IN THE SUPREME COURT OF IOWA

IN RE ESTATE OF VERA E. CAWIEZELL

TERRY BROOKS, JILL BROOKS and PHYLLIS KNOCHE,	)	
Co-Executors/Applicants,	)	
v.	)	**S.C. NO. 19-1214**
TOM CORONELLI and BETH CORONELLI,	)	
Beneficiaries/Resisters.	)	

APPEAL FROM
THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY
THE HONORABLE PATRICK A. McELYEA, JUDGE

RESISTANCE TO APPELLANTS' APPLICATION FOR FURTHER REVIEW OF THE COURT OF APPEALS' RULING, FILED NOVEMBER 4, 2020

Andrew B. Howie
SHINDLER, ANDERSON, GOPLERUD & WEESE, P.C.
5015 Grand Ridge Drive, Suite 100
West Des Moines, Iowa 50265
515-223-4567; Fax: 515-223-8887
howie@sagwlaw.com
ATTORNEY FOR RESISTERS

Questions Presented

Question 1

When affirming the district court, the court of appeals properly applied the rule against restrictions on alienation in devises of property – a rule that has been recognized and applied in Iowa since 1880 – and properly rejected Appellants' argument to overrule 140 years of precedent to adopt Restatement (Third) of Property: Servitudes §§ 3.4 and 3.5; and properly found that, because the testator's devise was not charitable, rejected the executors' suggestion that the exception to the rule against restrictions on alienation of property should apply to noncharitable devises.

Question 2

The court of appeals' decision regarding the appointment of the temporary executor and the will's lease and option provisions does not conflict with: *Talladega College v. Callanan*, 197 N.W. 635, 638 (Iowa 1924); *In re Estate of Hansen*, 264 N.W.2d 746, 749 (Iowa 1978); or *Riley v. City of Hartley*, 565 N.W.2d 344, 346 (Iowa 1997).

Table of Contents

Page

Table of Authorities

Cases **Page**

Statutes and Rules

Other Authorities

Statement in Support of Resistance to Application for Further Review

This litigation concerns the probate of a will executed by the decedent, Vera Cawiezell. (App. at 12-14.) Applicants/Appellants, Terry Brooks, Jill Brooks, and Phyllis Knoche (hereinafter "the executors"), have applied for further review of the court of appeals' decision, filed November 4, 2020. (Court of Appeals' Ruling.) The Resisters/Appellees, Tom Coronelli and Beth Coronelli (hereinafter "the Coronellis"), who are beneficiaries under the will, resist that application for further review.

In her will, Vera left farmland of approximately 150 acres to the Coronellis, but restricted their ability to sell or transfer that property for twenty years after her death. (App. at 12-13 ("Item 3").) That restriction violates Iowa law. *See McCleary v. Ellis*, 54 Iowa 311, 6 N.W. 571 (1880) (adopting the rule against restrictions on alienation). In their application for further review, the executors ask this Court to overturn *McClearly* – 140 years of legal precedent. Neither the Restatement (Third) of Property: Servitudes §§ 3.4 and 3.5, nor the Iowa Supreme Court's decision in *In re Matter of Coe College*, 935 N.W.2d 581 (Iowa 2019), provide any basis to reverse the district court or reverse more than a century of legal precedent.

Further, the executors did not raise the issue of adopting the Restatement in the district court, mentioning overturning the *McCleary* precedent for the first time during their appeal. At trial, the executors argued that Iowa Code section 614.24 invalidates the rule against restrictions on alienation – an argument they now abandon in their application for further review. (*Cf.* Court of Appeals' Ruling p5-7.) Therefore, raising the Restatement as a basis to succeed in their appellate argument is not preserved appellate review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."); *see also State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) ("Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in trial court.").

As a result of that procedural posture, even if this Court found the issue properly preserved and that restraints on alienation were now valid as long as "reasonable" as the executors argues, there is virtually no evidentiary record to determine if this restraint is reasonable. If this scant evidentiary record supports any conclusion, restraining the Coronellis from selling the property except to their immediate family for twenty years is unreasonable.

The district court committed no error invalidating Vera's restriction on

alienation, and the court of appeals properly affirmed. (Ct. App. Ruling.) There is no basis for the Supreme Court to grant further review of the court of appeals' decision because the court of appeals properly applied the established law, correctly reviewed the evidence proffered at trial, and reached a sound resolution. *See* Iowa R. App. 6.1103(1)(b). Additionally, this case represents a clear application of *140-year-old* rule against restraints on alienation and does not present an issue of broad public importance. *See* R. 6.1103(1)(b)(4). This Court should deny further review.

Course of Proceedings and Relevant Facts

Vera died testate on April 17, 2018. (*See* App. at 12-14 (Vera's Last Will and Testament).) Terry Brooks had farmed Vera's approximately 150 acres as her tenant for five years prior to Vera's death. (App. at 46:14-18.) In her will, Vera specifically devised:

> I hereby will, devise and bequeath all of my farm real estate … consisting of approximately 150 acres to my friends, Tom and Beth Coronelli or unto the survivor of them, subject to the restriction that they should not sell or transfer the property outside their immediate family within a period of twenty years after my death. Terry Brooks has been leasing the farm from me under a share crop agreement and I would request that the Coronelli family continue leasing to Terry under favorable terms for his benefit. I further give Terry Brooks the first option to purchase the farm during the twenty year period following my death and I would further request that the terms of sale be favorable for Terry Brooks.

