IN THE COURT OF APPEALS OF IOWA

No. 8-492 / 07-2160
Filed October 29, 2008

IN THE MATTER OF THE ESTATE OF JACK RAYMOND DELMEGE

DIANA D. MALDONADO and PATRICIA CRANFORD,
Petitioners-Appellees,

vs.

BENEFICIARIES UNDER THE WILL ARDIS WICKER, WILLIAM DELMEGE, AUDREY BIRD and ESTATE OF RICHARD DELMEGE,
Respondents-Appellants.

Appeal from the Iowa District Court for Polk County, Ruth B. Klotz, Associate Probate Judge.

Appellants claim the court erred in refusing their request to reopen an estate. **AFFIRMED.**

Dwaine F. Meyer of Meyer Law Office, Pella, for appellants.

John Harding of Harding Law Firm, Des Moines, for appellees.

Heard by Huitink, P.J., and Vaitheswaran and Potterfield, JJ.

POTTERFIELD, J.

The facts of this case are essentially undisputed. Jack Delmege executed a will on April 7, 2001, in the presence of Wayne Bode, John Hemminger, and notary public Virgil Moore. The will, as originally typed, provided:

> I hereby request that the executors of my estate sell any and all real estate affiliated with the estate and divide the proceeds in equal shares per stirpes to each of my brothers and sisters, RICHARD DELMEGE, AUDREY BIRD, ARDIS WICKER, KAY STINSON, and WILLIAM DELMEGE.
>
> I give all of my estate, both real and personal property in equal shares per stirpes to my brothers and sisters, RICHARD DELMEGE, AUDREY BIRD, ARDIS WICKER, KAY STINSON, and WILLIAM DELMEGE.

The testator died on December 2, 2004. However, prior to his death, his sister Kay Stinson predeceased him, leaving two daughters, Diana Maldonado and Patricia Cranford. When the will was admitted to probate, the word "stirpes," which appeared twice in the original typed will, was crossed out both times and replaced with the handwritten word "capita." Both changes were accompanied by the testator's handwritten initials, J.R.D.

In September 2005, the will was admitted into probate and Richard Delmege was appointed as executor. After the admission of the will, the inventory only contained the names of the testator's four surviving siblings. It did not include Kay Stinson's surviving children. On June 1, 2006, Wayne Bode and John Hemminger filed affidavits affirming that the testator had, on the day he executed the will, initialed the two places where the word stirpes was struck and capita inserted. It was not until February 19, 2007, that notice of the probate proceedings were provided to Stinson's daughters, Maldonado and Cranford.

On May 8, 2007, the executor filed its final report, showing the testator's four surviving siblings as the sole devisees under the will. The estate was closed after the beneficiaries filed receipts and waivers. On October 11, 2007, Maldonado and Cranford filed a petition to reopen the estate, claiming they were beneficiaries under the will but had not been given notice of the final report. They further alleged their exclusion as beneficiaries entitled to notice was fraudulent and malicious.

Following a hearing, the district court issued a ruling. It first found that striking the words "stirpes" and replacing them with "capita" had been done on the date of the execution of the will and that the testator's intent was to provide for distribution per capita. However, it further concluded that the distinction between per capita and per stirpes was essentially irrelevant because by virtue of Iowa's antilapse statute, Iowa Code section 633.273 (2005), Kay Stinson's share passed to her two daughters. Accordingly, the court ordered that the estate be reopened.

The testator's surviving siblings appeal from this ruling. They first claim the court erred in ruling that the testator's "striking 'stirpes' from his will and replacing it [with] 'capita' did not prevent issue of beneficiary who died after will was executed and prior to decedent's death from taking by right of representation." They further maintain the antilapse statute was inapplicable and that Maldonado and Cranford are not parties in interest entitled to reopen the estate. We review this probate matter de novo. *In re Estate of Lamb*, 584 N.W.2d 719, 722 (Iowa Ct. App. 1998).

