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In re Estate of Donald J. Evans, deceased. Ted L. Evans, former Copersonal Representative of the Estate of Donald J. Evans, deceased, appellant, v. Mary C. Evans, former Copersonal Representative of the Estate of Donald J. Evans, deceased, et al., appellees.

827 N.W.2d 314

Filed March 12, 2013. No. A-12-527.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Decedents' Estates: Words and Phrases.** When there are surviving nieces and nephews of a deceased person who has left no living issue or parent, these nieces and nephews are issue of the parents under Neb. Rev. Stat. § 30-2303 (Reissue 2008), pursuant to Neb. Rev. Stat. § 30-2209(23) (Cum. Supp. 2012).
4. ____: ____. Neb. Rev. Stat. § 30-2306 (Reissue 2008) provides the operative definition of the phrase "by representation," as used in Neb. Rev. Stat. § 30-2303(3) (Reissue 2008).
5. **Decedents' Estates.** Pursuant to Neb. Rev. Stat. § 30-2306 (Reissue 2008), the probate court is required to divide the estate into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent.
6. **Decedents' Estates: Words and Phrases.** The difference between strict per stirpes and modern per stirpes is the generation at which shares of the estate are divided: Strict per stirpes begins at the generation closest to the decedent, regardless of whether there are any surviving individuals in that generation, whereas modern per stirpes begins at the first generation where there is living issue.
7. **Decedents' Estates.** Neb. Rev. Stat. § 30-2306 (Reissue 2008) is modeled after the original Uniform Probate Code, which adopted a form of modern per stirpes.
8. ____. An oral request via testimony does not equate to filing a petition for removal of a personal representative for cause under Neb. Rev. Stat. § 30-2454(a) (Reissue 2008).
9. **Decedents' Estates: Notice.** The presence of interested persons at a hearing does not equate to notice to a personal representative that his or her status is at issue under Neb. Rev. Stat. § 30-2454(a) (Reissue 2008).
10. **Decedents' Estates: Executors and Administrators.** Taken together, Neb. Rev. Stat. §§ 30-2454 and 30-2457 (Reissue 2008) set forth the procedure by which to suspend and remove a personal representative and appoint a special administrator.

11. **Decedents' Estates.** When the procedural steps under Neb. Rev. Stat. § 30-2454 (Reissue 2008) to remove a personal representative before appointing a successor personal representative are not followed by the petitioner, the probate court cannot remove the personal representative, particularly because service of the removal petition on the personal representative results in statutory restrictions on the personal representative's ability to act on behalf of the estate during the pendency of a removal petition.

Appeal from the County Court for Lincoln County: MICHAEL E. PICCOLO, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Christopher S. Bartling, of Bartling & Hinkle, P.C., for appellant.

Kent E. Florom, of Lindemeier, Gillett & Dawson, for appellees Mary C. Evans and Susan Evans Olson.

Steven P. Vinton, of Bacon & Vinton, L.L.C., pro se.

INBODY, Chief Judge, and SIEVERS and RIEDMANN, Judges.

SIEVERS, Judge.

FACTUAL BACKGROUND

The decedent, Donald J. Evans, died intestate on October 2, 2011. At the time of his death, Donald was domiciled in Wallace, Nebraska. Donald was not married at the time of his death, and he had no surviving children or issue. Donald's parents were deceased at the time of his death. Donald had three brothers, Robert Evans, Stewart Evans, and Frederick Evans, but all three brothers predeceased Donald. Of the brothers, Robert did not have any children. Stewart had three children: Susan Evans Olson (Susan), Anna Evans, and Mary C. Evans. Anna predeceased Donald and did not have any children. Frederick had two children: Ted L. Evans and John Evans. John predeceased Donald and did not have any children. Thus, Donald was survived by nieces Susan and Mary (via Stewart) and nephew Ted (via Frederick).

PROCEDURAL BACKGROUND

On March 8, 2012, Ted filed a petition for a formal adjudication of intestacy, a determination of heirs, and an appointment

of a personal representative of Donald's estate. Ted alleged that a statement of informal probate was entered on November 1, 2011, appointing Ted and Mary as copersonal representatives of the estate. Although the appointment does not appear in our record, their prior appointment as copersonal representatives is an undisputed fact. In his petition, Ted nominated himself as the sole personal representative of the estate and alleged that he had priority status as an heir entitled to at least 50 percent of the estate as a resident of Nebraska, whereas Susan and Mary were Colorado residents.

