is likely invalid under the statute of frauds; the only evidence arguably constituting an agreement being made prior to January 26, 2019, is contained in a writing not signed or sent by any party to the alleged agreement. Because the purported agreement involved the mortgage of real property and was to take place over a period of five years, a writing signed by and enforceable against one of the parties is required. *See* Minn. Stat. § 513.01, .04 (2020); *see also O'Brien Ent. Agency v. Wolfgramm*, 407 N.W.2d 463, 466 (Minn. App. 1987).

[4] We express concern regarding the multiple roles Tanis undertook in this matter. *See* Minn. R. Prof. Conduct 1.7(a) (prohibiting attorneys from representing clients where the representation involves concurrent conflicts of interest). Tanis was present with Bach as she made changes to her will. He witnessed the execution of the will. He also acted as the estate's attorney. It appears that he facilitated and negotiated the deal between Sylvia, Neal, and Thomas. He did not advise the co-personal representative of the deal. Sylvia believed that Tanis was acting as her personal attorney. Neal and Thomas were confused about Tanis's role, believing that Tanis represented them in some capacity. And Tanis

these actions were contrary to the terms of the will. Minnesota law requires the personal representatives of an estate, here Lee and Sylvia, to distribute the estate in accordance with the terms of the will. Minn. Stat. §§ 524.3-703(a) (2020). Our decision today rests on well-settled probate law and the plain language of the will. We express no opinion as to whether other remedies may be available to the parties based on the factual circumstances and Minnesota law.[5]

Finally, we observe that the will contains no provision regarding the distribution of the 200-acre parcel if Neal and Thomas do not satisfy a condition precedent to the devise. Because a condition precedent was not satisfied, and no other provision of the will specifies the distribution of the 200-acre parcel upon failure of the condition precedent, the 200-acre parcel should be added to the residual estate and distributed pursuant to Article IV of the will. *See* Minn. Stat. § 524.2-604(a) (2020) ("[A] devise, other than a residuary devise, that fails for any reason becomes a part of the residue."). We therefore remand to the

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billed the estate for the time devoted to facilitating the deal between Sylvia, Neal, and Thomas and drafting the related documents.

[5] We generally do not address questions not previously presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580-82 (Minn. 1988); *In re Est. of Northlund*, 602 N.W.2d 910, 914 (Minn. App. 1999) (applying *Thiele* in a probate appeal), *rev. denied* (Minn. Feb. 15, 2000). We note that the parties do not raise any equitable arguments to excuse their nonperformance or address the impact of the agreement between Neal, Thomas, and Sylvia on the rights of others who could or might take under the will. We also note that the district court mentioned that Sylvia and Lee are both beneficiaries to and co-personal representatives of the will but declined to address issues regarding this "conflict of interest" because the parties did not raise such arguments. Because these and other potential issues were not presented by the parties for consideration by the district court, we do not address them and confine our opinion to the issues raised below and on appeal.

district court to order the distribution of the 200-acre parcel in a manner consistent with this opinion.

Reversed and remanded.