(App. at 12-13¶3; *see also* App. at 28¶2, 29-30); *In re Hoagland's Estate*, 203 N.W.2d 577, 581 (Iowa 1973) (defining a "specific devise" as "a gift of 'a designated article or specific part of the testator's estate which is identified and distinguishable from other things of the same kind, which may be satisfied by delivery of the specific thing or portion.'").

Based on Vera's will, the executors sought court approval of a deed conveying the farm to the Coronellis containing the restrictions prohibiting the Coronellis from selling or transferring the property outside of their immediate family for twenty years after Vera's death. (App. at 36¶5; *see* App. at 12-14.) The Coronellis responded by resisting the executors' actions and requested the court find, as to the farmland, "that any restrictions in the Last Will and Testament are unfair, unreasonable, and unenforceable." (App. at 41-42.) Another beneficiary of Vera's estate, Greg Ales, also challenged the executors' actions regarding the residence Ales received. (App. at 41-44; *see* App. at 12 ("Item 2").) Ales argued that boundary lines in the proposed deed for the residence, adjacent buildings, and the real estate he would receive diminished Ales' devise and violated Vera's intent. (App. at 43-44.)

The district court conducted an evidentiary hearing on January 2, 2019, regarding the executors' pending application to approve their version of the

respective deeds and the Coronellis' and Ales' respective resistances thereto. (App. at 45:all.) In a ruling filed on January 11, 2019, the district court initially concluded that the executors' application to approve their actions "is, in part, and uncaptioned Application to Approve Self-Dealing." (App. at 54.) The district court then appointed Gary McKenrick, a person who had "no financial or personal interest" in this action, as executor to determine the extent of the residence Ales received and the farm the Coronellis received. (App. at 54-55.)

On March 20, 2019, McKenrick filed a motion with the court regarding his recommendations to resolve the dispute. (App. at 58-61) Germane to this appeal, McKenrick recommended that the will's restriction on alienation of the farm "is not enforceable." (App. at 61.) However, McKenrick recommended "the 20-year right of first refusal in favor of Terry Brooks is enforceable and must be incorporated into the deed." (*Id.*) After another evidentiary hearing, the court ruled *inter alia* on May 29, 2019, regarding McKenrick's recommendations pertaining to the farm:

> On the issue of the restraint on alienation provision, the Court finds the provision *is not valid*. "The courts generally will not give effect to a testamentary provision to the effect that a devisee shall not for a period of time sell the property devised." *Guenther v. Roche*, 29 N.W.2d 222, 223 (Iowa 1947). The Court does not find [Iowa Code section] 614.24 controlling. The Court does find it equitable and consistent with the testator's intent to uphold the right of first refusal for Terry Brooks.

***

> It is further ordered that Terry Brooks shall retain a right of first refusal on the property and shall be given 90 days notice by the Coronelli's prior to listing the property for sale.

(App. at 83-85 (emphasis added); *see* App. at 58-61; *see also* App. at 12-13¶3.) The Coronellis and the executors timely filed motions per Iowa Civil Procedure Rule 1.904(2). (App. at 86-87, 88-89.) In their resistance to the Coronellis' motion, the executors requested:

> the Court *affirm its previous decision regarding the 90 day time period to refuse or accept a right of first refusal*. The Court should further state that Coronelli's cannot sell the property to any other third party without first offering the property to Terry Brooks for the same price and terms of sale.

(Emphasis added.) In response to those motions and resistances, on June 24, 2019, the court amended its previous ruling to state:

> The Court's intent in structuring the right of first refusal in the manner it did was to give Terry [Brooks] the option to purchase the property before it was listed on the open market. The Court finds there does need to be further specificity with the right of first refusal in that Terry shall have 90 days to exercise his right and the price shall be a fair market value price for the property. In the event the parties are unable to agree on an amount, the fair market value shall be determined by an average of two appraisals, one obtained by Terry and one obtained by the Coronelli's. The Court finds this is in keeping with the testamentary intent that the terms of sale be favorable to Terry, rather than forcing him to match an offer from the open market. Once the 90 days has expired or Terry has declined to exercise his right in writing, whichever event occurs first, the property may be listed and sold to a buyer of the Coronelli's choosing.

***

> The Court denies the request for further explanation on the ruling regarding the restraint. It was outlined in the Coronelli's resistance that simply having a right of first refusal does not prohibit the sale in contrast with the other language in the Will which does.

(App. at 91-92.)

Argument

As the Iowa Supreme Court ruled in 1880, "a restriction which would suspend all power of alienation for a *single day*, is inconsistent with the estate granted, unreasonable, and void." *McCleary*, 6 N.W. 573 (emphasis added). The Iowa Supreme Court has consistently reaffirmed that principle, most recently in *Matter of Coe College*, 935 N.W.2d 581, 586-87 (Iowa 2019) (citing *Sisters of Mercy of Cedar Rapids v. Lightner*, 274 N.W. 86, 92-93 (1937) ("In this state a restraint against alienation in a conveyance of a vested estate in fee simple is void, and this is true though the restraint is for a limited or particular time.")). Vera's intent to restrict the Coronellis' ability to sell or transfer the farm outside of their family for twenty years violates the rule against restrictions on alienation. *See id.* The executors have proffered no reasonable argument that the district court or Iowa's appellate courts should overturn that well-established precedent. This court should deny further review.