A division per capita means by a number of individuals equally or share and share alike, as opposed to a division per stirpes, where those of more remote kinship to testator take by right of representation. *Gilbert v. Wenzel*, 247 Iowa 1279, 1281, 78 N.W.2d 793, 794 (1956). The determining factor in ascertaining whether beneficiaries under a will take per capita or per stirpes is the intention of the testator, which is to be found from the language used as applied to all the surrounding circumstances and conditions present in the testator's mind when the will was made. *Martin v. Beatty*, 253 Iowa 1237, 1241-42, 115 N.W.2d 706, 709 (1962). We will not distort or nullify the testator's clear intention through the application of arbitrary or technical rules of construction. *Id.* at 1241, 115 N.W.2d at 709. The testator's intent "is to be reached from the language used as applied to the surrounding circumstances and the conditions present in testator's mind when the will was made." *Gilbert*, 247 Iowa at 1281, 78 N.W.2d at 795.

Initially, upon our de novo review, we agree with the finding that the change from stirpes to capita was made on the date of the execution of the will. Two of the witnesses to the will filed affidavits stating the testator had requested the word change and that he had initialed the changes on the date of its execution. Thus, we find the will, as executed, provided for a per capita distribution to the testator's aforementioned siblings.

However, the further question remains as to the effect of the distribution scheme once Kay Stinson predeceased the testator. The appellants essentially claim the handwritten addition of "per capita" indicates an unambiguous intention that only the brothers and sisters who survived him would be his sole

beneficiaries, to the exclusion of his pre-deceased sister's issue. The court below rejected this claim, finding that Iowa's antilapse statute acted to allow Stinson's daughters to take her share.

Iowa Code section 633.273, the antilapse statute, provides in pertinent part:

> If a devisee dies before the testator, leaving issue who survive the testator, the devisee's issue who survive the testator shall inherit the property devised to the devisee per stirpes, unless from the terms of the will, the intent is clear and explicit to the contrary.

The purpose of the antilapse statute is "to preserve the devise for those who would presumably have enjoyed its benefits had the deceased devisee survived the testator and died immediately thereafter." *In re Estate of Micheel*, 577 N.W.2d 407, 409 (Iowa 1998). The statute should be given a broad and liberal construction. *Id.* We presume a testator knew of the antilapse statute, and a testator's intent to avoid the statute "must be manifest from terms of the will if the statute is not to be applied." *Id.* at 409-10.

As the court below noted, if the testator had intended that the issue of any of his brothers or sisters not take a share from their parent, if deceased, he could have easily crafted his will for this purpose. For example, he could have provided an express survivorship clause with regard to his siblings. *Bankers Trust Co. v. Allen*, 257 Iowa 938, 945, 135 N.W.2d 607, 611 (1965). This would have negated the effect of the antilapse statute. *See* Sheldon F. Kurtz, *Kurtz on Iowa Estates*, § 15.31 at 629 (3d ed. 1995). Moreover, the gift was not a class gift, but rather one to five named siblings.

The appellants' claim that the phrase "per capita" served as clear and unambiguous evidence of the testator's intention that only his surviving siblings shall take. We disagree. In light of the presumption that the testator knew about the antilapse statute, we cannot say the language in his will was sufficient to defeat the statute. We conclude the testator's intent, as expressed by the will's language, was that his estate go per capita equally to his five siblings, but that if one of them should predecease him, that individual's share should go to his or her issue per stirpes through the parent. In other words, the deceased parent's share does not lapse.

Having so concluded, we next address the appellants' final contention that Iowa Code section 633.309 bars this action. That provision states:

> An action to contest or set aside the probate of a will must be commenced in the court in which the will was admitted to probate within the later to occur of four months from the date of second publication of notice of admission of the will to probate or one month following the mailing of the notice to all heirs of the decedent and devisees under the will whose identities are reasonably ascertainable, at such persons' last known addresses.

Iowa Code § 633.309. We reject this claim. Iowa Code section 633.488 allows the reopening of a final report when the estate was "settled in the absence of any person adversely affected and without notice to the person . . . ." Here, the appellants are not contesting the will, so section 633.309 is not applicable. Rather, they are claiming that as beneficiaries they were entitled to notice of the hearing on the final report. We therefore affirm the ruling that the appellants are entitled to reopen the estate.

AFFIRMED.