IN THE COURT OF APPEALS OF IOWA

No. 8-093 / 07-1427
Filed May 14, 2008

**IN THE MATTER OF THE ESTATE OF
CLYDE L. GUTHRIE, Deceased,**

**JAMES GUTHRIE, CLARA LUTZ,
AND DORIS DAUBER,**
Plaintiffs-Appellees,

vs.

**KAITLYN BUSCH, a minor,
AND BROCK BUSCH,**
Defendants-Appellants.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

Defendants appeal the district court's decision in a probate case. **AFFIRMED.**

Michelle L. Heller of Nepple Law Firm, P.L.C., Muscatine, and Jon R. Pearce, Muscatine, for appellants.

Robert S. Hatala and Stephanie A. Legislador of Crawford, Sullivan, Read & Roemerman, P.C., Cedar Rapids, for appellees.

Jeffrey P. Taylor of Klinger, Robinson & Ford, Cedar Rapids, for the estate.

Considered by Huitink, P.J., and Zimmer, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BROWN, S.J.

This case involves the impact of Iowa's antilapse statute on the will of Clyde Guthrie. The issue is whether Clyde's children who died before the will was executed in 2002 are included in the class which takes under the will. The district court concluded they were not included. We agree and therefore affirm.

I. Background Facts & Proceedings

Clyde Guthrie died testate on July 6, 2006. Clyde and his wife had five children, Doris Dauber, Clara Lutz, Terry Guthrie, James Guthrie, and Clyde Dean Guthrie. Clyde's wife predeceased him and he was also predeceased by two of the children, Clyde Dean, who died in 1969, and Terry, who died in 1975. Clyde Dean left no issue. Terry had one child, Kimberly Murphy, who died in 2005. Kimberly had two children, Brock Busch and Kaitlyn Busch. Clyde's will, dated January 22, 2002, provided:

> In the event that my wife, Clara Ziegler Guthrie, should not survive me by a period of sixty (60) days such that the provisions of Paragraph II do not take effect, I give, devise, and bequeath all of the rest, residue, and remainder of my estate, real, personal, and mixed, and wherever situated in equal shares to my children. Provided, however, that in the event any of my children should predecease me leaving issue who survive me, then the share of such predeceased child shall go in equal share to his or her issue who survive me, per stirpes.

Doris, Clara, and James filed a petition for declaratory judgment seeking a ruling that Clyde's will meant to include as beneficiaries only those children who were alive at the time the will was written. They claimed that under the antilapse statute, Iowa Code section 633.273(2) (2005), since Terry died before

the will was made, Terry's descendants are not included within the class of beneficiaries under the will.

Plaintiffs filed a motion for summary judgment. The district court found the language of Clyde's will was unambiguous. The court determined, "[t]he language of the 2002 Will indicates that the class of persons that was intended to benefit under the distribution scheme of the 2002 Will were the children of Clyde L. Guthrie who were living at the time the 2002 Will was executed." The court found the statement "in the event any of my children should predecease me" applied only if one of Clyde's children who was living at the time the will was made predeceased him, and had no applicability to the children who had already predeceased him prior to when the will was written. The court granted the motion for summary judgment.

Defendants Brock and Kaitlyn filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). The district court denied the motion on the merits. Defendants appeal the decision of the district court.

II. Standard of Review

This case was brought in equity under section 633.33. Generally, in equity cases our review is de novo. Iowa R. App. P. 6.4. However, when an equity case is resolved on summary judgment, our review is for the correction of errors at law. *Kragnes v. City of Des Moines*, 714 N.W.2d 632, 637 (Iowa 2006).

Summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Iowa R. Civ. P. 1.981(3). We view the record in the light most favorable to the resisting party. *Smith v. Shagnasty's Inc.*, 688 N.W.2d 67, 71 (Iowa 2004).

III. Merits

The antilapse statute, section 633.273, provides:

> 1. 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.
> 2. A person who would have been a devisee under a class gift, if the person had survived the testator, is treated as a devisee for purposes of this section, provided the person's death occurred after the execution of the will, 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) (citation omitted). 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.

In the present case, Terry died in 1975, before the execution of Clyde's will in 2002. Because Terry died before the will was executed, by the terms of section 2 of the statute he would not be considered a devisee unless a contrary intent is "clear and explicit" from the terms of the will. *See* Iowa Code § 633.273(2). This "clear and explicit" intent can only be ascertained from the terms of the will itself, and not from extraneous evidence. *Micheel*, 577 N.W.2d

at 409-10. The district court stated it had not considered extrinsic evidence in its ruling, nor have we in our review.

Clyde's will provides, "in the event any of my children should predecease me leaving issue who survive me, then the share of such predeceased child shall go in equal shares to his or her issue who survive me, per stirpes." We find no error in the district court's conclusion that an intent to avoid the application of the antilapse statute is not "clear and explicit" from the terms of the will. The will states "in the event" Clyde was predeceased by a child, when in fact Clyde had been predeceased by two of his children at the time the will was written. If the will was referring to the children who had already predeceased Clyde, there would be no need to say "in the event." By stating "in the event" it is clear Clyde was looking ahead to possible future events, when one of his children who were alive when the will was written might predecease him.

Brock and Kaitlyn look to the word "should" in the phrase "in the event any of my children should predecease me" and claim the district court improperly found the word looked to the future. They claim the word should be interpreted as the past tense of "shall" to imply a duty or obligation. *See* Black's Law Dictionary 1379 (6th ed. 1990). Looking at the phrase as a whole, however, rather than at a single word, we determine the phrase is considering possible future events. *See In re Estate of Grulke*, 546 N.W.2d 626, 627 (Iowa Ct. App. 1996) (noting we must ascertain a testator's intent from the entire will).

We affirm the decision of the district court.

AFFIRMED.