1. When affirming the district court, the court of appeals properly applied the rule against restrictions on alienation in devises of property – a rule that has been recognized and applied in Iowa since 1880 – and properly rejected Appellants' argument to overrule 140 years of precedent to adopt Restatement (Third) of Property: Servitudes §§ 3.4 and 3.5; and properly found that, because the testator's devise was not charitable, rejected the executors' suggestion that the exception to the rule against restrictions on alienation of property should apply to noncharitable devises.

In their application for further review, the executors "believe" that the 140 year-old "single day" rule that prohibits any restraint on alienation, as established by *McCleary v. Ellis*, 54 Iowa 311, 6 N.W. 571 (1880), is "outdated" and "inconsistent with other Iowa law". (Appellants' App. for Fur. Rev. p4.) The executors argue the ""single day"" test … should be replaced with a more balanced approach." (Appellants' App. for Fur. Rev. p7.) In other words, they want this court to overrule 140 years of precedent.

The authority they cite for such an audacious proposition is the Iowa Supreme Court's recent decision in *Matter of Coe College*, 935 N.W.2d 581, 586 (Iowa 2019). (Appellants' App. for Fur. Rev. p11-12.) By relying on *Coe College*, the executors blur legal concepts that are distinctly separate. *Coe College* dealt with a donation to a charity. That fact alone distinguishes *Coe College* from this case

because that case only concerned the interpretation of the *exception* to the rule against restrictions on alienation – the rule does not apply to gifts to charity or charitable uses. *Id.* at 586-87. Vera's will has nothing to do with charity – the farmland was not a charity, the Coronellis are not a charity, Vera cited no charitable condition or consideration in her will. (*See* App. at 12-14.) Further, the Iowa Supreme Court in *Coe College* reaffirmed the general rule against restrictions on alienation. 935 N.W.2d at 586-87 (citing *Sisters of Mercy of Cedar Rapids v. Lightner*, 223 Iowa 1049, 1060–61, 274 N.W. 86, 92–93 (1937).) Because this case does not involve a charity, *Coe College* does not apply here. (*See* Court of Appeals' Ruling p6-7.)

Because *Coe College* does not apply, the executors now argue that this Court should replace *McCleary* with the Restatement (Third) of Property: Servitudes §§ 3.4 and 3.5. (Appellants' App. for Fur. Rev. p7-13.) However, adopting the sections 3.4 and 3.5 will not bring "consistency and reasonableness to this area of law", rather it will instill uncertainty to property titles, conveyances, and devises. (*Cf.* Appellants' App. for Fur. Rev. p11-12.) The executors downplay Vera's restriction on alienation by calling the twenty-year ban on alienating the farm "of a limited nature and for a limited time". (Appellants' App. for Fur. Rev. p8.) Twenty years is hardly a "limited time". The executors argue that a twenty-

years restriction is reasonable by "weighing the utility of the restraint against the injurious consequences of enforcing the restraint." (Appellants' App. for Fur. Rev. p8.) Evaluating the possibilities of enforcing such a restraint need consider innumerable possibilities. Vera made no condition that the land she devised to the Coronellis can only be a farmed. Therefore, their citations about Iowa's "long policy … protecting its farms" has no bearing on this Court's determination in this case. (*See* Appellants' App. for Fur. Rev. p10.)

The executors' argument then extends to nothing but speculation because the Coronellis could choose to let this ground lay fallow for twenty years. Even if someone outside of the Coronellis' immediate family wanted to buy the ground to farm it, as the executors claim Vera desired, the restraint on alienation prevents such a transfer. Such possibilities refute claims that Vera's restriction is reasonable.

Finally, to reverse 140 years of precedent, this Court should demand a more substantive evidentiary trial record that is not here. For example, the executors' reliance on *Alfaro*, is misplaced as that California case detailed a long factual history through multiple local and state government regulations to provide affordable housing. *See Alfaro v. Cmty. Hous. Improvement Sys. & Planning Assn.*, Inc., 171 Cal. App. 4th 1356, 1364, (2009). The other cases they cite

allegedly supporting their argument is last ditch effort to throw any spurious and dubious legal claim to unjustly reverse precedent generally and the district court's ruling specifically.

Finally, the executors argue that "adopting the Restatement, Servitude is not a major change in Iowa law." (Appellants' App. for Fur. Rev. p11.) In support, they cite that Iowa permits a "right of first refusal" as a permissible restraint on alienation, *Trecker v. Langel*, 298 N.W.2d 289 (Iowa 1980), but a right of first refusal is not a blanket prohibition on virtually all sales as we have in this case. In her will, Vera prohibited the Coronellis from selling to anyone except their immediate family for twenty years. That restriction is unreasonable on its face. For example, the trial record reveals nothing of the Coronellis' immediate family, what "immediate" means, or if any such persons even exist, so it is difficult if not impossible for the court begin to evaluate whether the restriction is reasonable. The executors' arguments never consider the effect inflicted upon that land and the title if the court granted their relief. This Court should deny further review.

2. The court of appeals' decision regarding the appointment of the temporary executor and the will's lease and option provisions does not conflict with *Talladega College v. Callanan*, 197 N.W. 635, 638 (Iowa 1924); *In re Estate of Hansen*, 264 N.W.2d 746, 749 (Iowa 1978); or *Riley v. City of Hartley*, 565 N.W.2d 344, 346 (Iowa 1997).

