STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2121

In re the Estate of: Chester J. Olson, Deceased.

Filed September 3, 2013
Affirmed
Willis, Judge[*]

Stevens County District Court
File No. 75-PR-06-445

Nathan L. Seeger, Fergus Falls, Minnesota (for appellant Clinton Olson)

Theodora D. Economou, Morris, Minnesota (for respondents Sharon Hallett, Carolyn Brummond, Juanita Swartwout, and Jeffrey Olson)

Bradley Henrichs, Kansas City, Missouri (pro se respondent)

Virene Olson, Morris, Minnesota (pro se respondent)

Considered and decided by Kalitowski, Presiding Judge; Cleary, Judge; and Willis, Judge.

U N P U B L I S H E D O P I N I O N

WILLIS, Judge

Appellant challenges the district court's denial of the relief requested in his petition for determination of descent of property omitted from decedent's estate. Appellant argues that the district court erred by finding that his petition was barred by the

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

statute of limitations and by finding that decedent's will created a valid trust. Because we conclude that appellant's petition, to the extent that it sought to alter the previous construction of the will, was time-barred and that the underlying trust was valid, we affirm.

FACTS

Decedent Chester Olson died on September 28, 2006. Decedent had six children with his first wife: appellant Clinton Olson; respondents Sharon Hallett, Carolyn Brummond, Juanita Swartwout, and Jeffrey Olson; and Elda Best. At the time of his death, decedent owned an undivided 1/2 interest in several parcels of land in Stevens County, Minnesota. In pertinent part, decedent's will provides:

> ARTICLE II
>
> I give and bequeath the remainder of my property, real, personal or mixed, to the following of my children who survive me: Elda C. Best, Sharon L. Hallett, Carolyn M. Brummond, Juanita M. Swartwout, and Jeffrey A. Olson, in equal shares, share and share alike, their heirs and assigns forever. In the event that any of these children should predecease me, the share going to the other children named shall increase proportionately. The share going to Elda C. Best shall be subject to the Trust provisions in Article IV. and shall be transferred to the Trustees of the Elda C. Best Trust.
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> ARTICLE III
>
> I make no provision for my son, Clinton Olson, in this my Last Will and Testament as I have already provided him with enough help. Also I make no provision for my wife, Virene M. Olson,[1] as we have made other arrangements.

[1] Respondent Virene Olson was decedent's second wife.

> ARTICLE IV
>
> Carolyn M. Brummond and Jeffrey A. Olson shall be the Co-Trustees of the Elda C. Best Trust created herein for the benefit of my daughter, Elda C. Best. The Trustees of the Elda C. Best Trust shall distribute the income to my daughter, Elda C. Best, in convenient installments, but at least annually, until her 80th birthday, at which time all undistributed income and the principal of the Trust shall be distributed to Elda C. Best. In the event of the death of Elda C. Best, all undistributed income and principal from this Trust shall be distributed to those of the following who survive her in equal shares: Sharon L. Hallett, Carolyn M. Brummond, Juanita M. Swartwout and Jeffrey A. Olson. If any of the above predecease her their share shall lapse and the other shares shall increase proportionately.

Decedent's will also waives the requirement for submission of the trust to a court but retains the beneficiary's right to do so; directs that the beneficiary not have the right to dispose of, or borrow against, the principal or anticipated income of the trust; and appoints co-personal representatives of decedent's estate.

Following decedent's death, his will was submitted to probate. As part of the probate process, all interested parties, including appellant, were served with an "Inventory and Appraisement," which listed decedent's assets, including decedent's 1/2 interest in the real estate at issue. On July 30, 2007, the co-personal representatives executed two deeds: one transferred an undivided 1/10 interest in decedent's 1/2 interest to the trustees of the trust, the other transferred an undivided 4/10 interest in decedent's 1/2 interest to the other four named devisees. No other deeds were made for the real estate at issue, so these deeds had the effect of leaving in the estate 1/2 of decedent's 1/2 interest in the real estate. On September 12, 2007, the co-personal representatives filed a statement to close the estate.