On March 23, 2012, Mary filed an objection and responsive pleading, alleging that Ted was not entitled to 50 percent of the estate. Mary asked that the court continue its appointment of copersonal representatives, as entered on November 1, 2011, and that it make a determination as to the share to which each heir is entitled. Mary did not petition for Ted's removal as copersonal representative.

A hearing was held on April 16, 2012, on Ted's petition for formal adjudication. Ted testified on direct examination that he believed Donald died without a will. However, on cross-examination, Ted testified that Donald set up a will in 2010 with a bank, but that Donald tore up the will in September 2011, a month prior to his death. Ted testified that he, along with the bank officer who wrote the will, was present when Donald tore up his will. Ted testified that Donald also had the bank draw up a trust, but that he tore the trust document up at the same time he tore up his will. Exhibits 2 and 3, copies of Donald's destroyed will and trust, were received into evidence, but are not part of the requested bill of exceptions. Ted testified that exhibits 2 and 3 were copies of the documents that Donald had torn up. He also agreed that under the will and trust documents that were torn up, the estate was to be divided one-third each to Susan, Mary, and Ted. There is no claim in this appeal that either of such documents is effective.

Ted testified that as copersonal representative, he sent Mary various requests to sign checks to reimburse Ted for various expenses, including expenses incurred prior to Donald's death and expenses for Donald's funeral. Some of the expenses incurred prior to Donald's death included hotel rooms for Ted

and his wife to be close to Donald, such as when Donald was in the hospital. Ted testified that he asked Mary to sign off on a total of $5,600 to $5,700 worth of reimbursements to him. While Ted did not testify that Mary refused the requests for reimbursements, Mary later testified that she did in fact refuse such requests. Ted asked the court to appoint him to be the sole personal representative of Donald's estate.

Mary testified that a preliminary inventory of Donald's estate showed a value of $2.9 to $3 million. Mary testified that Ted sent bills to her and wanted her to sign off on checks so that he could be paid for various claims that he had filed. Mary testified that she was reluctant to sign because some of the bills seemed to be duplicative or did not pertain to estate business. Mary also testified that she did not sign the estate inventory sent to her by Ted's attorney because she felt there were some omissions and because she and her attorney were trying to investigate. Mary testified that she had also not yet signed the paperwork to transfer certain stock to the estate—she stated that she had not refused to sign the paperwork, but, rather, that she had not signed it yet. She also testified that she and Ted each proposed a different bank for the estate account. Mary testified that she had no personal communication with Ted and that they each have an attorney.

Mary testified that she has been an officer-director and coowner of an investment advisory firm in Denver, Colorado, for the past 20 years. She testified that her firm manages "high, aggressive growth portfolios" and that they "invest them in securities for high net growth and ultra high net worth clients." Mary testified that she holds a securities license as a stockbroker or advisor. Mary testified that Ted lacks the securities experience needed for an estate as large as Donald's. While Mary initially testified that she would like to continue as copersonal representative of the estate, she later verbally asked during her testimony that the court appoint her to be the sole personal representative or, in the alternative, that the court appoint a neutral third party. Finally, Mary testified that she objects to Ted's claim that he is entitled to 50 percent of the estate. She thinks that the estate should be divided one-third each to Susan, Mary, and Ted.

In its journal entry and order filed on May 31, 2012, the county court found that Donald died intestate on October 2, 2011. The court found that prior to his death, Donald executed a last will and testament and the "Donald J. Evans Revocable Trust" (exhibits 2 and 3), but that the documents were allegedly destroyed by Donald. Therefore, the court determined that the estate would be divided in accordance with the provisions of intestate succession as set out in Neb. Rev. Stat. § 30-2303 (Reissue 2008). The court stated that in accordance with § 30-2303(5) relative to intestate succession, "'if there is no surviving issue, parent, issue of a parent, grandparent or issue of a grandparent, the entire estate passes to the next of kin in equal degree.'" The court determined that Susan, Mary, and Ted were Donald's "'next of kin'" and that each heir stands in equal degree of kinship to the other. The court specifically found and ordered that under § 30-2303, Susan, Mary, and Ted shall each inherit one-third of the entire estate.