A. The district court's appointment of a temporary executor has no effect on the district court's determination regarding the lease and/or "option" provisions and the executors accepted the appointment of the temporary executor.

The executors are direct and indirect devisees under the will. (*See* App. at 12-14.) Other beneficiaries, including Greg Ales and the Coronellis were other devisees under the will but not executors. (*Id.*) The executors prepared a survey to which they benefitted at the detriment of the will's other beneficiaries, Greg Ales and the Coronellis. (App. at 36¶5; *see* App. at 12-14.) The executors sought the district court's approval of the executors' survey as well as the deed the executors drafted which conveying the farmland to the Coronellis. (App. at 36¶5; *see* App. at 12-14.) After that hearing, the district immediately recognized that approving the executors' action would have confirmed the executors' self-dealing, or at least showed a conflict of interest. (App. at 54-55.)

The executors now argue that the court of appeals wrongly affirmed the appointment of the temporary executor because there was no finding "actual fraud" in the executors' actions. (Appellants' App. for Fur. Rev. p14-15 (citing

Talladega Coll. v. Callanan, 197 Iowa 556, 197 N.W. 635, 636 (1924).) *Talladega* does not stand for that principle. As the court of appeals correctly applied that case to this one, the *Talledega* decision requires:

> The one qualification which is put by many of the authorities upon the exercise of such power by the executors is that it must be in good faith. This necessarily means that the question raised must present a fair dispute. The decision may not be arbitrary. It may not contradict the clear provision of the will. In other words, the power may not be abused.

Talladega at 637; (*accord* Court of Appeals' Ruling p12-13). *Talledega* does not require the court to find the executors committed "actual fraud". *See id.*

More importantly, the executors raise an issue they did not challenge in the district court. As the court of appeals correctly concluded, "The executors did not contest the appointment of the temporary executor, although they disagreed with his recommendations. They presented no challenge on the issue of whether there was 'good cause' to appoint the temporary executor." (Court of Appeals' Ruling p13.) The executors' argument provides no basis for this Court to grant further review. *See* R. 6.1103(1)(b).

B. The will's language regarding the lease is not mandatory.

The executors argue that Vera's use of the word "request" regarding Terry Brooks should be "mandatory" rather than suggestive as to her bequest to the Coronellis. (Appellants' App. for Fur. Rev. p15.) In context, Vera's will expressly

states:

> Terry Brooks has been leasing the farm from me under a share crop agreement and *I would request* that the Coronelli family continue leasing to Terry under favorable terms for his benefit. I further give Terry Brooks the first option to purchase the farm during the twenty year period following my death and *I would further request* that the terms of sale be favorable for Terry Brooks.

(App. at 12-13¶3 (emphasis added).) In support of their argument, the executors cite *Matter of Hansen's Estate*, 264 N.W.2d 746, 749–50 (Iowa 1978). *Hansen* provides the legal principle that a court can interpret a testator's use of "request" as "precatory". "Precatory expressions are said to be 'Words of entreaty, request, desire, wish, or recommendation, employed in wills, as distinguished from direct and imperative terms.'" *Id.* at 749 (quoting Black's Law Dictionary (Rev. 4th Ed.)). "Compliance with a provision which is precatory is not compulsory." *Greer v. Bruck*, No. 02-1025, 2004 WL 149215, at *2 (Iowa Ct. App., filed Jan. 28, 2004) (citing *Phelps Mortgage Co. v. Thomas*, 194 Iowa 1078, 1083, 190 N.W. 399, 401 (1922)). However, here, the executors argue that when such "language in a will [] involves the disposition of real estate to more than one person is mandatory even if written in the form of a preference." (Appellants' App. for Fur. Rev. p15.) *Hansen* does not stand for that proposition at all.

In *Hansen*, the Court noted that debates over whether the word "request" is precatory or mandatory "[c]ommonly [arise] when a testator devises property

to a particular person and then addresses a wish to that person. In those situations the likelihood is stronger that the wish is precatory than when it is not addressed to the devisee." *Hansen,* 264 N.W.2d at 749. That is what Vera did in her will. Vera devised the farm to the Coronellis. Then, Vera "request[ed]" the Coronellis "continue leasing" to Brooks, but the Coronellis owned the farm outright. (App. at 12-13¶3.) *See Bradford v. Martin*, 199 Iowa 250, 201 N.W. 574, 576–77 (1925) (holding that phrases such as "wish" are "precatory" and not mandatory, particularly if the request or "wish" would be repugnant to the clause granting the devisee fee simple title). The only condition on the devise was the twenty-year restriction on alienation, but since that restriction violates the rule against restrictions on alienation, that condition is invalid leaving the Coronellis with a fee simple title. (*See* Resisters' arg. 1, supra.) Further, Vera's intent has no effect if her intent is legally unenforceable. *See, e.g.*, *Bradford*, 201 N.W. at 576–77. As the condition against alienation is entirely void, the Coronellis took an estate in fee simple, and the trial court was correct in its conclusion there were no further restrictions other than the right of first refusal. *In re Ogle's Estate*, 146 Iowa 33, 124 N.W. 758, 759–60 (1910). As such, Vera's "request" is precatory and not mandatory. *See Hansen's Estate*, 264 N.W.2d at 749; *Bradford*, 201 N.W. at 576–77. Therefore, there is no basis for this court to review the court of appeals' decision because the court of appeals properly applied the law and reached a correct

decision. *See* R. 6.1103(1)(b).