Best died intestate on November 19, 2011. Her sole heir was her son, respondent Bradley Henrichs, who subsequently transferred, by quitclaim deeds, Best's interest under the decedent's will to himself, and then to appellant. After those transactions, appellant filed a petition for determination of descent, which alleged that the co-personal representatives failed to distribute all of the estate's property. Appellant requested that the court construe the decedent's will to provide that Best herself (rather than the trust) was entitled to the 1/5 interest in decedent's 1/2 interest that was designated for the trust or Best, a construction that appellant alleged would allow him to take that interest, under the transfer by Best's son of his inherited interest to appellant.

At a hearing on the parties' cross-motions for summary judgment, the parties agreed that the legal issues were dispositive of the case and that there was undistributed property in the estate. Respondents indicated that they would bring another petition to distribute that property if it were not addressed at that time. In its order after the hearing, the district court stated that "[i]t is undisputed that" the co-personal representatives' deeds "failed to distribute all of Chester J. Olson's interests in the subject real estate parcels, and that there remains to be distributed a 5/10th interest of decedent in the subject real estate parcels." The district court construed the will to indicate that decedent "intended that the fifth share" of his property for Best "be placed in trust for her benefit in the testamentary trust he created for that purpose in Article IV of the Will." Thus, the district court construed the will to devise the omitted 1/2 interest in the same manner as the previously distributed 1/2 interest, that is, 1/10 went the trust and 4/10 went to

respondents. The trust's 1/10 interest, according to the district court, was then to be distributed to respondents according to Article IV of decedent's will because Best did not live to 80 years of age. Thus, "[n]either Elda C. Best individually nor her estate ever had a vested interest in any of the subject real estate parcels as described herein." The district court acknowledged that the will could have "been more artfully drafted" but concluded that giving effect to the devise directly to Best while ignoring the trust provisions in the will would be "hyper-technical, exalt[] form over substance, and does not manifest the true intent of the testator as evidenced by the document as a whole."

The district court rejected appellant's arguments that the will did not create a valid trust but acknowledged that the will's trust provisions violated the rule against perpetuities. The district court noted that the will contains no provision that would address what would happen if Best "die[d] before her 80th birthday and all her named siblings would predecease her." As a result, "the vesting of the interest was uncertain as of [decedent's making of the will] and the trust [was] thus invalid." But the district court determined that appellant's claim was barred by the statute of limitations in Minn. Stat. § 524.3-1006 (2012), which states that "the claim of any claimant to recover from a distributee . . . to recover property improperly distributed . . . is forever barred at the later of (1) three years after the decedent's death; or (2) one year after the time of distribution thereof." Because appellant commenced this action on July 13, 2012, and decedent's estate was closed on September 12, 2007, the district court decided that, at most, appellant could challenge the distribution of the omitted property but found that the

omission of that property was an "oversight" relating to a known property interest. Finally, the district court concluded that "[s]ince there was no challenge to [the] interpretation of the Will within the requisite time period, that interpretation stands" and that the omitted property must be distributed according to that same interpretation. This appeal follows.

D E C I S I O N

The material facts are not in dispute. A district court "shall" grant a motion for summary judgment if the evidence demonstrates "that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. This court applies a de novo standard of review to the district court's legal conclusions on summary judgment. *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 6 (Minn. 2012).