The court noted that Ted and Mary had previously accepted appointment as copersonal representatives. However, the court found that Ted and Mary were "annoyed" with each other, that communication between them had in essence stopped, and that any interaction had been handled through their respective attorneys. The court found that the conflict substantially hinders the administration of the estate and removed them both as copersonal representatives. The court, citing Neb. Rev. Stat. §§ 30-2412(b)(2) and 30-2456 (Reissue 2008), appointed Steven P. Vinton, an attorney, as successor personal representative. Ted appeals.

ASSIGNMENTS OF ERROR

Ted assigns, restated, that the trial court erred in (1) determining that the estate passes to Susan, Mary, and Ted in equal shares; (2) removing Ted as a personal representative; and (3) appointing a successor personal representative who does not have priority for appointment.

STANDARD OF REVIEW

[1,2] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Estate of*

Cooper, 275 Neb. 322, 746 N.W.2d 663 (2008). On a question of law, however, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id*.

ANALYSIS

Division of Donald's Estate.

Ted's first assignment of error is that the trial court erred in determining that the estate passes to the next of kin in equal shares. All of the parties, including Ted, Mary, and Vinton, agree that § 30-2303 applies, which statute provides:

> The part of the intestate estate not passing to the surviving spouse under section 30-2302, or the entire intestate estate if there is no surviving spouse, passes as follows:
>
> (1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;
>
> (2) if there is no surviving issue, to his parent or parents equally;
>
> (3) if there is no surviving issue or parent, to the issue of the parents or either of them by representation;
>
> (4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half;
>
> (5) if there is no surviving issue, parent, issue of a parent, grandparent or issue of a grandparent, the

> entire estate passes to the next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through a more remote ancestor.

[3] All parties agree that § 30-2303(3) applies and that the entire estate passes to the issue of the parents by representation. Further, the parties agree that the trial court incorrectly applied § 30-2303(5) after finding that there was no issue of the parents. The trial court failed to identify Susan, Mary, and Ted as the issue of Donald's parents. Susan, Mary, and Ted, as the three surviving grandchildren of Donald's parents, are the "issue of the parents" of Donald. "Issue of a person means all his or her lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in the Nebraska Probate Code." Neb. Rev. Stat. § 30-2209(23) (Cum. Supp. 2012). Thus, it is clear from the record that § 30-2303(3) controls and that Donald's entire estate should be distributed to the issue of his parents, by representation.

Ted claims that Susan, Mary, and he should take proportionate shares of the estate by representation, with Susan and Mary each inheriting one-quarter of the estate through their deceased father and Ted inheriting one-half of the estate through his deceased father. Ted reaches this result because § 30-2303(3) states that the issue of the parents take "by representation," rather than providing that issue take when they are "next of kin in equal degree," as provided in § 30-2303(5). Mary counters that the estate is to be divided equally among the surviving heirs in the nearest degree of kinship, with Susan, Mary, and Ted each receiving an equal one-third share because they all have the same degree of kinship to Donald.

[4,5] Neb. Rev. Stat. § 30-2306 (Reissue 2008) provides the operative definition of the phrase "by representation," as used in § 30-2303(3), as follows:

> If representation is called for by this code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in

> the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

Ted argues § 30-2306 means that the surviving issue of Stewart, namely Susan and Mary, would receive one share and that he, as the sole surviving issue of Frederick, would receive one share. Ted's end result would have Susan and Mary splitting Stewart's one-half share and Ted receiving Frederick's one-half share.

Ted misapplies § 30-2306. The portion applicable to our facts here provides: "If representation is called for by this code, the estate is divided into as many shares as there are *surviving heirs in the nearest degree of kinship* . . . ." § 30-2306 (emphasis supplied). Because none of Donald's brothers survived him, there are no surviving heirs in the nearest degree of kinship, namely Donald's siblings. Thus, the probate court must look to the next degree of kinship, or the next generation, which contains at least one surviving heir. The first generation which has living issue is composed of Donald's parents' grandchildren, who also are Donald's two nieces and his nephew. There must be at least one survivor in a degree of kinship. Here, because none of Donald's siblings survived him, the nearest degree of kinship to him containing a survivor was the generation containing two nieces and a nephew. And we note that Donald had no deceased nieces or nephews who have surviving issue. Susan, Mary, and Ted, who are all in an equal degree of kinship to one another, should, therefore, each receive a one-third share.