C. The court of appeals properly rejected the executors' argument that will's provisions gave Brooks an "option" instead of a "first right of refusal" to purchase the farmland from the Coronellis.

The executors wrongly assert that the court of appeals erred by finding that the executors' "were not preserved" on whether the trial court should have granted Brooks and "option" to purchase the farmland instead of a "first right of refusal". (*See* Appellants' App. for Fur. Rev. p16.) The court of appeals did *not* hold that the executors failed to preserve error, rather the court of appeals rejected the executors' alleged error by under the "Doctrine of Invited Error". (Court of Appeals' Ruling p9-10.) Therefore, whether the court of appeals' ruling conflicts with *Riley v. City of Hartley*, 565 N.W.2d 344, 346 (Iowa 1997), never comes into consideration.[1]

---

[1] If this Court finds the issue should have been determined, the executors still provide no legal basis to reverse the court of appeals' ruling. The executors wrongly claim the court of appeals ruling "unfairly eviscerated" Vera's bequest when it approved of the district court's grant to Brooks a 90-day right of first refusal rather than an "option". (*See* Appellants' App. for Fur. Rev. p16.) The executors confuse a "right of first refusal" and an "option". A right of first

To understand the real issue, the context of what occurred in the trial court, then how the court of appeals reviewed that decision is important. First, the will's language at the heart of this argument:

> I further give Terry Brooks the first option to purchase the farm during the twenty year period following my death and I would further request that the terms of sale be favorable for Terry Brooks.

---

refusal, often referred to as a preemption, is not an unlimited right, rather having a right of first refusal "merely requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the preemption. Once the owner decides to sell the property, the preemption ripens into an option." *Knepper v. Monticello State Bank*, 450 N.W.2d 833, 836 (Iowa 1990); *see Trecker v. Langel*, 298 N.W.2d 289, 290–91 (Iowa 1980). Therefore, under the terms of Vera's will, Brooks' right to purchase the farm became an option only when the Coronellis decided to sell the property. *See id.* Until the Coronellis choose to sell, Brooks has no legal rights in the farm. *Id.* If, after having notice of the sale and being given the option to pay the district court's provided price, the right of first refusal terminates. *See id.* The lower court correctly interpreted the language in Vera's will to be a right of first refusal in Brooks' favor. (App. at 90-92.)

(App. at 12-13 ("Item 3").) Construing that language, the trial court correctly found that Terry Brooks should retain the first right of refusal to purchase the farm as provided in Vera's will. (App. at 90-92.) Regarding the price that Brooks must pay, the court also required, if the parties could not agree, the amount would be "an average of two appraisals, one obtained by [Brooks] and one obtained by the Coronelli's." (App. at 90.)

On appeal, the executors argue Brooks has an option rather than a right of first refusal. (Court of Appeals' Ruling p9.) Rejecting the executors' alleged error, the court of appeals correctly found:

> On June 4, 2019, the executors filed a resistance to the Coronellis' rule 1.904(2) motion, stating:
>
> > [*The executors] request the Court affirm its previous decision regarding the 90-day time period to refuse or accept a right of first refusal.* The Court should further state that [the] Coronellis cannot sell the property without first offering the property to Terry Brooks for the same price and terms of sale.
>
> Before the district court, the executors accepted the court's decision that Cawiezell's will gave Brooks a right of first refusal and asked the court to affirm its earlier ruling on this issue.

(Court of Appeals' Ruling p9-10 (emphasis added).) The court of appeals properly concluded based on the executors' actions in the district court that they could not change their tune on appeal when they accepted the district court's decision. (*Id.* (citing *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 378 (Iowa Ct. App. 1989).) "Under the Doctrine of Invited Error, it is elementary a

litigant cannot complain of error which he has invited or to which he has assented." *McCracken* at 378-79. The executors own pleading clearly informed the trial court that they assented its decision to award Brooks a right of first refusal. *See id.* By failing to address the legal basis the court of appeals rejected the executors' claimed error in their application for further review, no basis exists for the Supreme Court to grant further review. *See* Iowa R. App. P. 6.1103(1)(b); *see also* R. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."); *cf. State v. Lyle*, 854 N.W.2d 378, 382 (Iowa 2014) ("We have consistently held an issue 'may be deemed' waived if a litigant fails to identify the issue, assign error, and make an argument supported by citation to authority in their initial brief."); *Soo Line R. Co. v. Iowa Dept. of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994) ("[R]andom mention of [an] issue, without elaboration or supportive authority, is insufficient to raise the issue for [the appellate court's] consideration."). Again, the executors have provided no basis for this Court to grant further review. See R. 6.1103(1)(b).

Conclusion

The executors fail to provide a factual or legal basis to reverse 140 years of legal precedent. The district court and court of appeals applied this unambiguous practice governing conveyances, transfers, and devises of real property. They either waived error or misunderstood the legal principles

governing the correct decisions of the district court and court of appeals. This court should deny further review.