Appellant brought this action to determine the descent of property omitted from the distribution of the estate. Appellant sought three things: (1) to have the trust provisions declared ineffective, so that (2) a 1/10 interest in decedent's 1/2 interest in the real estate would go to appellant as the holder of Best's interest, and so that (3) the 1/10 interest that was previously distributed to the trust would also go to him as the holder of Best's interest. Appellant also asked the district court to distribute the remaining 4/10 of decedent's 1/2 interest to the other named devisees. The parties agree that half of Best's 1/5 interest in decedent's 1/2 interest was omitted from the distribution of the estate; the co-personal representatives deeded a 1/10 interest in the 1/2 interest to the trust, leaving

out a 1/10 interest. The omission of property from the distribution of the estate appears to result from an unintentional error, in that distributing 1/10 of the entire ownership interest in the real estate at issue (or 1/5 of decedent's 1/2 interest) to the trust would have been correct, while the co-personal representatives actually distributed only 1/10 of decedent's 1/2 interest. This error appears to be arithmetic rather than the result of confusion about the amount of property each named child was to receive. Regardless, the error omitted property from the distribution of the estate.

Any interested person[2] may petition the probate court to assign omitted property to the persons entitled to it. Minn. Stat. § 524.3-413 (2012). Such petitions may be brought "at any time," as can petitions to correct clerical errors. *Id.*; *see also* Minn. Stat. § 524.1-304(b)(1). But the district court applied the statute of limitations governing claims "to recover property improperly distributed." Minn. Stat. § 524.3-1006 (2012). Such claims are "forever barred at the later of (1) three years after the decedent's death; or (2) one year after the time of distribution thereof," either of which limitation bars appellant's claim that property was improperly distributed.

These statutes of limitations allow appellant to bring a petition to distribute the omitted property but preclude him from challenging the distribution of property that

[2] Respondents argue that appellant does not have standing to bring this petition, based on the will's provision that appellant is to take nothing from the will. Without addressing the construction of that provision or the propriety of taking a possible share as a method of attacking the underlying construction of a will, we believe that appellant is an "interested person" as the child of decedent under Minn. Stat. § 524.1-201(32) (2012) (defining an interested person as "heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against the estate of a decedent, ward or protected person which may be affected by the proceeding").

occurred during the administration of the estate, and, thereby, the construction of the will that prevailed during the estate's administration. Thus, the omitted property may be distributed only under that construction, and therefore would go to the named takers from the trust following Best's death. We agree with the district court's conclusion that because "there was no challenge to [the co-personal representatives'] interpretation of the Will within the requisite time period, that interpretation stands."

But even if appellant's attempt to alter the construction of the will were not time-barred, we nonetheless conclude that the trust provisions in the will were effective. "The primary purpose of construing a will is to discern the testator's intent." *In re Estate & Trust of Anderson*, 654 N.W.2d 682, 687 (Minn. App. 2002), *review denied* (Minn. Feb. 26, 2003). "[W]e determine the testator's intent from a full and complete consideration of the entire will." *In re Estate of Lund*, 633 N.W.2d 571, 574 (Minn. App. 2001). "We review a district court's construction of an unambiguous instrument de novo." *Anderson*, 654 N.W.2d at 687.

Appellant argues that Best herself, rather than the trust, received a 1/5 interest in decedent's 1/2 interest under the will. First, appellant argues that the will devised an indefeasible fee simple estate in an undivided 1/5 interest in decedent's 1/2 interest to Best directly and that, therefore, language relating to a trust is precatory. Second, appellant argues that the will failed to create a trust because it relied on a subsequent transfer to the trust by the co-personal representatives, it did not comply with the rules for

making a trust, it violated the rule against perpetuities, and it violated the rule against the suspension of the power of alienation. We reject both arguments.

First, decedent's intent to create a trust for Best in his will is clear and unequivocal. Appellant is correct that the will uses language such as "give and bequeath" and "their heirs and assigns forever" in the first sentence of Article II, which typically indicates that the testator intended to devise a fee simple estate in the property bequeathed. But that language is followed by language in that same paragraph dictating that one of those shares "shall be subject to the Trust provisions in Article IV. and shall be transferred to the Trustees of the Elda C. Best Trust." Moreover, two other articles of the will deal with the trust's creation and administration. Because we must give effect to the intent of a decedent as determined from the will as a whole, the statement of devise at the outset of article II should not be considered in isolation from the rest of the will.