Ted relies on *In re Estate of Tjaden*, 225 Neb. 19, 402 N.W.2d 288 (1987), for the proposition that the term "right of representation" under Nebraska law means distribution on a per stirpes basis, resulting in a 50-percent share. However, *In re Estate of Tjaden* involved the construction of a testator's intent where there was a will and, thus, is distinguishable:

> "This Court is of the opinion that the clear intent of the testator was to provide for a division by a 'per stirpes' division among identified beneficiaries, their issue or

> descendents. Clearly, the decedent intended to divide her estate, after specific requests [sic], equally among her brothers and sisters and the issue of deceased brothers and sisters or the issue of deceased issue of deceased brothers and sisters. . . ."

225 Neb. at 22, 402 N.W.2d at 291. The *In re Estate of Tjaden* court quotes *Gaughen v. Gaughen*, 172 Neb. 740, 112 N.W.2d 285 (1961), for the description of distribution per stirpes:

> "Distribution per stirpes is a division with reference to the intermediate course of descent from the ancestor. It gives the beneficiaries each a share in the property to be distributed, not necessarily equal, but[, rather,] the proper fraction of the fraction to which the person through whom he claims from the ancestor would have been entitled."

225 Neb. at 27, 402 N.W.2d at 293. The court concludes, "in a per stirpes distribution, ordinarily applicable in an intestate's estate, there is a division of property among a class or group of distributees who take the share which a decedent would have taken if such decedent were alive, taking such share by the right of representing the decedent." *Id.* at 28, 402 N.W.2d at 294.

[6] The parties are all applying a form of distribution traditionally referred to as "per stirpes distribution" in interpreting the words "by representation" found in § 30-2303(3) and defined in § 30-2306, but Ted is applying the older version of per stirpes distribution, referred to as "strict per stirpes," "classic per stirpes," or "English per stirpes." Mary and Vinton are applying the modern version of per stirpes distribution, referred to as "modern per stirpes," "modified per stirpes," or "American per stirpes." These terms are well explained in Samuel B. Shumway, Note, *Intestacy Law—the Dual Generation Dilemma—Wyoming's Interpretation of Its 130-Year-Old Intestacy Statute*. Matter of Fosler*, 13 P.3d 686 (Wyo. 2000)*, 2 Wyo. L. Rev. 641 (2002). We borrow liberally from that article and summarize as follows: The difference between strict per stirpes and modern per stirpes is the generation at which shares of the estate are divided. Strict per stirpes begins at the generation closest to the decedent,

regardless of whether there are any surviving individuals in that generation, whereas modern per stirpes begins at the first generation where there is living issue. Thus, the distinction between strict per stirpes and modern per stirpes will be most evident in instances where all of the heirs in the closest degree of kinship are deceased. In the present case, as earlier detailed, all of Donald's closest heirs, his parents and siblings, were deceased at the time of his death, and thus, the next generation with living members is Donald's parents' grandchildren: Susan, Mary, and Ted. Shumway concludes that although the strict per stirpes system was the early standard for America, the majority of states now follow a different system of distribution.

[7] According to Shumway's article, 23 states have adopted some variation of modern per stirpes distribution, including Nebraska. Shumway explains that the distinction between modern per stirpes and strict per stirpes is that, in the latter system, the estate is divided into shares at the generation nearest the decedent regardless of whether there are living members, whereas in modern per stirpes, the estate is divided into equal shares at the nearest generation with surviving heirs. Nebraska is one of the 23 states that has adopted some variation of modern per stirpes distribution, because it has adopted the original 1969 Uniform Probate Code, a form of modern per stirpes. See Shumway, *supra*. See, also, 1974 Neb. Laws, L.B. 354. Section 30-2306 is modeled after the original Uniform Probate Code. See Unif. Probate Code, rev. art. II, § 2-106, 8 (part I) U.L.A. (1998). In comparing the language of the two provisions, they are the same. See, Restatement (Third) of Property: Wills and Other Donative Transfers § 2.3 (1999); Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 Cal. L. Rev. 1877, 1904-05 (2000) ("a modernized *per stirpes* (or taking 'by right of representation' with the representation beginning with equal division in the nearest descendant generation in which there are living members (the 'stock' generation) with representation thereafter for deceased members' issue) has come to be the prevalent current view, with reinforcement from the original (1969) Uniform Probate Code").