Respectfully submitted,

/s/ Andrew B. Howie

Andrew B. Howie, AT0003716
SHINDLER, ANDERSON, GOPLERUD & WEESE, P.C.
5015 Grand Ridge Drive, Suite 100
West Des Moines, Iowa 50265
515-223-4567; Fax: 515-223-8887
howie@sagwlaw.com
ATTORNEY FOR RESISTERS

Certificate of Service

Pursuant to Iowa Appellate Procedure 6.701 and 6.901, the undersigned hereby certifies that on the 3rd day of December 2020, the Resistance to Application for Further Review was filed with the Supreme Court via EDMS and electronically served on all parties of record.

/s/ Andrew B. Howie
Andrew B. Howie

Certificate of Compliance with Typeface Requirements, And Type-Volume Limitation

This resistance complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this resistance has been prepared in a proportionally spaced typeface using Garamond in 14 point, and contains 4,620 words, excluding the parts of the resistance exempted by Iowa R. App. P. 6.1103(4)(a), or

[ ] this resistance has been prepared in a monospaced typeface using Garamond in 14 point, and contains ____lines of text, excluding the parts of the resistance exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Andrew B. Howie
Signature

December 3, 2020
Date

IN THE COURT OF APPEALS OF IOWA

No. 19-1214
Filed November 4, 2020

IN THE MATTER OF THE ESTATE OF VERA E. CAWIEZELL, Deceased.

PHYLLIS KNOCHE, TERRY BROOKS and JILL BROOKS,
Co-Executors-Appellants.

Appeal from the Iowa District Court for Muscatine County, Thomas G. Reidel and Patrick McElyea, Judges.

The executors appeal several issues concerning the district court's construction of the decedent's will. **AFFIRMED.**

Gregg Geerdes, Iowa City, for appellants.

Andrew B. Howie of Shindler, Anderson, Goplerud & Weese, P.C., West Des Moines, for appellees Tom and Beth Coronelli.

John L. Holmes of Koenig Law Firm, Rock Island, Illinois, for appellee Greg Ales.

Heard by Mullins, P.J., and May and Schumacher, JJ.

SCHUMACHER, Judge.

The executors appeal several issues concerning the district court's construction of the decedent's will. We determine the district court properly ruled a restriction on alienability in the decedent's will was not valid. We affirm the court's ruling on the provisions of the will concerning the farm tenant's first right of refusal to purchase the farmland and his continued leasing of the property. We also determine the court properly determined the boundary lines of the decedent's residence. Accordingly, we affirm the decision of the district court.

I. Background Facts & Proceedings

Vera Cawiezell was a hardworking former schoolteacher with a deep devotion to her 150-acre Muscatine County farm. She was actively involved in the farm's operation and assisted with her livestock until she was ninety years old. Cawiezell did not have children. Cawiezell died on April 17, 2018, at the age of ninety-four years, with her will nominating executors Phyllis Knoche, a friend; Terry Brooks, a farm tenant; and Jill Brooks, Terry Brooks's wife. This case involves the last will and testament of Cawiezell and the difficulties that arose between the executors and beneficiaries of the will. Cawiezell's will provided:

> Item 2. I hereby will, devise and bequeath my residence house and buildings close to home which are a part of my farm residence to my 2nd Cousin, Greg Ales. My executors are further authorized and empowered to determine the boundary lines for the survey of the farm residence. In addition, I give and bequeath all of the household contents located in my home to Greg Ales.
>
> Item 3. I hereby will, devise and bequeath all of my farm real estate located in the Northeast Quarter of Section 21, Township 78 North, Range 4 West of the 5th P.M. in Muscatine County, Iowa, except my homestead referred to in Item 2 above, consisting of approximately 150 acres to my friends, Tom and Beth Coronelli or unto the survivor of them, subject to the restriction that they should not sell or transfer the property outside their immediate family within

> a period of twenty years after my death. Terry Brooks has been leasing the farm from me under a share crop agreement and I would request that the Coronelli family continue leasing to Terry under favorable terms for his benefit. I further give Terry Brooks the first option to purchase the farm during the twenty year period following my death and I would further request that the terms of sale be favorable for Terry Brooks.

The will further provided Brooks would receive Cawiezell's farm machinery and livestock. Additionally, any debt he owed to Cawiezell was forgiven. Knoche received the remainder of Cawiezell's estate. The probate inventory shows Cawiezell had total gross property worth about $2.5 million.

As directed by the will, the executors, working with a surveyor, designated the residence property that was to be transferred to Ales. On November 2, 2018, the executors asked the court to approve the legal description of the residence. They also asked that the legal description of the farm property to be transferred to the Coronellis contain language recognizing the restriction on selling the property and noting Brooks's option to purchase. The Coronellis resisted the executors' requests concerning the farm property, arguing any restrictions in the will on their ability to sell or transfer the property were unfair, unreasonable, and unenforceable. Ales also objected to the legal description of the property set aside as the residence.

A hearing was held on January 2, 2019. The district court was concerned about potential self-dealing and determined "the decisions need to be made by an Executor who has no financial or personal interest in the execution of the above tasks." The court appointed a temporary executor, Gary McKenrick, to determine the area for the residence, draft proposed legal descriptions for the residence and farm property, make a recommendation concerning the restriction on transfer of

the farm property, and submit a report to the court. The executors filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), which was resisted by Ales. Based on the motion, the court ordered McKenrick "to make a recommendation to the Court regarding whether the garage should be included" in the property awarded to Ales.