Second, the trust intended by decedent's will was validly created. "Under Minnesota law, the requirements of an express trust are (1) a designated trustee with enforceable duties; (2) a designated beneficiary vested with enforceable rights; and (3) a definite trust res in which the trustee has legal title and the beneficiary has the beneficial interest." *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 914–15 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. Jan. 20, 2009). There must also be a clearly expressed intent to create a trust, which will be found "even if the settlor's language is inept, clumsy, or even unsuitable." *Id.* at 915 (quotation

omitted). In interpreting a trust agreement, we must "ascertain and give effect to the grantor's intent." *In re Stisser Grantor Trust*, 818 N.W.2d 495, 502 (Minn. 2012).

Decedent's will satisfied the requirements to create a trust. It designated trustees and required that Best's share of decedent's interest be transferred to the trustees, so that the trustees had legal title to that share. The will also created a beneficial interest in Best, by requiring that the income from the trust be distributed to her at least annually and requiring the distribution of the principal to Best when she reached the age of 80. Moreover, appellant provides no legal authority for his arguments that other putative problems with the creation of the trust—that it must be effectuated by the co-personal representatives of the estate and that it does not "contain a power of sale" or "provide a power of distribution of income or principal" or a date of termination after Best's death—cause the trust to be invalid. Thus, these arguments do not affect the validity of the trust.

Appellant claims that the trust provisions in the will violate the rule against perpetuities, making the trust invalid. The statutory rule against perpetuities declares that "[a] nonvested property interest is invalid unless: (1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or (2) the interest either vests or terminates within 90 years after its creation." Minn. Stat. § 501A.01(a) (2012); *see also* Minn. Stat. § 501A.06 (2012) ("Sections 501A.01 to 501A.07 supersede the rule of the common law known as the rule against perpetuities."). Appellant correctly notes that the will does not direct the manner of distribution of the trust property if Best were to be predeceased by all other named

siblings and die before she reaches 80 years of age. Appellant is also correct that this precludes certainty that the trust property would vest or terminate no more than 21 years after the end of a life in being. But section 501A.01 is part of Minnesota's Uniform Statutory Rule Against Perpetuities. Minn. Stat. § 501A.07 (2012). Under that statute, when a property interest would become invalid as a result of section 501A.01, a court may reform that interest "in the manner that most closely approximates the transferor's manifested plan of distribution." Minn. Stat. § 501A.03 (2012). Under this "wait-and-see" approach, courts will not invalidate ab initio a property interest because of unlikely future events. Unif. Statutory Rule Against Perpetuities § 1 cmt. A, 8B U.L.A. 238-39 (2001) (referring to the uniform version of the rule against perpetuities as representing "the wait-and-see method of perpetuity reform" because "interests that would have been initially invalid at common law are invalid only if they do not actually vest or terminate within the permissible vesting period"). As a result, the trust is not invalid because of the rule against perpetuities.

Finally, appellant argues that the trust is invalid because it would impermissibly suspend the power of alienation. Appellant argues that the will's trust provisions indicate that "there are no persons in being who, alone or in conjunction with others, can convey an absolute fee in possession or absolute ownership of real property or absolute ownership of personal property." Minn. Stat. § 501B.09, subd. 1 (2012). For "property held in trust," suspension of the power of alienation is allowed "by the terms of the trust, for a period of not more than 21 years." *Id.*, subd. 2 (2012). But "[n]otwithstanding any

contrary term of a trust, suspension of the power of alienation by the terms of a trust ceases after a period of 21 years, after which the trustee has the power to convey an absolute fee in possession or absolute ownership of the trust property." *Id.* As a result, the trust's provisions do not violate Minn. Stat. § 501B.09.

Because the decedent's will clearly expresses an intent to create a trust for Best's share of the devised property, and because the trust does not suffer from any of the fatal defects alleged by appellant, we conclude that the trust was effectively created. Further, we agree with the district court's conclusion that appellant's challenge to the construction of the will is time-barred.

Affirmed.