

**IN THE COURT OF APPEALS OF IOWA**

No. 8-487 / 07-2033  
Filed October 29, 2008

**IN THE MATTER OF THE ESTATE OF  
MICHAEL J. WAGNER,**  
Deceased,

**JANET S. WAGNER, Executor of the  
Estate of MICHAEL J. WAGNER,**  
Appellant.

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Appeal from the Iowa District Court for Muscatine County, Nancy S.  
Tabor, Judge.

Surviving spouse appeals district court judgment ordering abatement  
under Iowa Code section 633.437. **AFFIRMED.**

Bruce L. Walker of Phelan, Tucker, Mullen, Walker, Tucker & Gelman  
L.L.P., Iowa City, for appellant.

William B. Tharp of Allbee, Barclay, Allison, Denning & Oppel P.C.,  
Muscatine, for appellee.

Heard by Sackett, C.J., and Eisenhauer and Doyle, JJ.

**EISENHAUER, J.**

On March 29, 2006, Michael J. Wagner died testate. Michael's wife, Janet S. Wagner, was appointed executor. Janet elected to take under the will and, in January 2007, reported \$1,830,215 "Total Iowa Gross Estate," of which \$650,514 was joint tenancy property with Janet.

Michael's will first specifies his relationships to Janet and their three children. It also provides any reference to "children" includes his two daughters from a previous marriage, Kathryn Green and Amanda Wagner. Article III authorizes payment of debts, funeral, and testamentary expenses. Article IV bequeaths Michael's homestead and adjacent land to Janet and Article V disposes of personal property. Article VI, entitled, "Specific Bequests," contains three subsections: (A) giving \$50,000 to daughter Kathryn Green; (B) giving \$50,000 to daughter Amanda Wagner; and (C) giving redemption agreement proceeds to the family trust created in a later section. In Article VII the residue of Michael's estate is given to Janet.

In June 2007, Janet, as executor, sought a declaratory judgment requesting the court follow the abatement procedures in Iowa Code section 633.436 (2005) when selecting the assets to be applied to the estate's \$240,000 debt. This procedure would extinguish the \$100,000 bequests to Kathryn and Amanda while the remaining \$140,000 would be deducted from the redemption agreement asset. Consequently, the residue of the estate awarded to Janet would not contribute towards payment of the \$240,000.

Amanda and Kathryn answered and filed an application for the court to order abatement under section 633.437. See Iowa Code § 633.437(2). That section makes section 633.436's order of abatement inapplicable when the court finds "it clear and convincing that the provisions of the will, the testamentary plan, or the express or implied purpose of the devise would be defeated by" using section 633.436. *Id.*

In November 2007, the district court, relying on *In re Estate of Twedt*, 173 N.W.2d 545 (Iowa 1970), ruled, "the court finds by clear and convincing evidence that application of Iowa Code section 633.436 would defeat Mr. Wagner's intent as provided in his will." The court ordered the \$240,000 paid out of the residuary estate; consequently, the specific bequests to Kathryn and Amanda did not abate. Janet appeals. We review this equity case de novo. Iowa R. App. P. 6.4.

We also conclude the *Twedt* case is controlling. Similar to Michael, Mr. Twedt "possessed substantial resources to provide for his widow." *Twedt*, 173 N.W.2d at 548. Twedt's will appointed his wife, Mabel, his executrix, provided for debt payment, left a specific bequest to a group of charities, and gave the residue to his surviving spouse. *Id.* at 546. Mabel, like Janet, argued section 633.436 requires the court to pay the estate debts out of the will's specific bequests and not out of the surviving spouse residuary. *Id.* at 547.

The *Twedt* court's reasoning in rejecting Mabel's claims and using section 633.437 abatement controls our case. The *Twedt* court stated: "In considering abatement matters there is a preference given to the spouse but the preference

is not given effect where the will clearly discloses a contrary intent.” *Id.* at 548.

The court determined the “testamentary plan alone” showed a contrary intent.

Here was a man possessed of substantial resources to provide for his widow. With the joint tenancy property and the property in the estate, even after all taxes are paid and the charitable gift is fulfilled, abundant assets still exist for the widow. Testator selects his favorite charities and sets aside a farm for them. He makes his will and gives them the proceeds of the farm and the balance to his widow. He had legal counsel. . . .

Now what would application of regular abatement do? It would wipe out the charitable gift, just contrary to testator’s expectations and his testamentary plan. If he had possessed any notion that such result would ensue, he would not have gone to the bother of inserting the charitable gift in the will; to do so was a completely idle act.

*Id.* Therefore, “[i]n this particular situation application of regular abatement would frustrate the testamentary plan so substantially” that the debts “should fall on the residuum in order to effectuate [Mr. Twedt’s] intention.” *Id.*

Michael had \$1.8 million dollars in assets and utilized legal counsel to make a lengthy will just days before he died. The testator’s intent is controlling and, in determining a testator’s intent, one factor is the scheme of distribution. *In re Estate of Larson*, 256 Iowa 1392, 1395, 131 N.W.2d 503, 504-05 (1964). In Michael’s scheme of distribution, his surviving spouse receives over \$650,000 in joint tenancy property. Like Mr. Twedt, Michael made a specific bequest to parties other than his surviving spouse as residuary beneficiary. Each daughter was given \$50,000; therefore, the daughters receive five per cent of the gross estate while the remaining ninety-five per cent is given to Michael’s wife outright or to a family trust for the benefit of his wife. We conclude Michael had no

intention of inserting bequests which would be “completely idle acts” when he transferred his substantial assets. We agree with the district court:

The plain language of [Michael’s] will provides for these bequests to his two daughters. [Michael’s] bequest to his spouse of the residue of his estate comes at the end of, and not before, a list of specific bequests of property. The clear indication to any reader is that [Michael] intended for [Janet] to take the residue of the estate after every other bequest has been satisfied.

Janet argues section 633.437 is triggered only when the will itself contains explicit language of an abatement order contrary to section 633.436. We are not persuaded. First, the will at issue in *Twedt* did not contain explicit alternate abatement order language. Additionally, a careful reading of section 633.437 reveals explicit language is only a prerequisite to alternate abatement under subsection one: “When the provisions of the will . . . *provide explicitly* for an order of abatement contrary to . . . section 633.436, the provisions of the will . . . shall determine the order of abatement.” Iowa Code § 633.437(1) (emphasis added). Subsection two provides direction when the will does not contain explicit language:

*Except as provided in subsection 1 of this section*, if the provisions of the will, the testamentary plan, or the express or implied purpose of the devise would be defeated . . . the court shall determine the order for abatement . . . in such other manner as may be found necessary to give effect to the intention of the testator.

*Id.* § 633.437(2) (emphasis added).

We find it clear and convincing that the will’s provisions, Michael’s testamentary plan, and the purpose of the devises in Article VI would be defeated by regular abatement. Michael intended for his daughters to receive \$100,000

and his widow to receive all the remainder. Accordingly, the provisions of section 633.437(2) apply. The debts and charges of the estate should be paid from the residuary estate while the specific bequests in Article VI do not abate. See *id.*

We decline the attorney fees request and tax costs to the appellant.

**AFFIRMED.**