McKenrick notified the parties on February 27, that he was recommending "the garage, existing driveway, well, and existing electrical service line . . . be included in the residential plat." McKenrick also stated:

> Regarding the issue of a restriction or limitation on alienation of the farm/agricultural tracts, my conclusion is that the provision in the will for the 20-year sale restriction is not enforceable. However, the 20-year right of first refusal in favor of Terry Brooks is enforceable and must be incorporated into the deed.

The executors contested McKenrick's recommendations.

After a hearing, the court found "the garage building is part of the residential property." The court ordered the plat to be redrawn to include the garage. The court also found the restraint-on-alienation provision of the will was not valid, citing *Guenther v. Roche*, 29 N.W.2d 222, 223 (Iowa 1947). The court determined "it is equitable and consistent with the testator's intent to uphold the right of first refusal" for Brooks. The Coronellis were ordered to give Brooks notice ninety days before listing the property for sale.

The Coronellis and the executors filed motions pursuant to Iowa Rule of Civil Procedure 1.904(2). Each party also resisted the other party's motion. The district court ruled:

> The Court's intent in structuring the right of first refusal in the manner it did was to give Terry the option to purchase the property before it was listed on the open market. The Court finds there does need to

> be further specificity with the right of first refusal in that Terry shall have 90 days to exercise his right and the price shall be a fair market value price for the property. In the event the parties are unable to agree on an amount, the fair market value shall be determined by an average of two appraisals, one obtained by Terry and one obtained by the Coronellis. The Court finds this is in keeping with the testamentary intent that the terms of sale be favorable to Terry, rather than forcing him to match an offer from the open market. Once the 90 days has expired or Terry has declined to exercise his right in writing, whichever event occurs first, the property may be listed and sold to a buyer of the Coronellis' choosing.

The court determined the boundaries for the residence should be those set out by McKenrick. The court denied the executors' request to further address its ruling on the issue of the validity of the provision restricting the Coronellis' ability to sell the farmland. The executors appeal the district court's ruling.

II. Standard of Review

Under Iowa Code section 633.33 (2018), this probate action was tried in equity. *See In re Estate of Hurt*, 681 N.W.2d 591, 593 (Iowa 2004). In equitable actions, our review is de novo. *Id.*

III. Restriction on Alienation

The executors claim the court improperly invalidated the provision in Cawiezell's will stating the bequest of farmland to the Coronellis was "subject to the restriction that they should not sell or transfer the property outside their immediate family within a period of twenty years after [Cawiezell's] death." The court found this restriction on alienation could not be enforced.

The case cited by the district court provides, "The courts generally will not give effect to a testamentary provision to the effect that a devisee shall not for a period of time sell the property devised." *Guenther*, 29 N.W.2d at 223. The Iowa Supreme Court has stated, "A general restraint on alienation, whether by deed or

will, is undoubtedly void." *Crecelius v. Smith*, 125 N.W.2d 786, 789 (Iowa 1964). Also, "the right of alienation has been considered an inseparable incident to an estate in fee, and it is repugnant to the estate conveyed and against the policy of the law to allow restraints to be imposed on the alienation of such an estate." *Id.*

The executors assert the provision is valid and enforceable under Iowa Code section 614.24. This section was enacted in 1965, and the executors contend that it changed the general rule against restrictions on alienation. *See* 1965 Iowa Acts ch. 428, § 1. Section 614.24(1) provides that an action arising from a will "reserving or providing for any reversion, reverted interest or use restrictions in and to the land therein described" cannot be brought "after twenty-one years from the admission of said will to probate."

The executors assert the restriction on alienation in Cawiezell's will is a "use restriction." The term "use restriction" is defined[1] as follows:

> [A] limitation or prohibition on the rights of a landowner to make use of the landowner's real estate, including but not limited to limitations or prohibitions on commercial uses, rental use, parking and storage of recreational vehicles and their attachments, ownership of pets, outdoor domestic uses, construction and use of accessory structures, building dimensions and colors, building construction materials, and landscaping.

Iowa Code § 614.24(5).

The executors contend "a restriction on the alienation of property is considered to be a restriction on the use of property," citing *Sisters of Mercy of Cedar Rapids v. Lightner*, 274 N.W. 86, 92 (Iowa 1937). The case sets out the general rule, "In this state a restraint against alienation in a conveyance of a vested

[1] The definition includes certain exceptions, which are not applicable here. *See* Iowa Code § 614.24(5)(a)–(c).

estate in fee simple is void, and this is true though the restraint is for a limited or particular time." *Sisters of Mercy*, 274 N.W. at 92. "However, gifts to charitable uses do not come within the prohibition of the rule." *Id.* Because the case involved a donation for a charitable use, the exception rather than the general rule was applied. *Id.* We conclude *Sisters of Mercy* does not support the executors' argument that a use restriction should be considered a restriction on alienation in situations that do not involve a charitable donation. Additionally, we have not found any other authority to support this proposition.

Furthermore, the purpose of section 614.24 is to "give effect and stability to record titles by rendering them marketable and alienable-in substance to improve and render less complicated the land transfer system." *Amana Soc. v. Colony Inn, Inc.*, 315 N.W.2d 101, 112 (Iowa 1982). "[T]he section imposes a twenty-one-year limit on the life of land-use restrictions 'by providing for automatic termination of the covenants in the absence of affirmative actions to continue them.'" *Chipman's Subdivision Homeowners Ass'n, Inc. v. Carney*, No. 11-0545, 2012 WL 642869, at *2 (Iowa Ct. App. Feb. 29, 2012) (quoting *Compiano v. Jones*, 269 N.W.2d 459, 461 (Iowa 1978)). Thus, the purpose of section 614.24 is to simplify the transfer of land, not to impose restrictions on the alienation of property.