Therefore, in the end, it is clear that the county court applied the incorrect statutory provision, but achieved the correct result. The probate court applied § 30-2303(5) when it should have applied § 30-2303(3), because the parents of Donald did have surviving issue as defined in § 30-2209(23). Susan, Mary, and Ted each take a one-third share of the estate, as they take by representation as defined in § 30-2306. Therefore, we affirm the county court's division of Donald's estate.

Removal of Personal Representative.

Ted's second assignment of error is that the trial court should not have removed him as a personal representative. Neb. Rev. Stat. § 30-2454 (Reissue 2008) provides in part:

> (a) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the court may order. Except as otherwise ordered as provided in section 30-2450, after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration or preserve the estate. If removal is ordered, the court also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.

[8] While the statute continues on to discuss cause for removal, we need not discuss that portion given the result we reach. Ted petitioned for appointment as the sole personal representative on March 8, 2012. On March 23, Mary filed an objection to the appointment of Ted as the sole personal representative and requested that the court continue its appointment of copersonal representatives, as entered on November 1, 2011. Mary never filed a petition to remove Ted as copersonal representative. During her testimony at the April 16, 2012, hearing, Mary said she wanted the court to appoint her sole personal representative or, in the alternative, to appoint a third party. But, before that statement, she testified she would like to continue as copersonal representative with Ted. Ted argues

that her oral request via her testimony does not equate to filing a petition for his removal as a personal representative pursuant to § 30-2454(a), and we agree. Moreover, because no petition was filed seeking Ted's removal, the court did not fix a time and place for a hearing nor give notice to Ted that his status as a personal representative was at issue in the hearing on April 16, 2012.

[9] Mary asserts that all surviving heirs were present before the trial court at the hearing on April 16, 2012, and that therefore, notice to Ted was satisfied under § 30-2454(a). But the presence of interested people does not equate to notice that Ted's removal as copersonal representative was an issue before the court to be tried and decided that day. Mary also points out that the trial court heard testimony from both copersonal representatives before finding that removal of both copersonal representatives was necessary for the estate to move forward. Mary claims that such action is authorized by § 30-2412(f). Mary also asserts that Ted did not object to the request to remove him as copersonal representative, an argument which begs the question given that she did not petition for his removal, and in any event, what was actually before the court via a proper petition was Ted's request that he be the sole personal representative—a request that necessarily asks for Mary's removal.

[10,11] The procedural steps under § 30-2454 to remove a personal representative before appointing a successor personal representative were not followed by Mary, and in the absence of a petition for Ted's removal and a notice and hearing thereupon, the court could not remove him as a personal representative. Taken together, § 30-2454 and Neb. Rev. Stat. § 30-2457 (Reissue 2008) set forth the procedure by which to suspend and remove a personal representative and appoint a special administrator. See *In re Estate of Cooper*, 275 Neb. 322, 746 N.W.2d 663 (2008). The requirement for the filing of a petition for removal of a personal representative takes on added importance given that under § 30-2454, service of the removal petition on the personal representative results in statutory restrictions on the personal representative's ability to act on behalf of the estate during the pendency of a removal

petition. We hold that the county court erred in ordering the removal of Ted as copersonal representative, because the statutorily mandated procedure for doing so was not followed, and thus the court lacked the power to order his removal. We reverse the order removing Ted as copersonal representative of Donald's estate.

Appointment of Successor Personal Representative.

Ted's third assignment of error is that the trial court should not have appointed a personal representative without priority. Because we have found that Ted was improperly removed as copersonal representative, it is clear that the successor personal representative was not properly appointed. Thus, as an adjunct of the finding of the improper removal of Ted, it necessarily follows that the order appointing Vinton as successor personal representative must be reversed. We should note Mary did not cross-appeal her removal as copersonal representative and, therefore, that portion of the county court's order stands.

CONCLUSION

Although the trial court incorrectly applied § 30-2303(5), the correct end result was reached with regard to the distribution of Donald's estate. Susan, Mary, and Ted are each entitled to a one-third share of the estate. Further, we find that the trial court improperly removed Ted as copersonal representative, and as a result, Ted remains personal representative of Donald's estate. The order appointing Vinton as successor personal representative is reversed. We remand the cause to the county court for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.