We determine the district court properly ruled the restriction on alienability in Cawiezell's will was not valid.

IV. Provisions Involving Brooks

A. Cawiezell's will "request[ed] that the Coronelli family continue leasing to Terry under favorable terms for his benefit" and "request[ed] that the terms of sale be favorable for Terry Brooks." The executors assert the term "request," as

used here, should be considered mandatory. "[T]he word request, in context, may be imperative." *In re Estate of Hansen*, 264 N.W.2d 746, 749 (Iowa 1978). Usually, however, a request is "a precatory clause in which a testator gives a beneficiary property and then expresses the hope that he will use it in a certain way." *Id.* at 750.

We previously stated, "Precatory expressions are words of entreaty, request, desire, wish, or recommendation, as distinguished from direct and imperative terms. Compliance with a provision which is precatory is not compulsory. The terms 'wish' or 'desire,' however, are often not merely precatory, but have the force and effect of a specific direction." *Greer v. Bruck*, No. 02-1025, 2004 WL 149215, at *2 (Iowa Ct. App. Jan. 28, 2004) (citations omitted). "A wish directed to a beneficiary is generally regarded as precatory, unless clearly the words express the testator's intention to the contrary; where the words are addressed to an executor, they are regarded as mandatory." *In re Estate of Johnson*, 30 N.W.2d 164, 166 (Iowa 1947).

The requests in Cawiezell's will were directed to the Coronellis, who are beneficiaries, and therefore, the term "request" should be considered precatory, rather than mandatory. *See id.* We determine the term "request" should be given its usual interpretation in this case, meaning a hope the beneficiaries will use the property in a certain way. *See Hansen*, 264 N.W.2d at 749. The will does not contain additional mandatory language which would change the context of the request in this case. *See id.* at 749–50 (finding a request, followed by mandatory language, made the request "not merely precatory").

B. Cawiezell's will stated, "I further give Terry Brooks the first option to purchase the farm during the twenty year period following my death and I would further request that the terms of sale be favorable for Terry Brooks." The district court construed the phrase "first option" as a right of first refusal, stating, "The Court's intent in structuring the right of first refusal in the manner it did was to give Terry the option to purchase the property before it was listed on the open market." On appeal, the executors argue Brooks has an option, rather than a right of first refusal.

"An option creates in the optionee a power to compel the owner of property to sell it at a stipulated price whether or not he be willing to part with ownership." *Trecker v. Langel*, 298 N.W.2d 289, 290 (Iowa 1980). The right of first refusal is the "'right to elect to take specified property at the same price and on the same terms and conditions as those contained in a good faith offer by a third person if the owner manifests a willingness to accept the offer.'" *Mercy Hosp. v. McNulty*, No. 14-0241, 2015 WL 576016, at *3 n.7 (Iowa Ct. App. Feb. 11, 2015) (quoting *First Refusal*, Black's Law Dictionary (6th ed. 1994)).

The district court ruled, "Terry Brooks shall retain a right of first refusal on the property and shall be given 90-days notice by the Coronellis prior to listing the property for sale." The Coronellis filed a rule 1.904(2) motion, asserting that if the Coronellis received a competing offer for the property, Brooks should have fourteen days to respond. On June 4, 2019, the executors filed a resistance to the Coronellis' rule 1.904(2) motion, stating:

> [The executors] request the Court affirm its previous decision regarding the 90-day time period to refuse or accept a right of first refusal. The Court should further state that [the] Coronellis cannot

> sell the property without first offering the property to Terry Brooks for the same price and terms of sale.

Before the district court, the executors accepted the court's decision that Cawiezell's will gave Brooks a right of first refusal and asked the court to affirm its earlier ruling on this issue. "Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in trial court. *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). "Under the Doctrine of Invited Error, it is elementary a litigant cannot complain of error which he has invited or to which he has assented." *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 378–79 (Iowa Ct. App. 1989). We conclude the executors are barred from arguing Brooks received an option rather than a right of first refusal. Also, the executors agreed to the ninety-day time limit, precluding their arguments on appeal challenging that time period.

C. The executors claim the district court improperly construed the provision "request[ing] that the terms of sale be favorable for Terry Brooks." The executors assert Brooks should be able to buy the farmland for twenty-five percent less than the fair market value. The executors state the terms of sale would not be "favorable" to Brooks unless there is a reduction in price. In the ruling on the rule 1.904(2) motions, the court stated Brooks should pay "a fair market value for the property."[2]

[2] The parties do not challenge the specific terms of the district court's ruling providing for what should happen "[i]n the event the parties are unable to agree on an amount . . . ." For this reason, we do not address the individual terms in the court's ruling on this hypothetical situation.

As noted above, the executors' resistance to the Coronellis' rule 1.904(2) motion stated, "The Court should further state that [the] Coronellis cannot sell the property without first offering the property to Terry Brooks for the *same price* and terms of sale." (Emphasis added.) By their argument in the district court, the executors have already agreed that Brooks could be required to pay the same price for the farmland as the Coronellis are offering it on the open market. The executors' assent to this provision in the district court precludes them from arguing on appeal that the provision was improper. *See id.*; *see also State v. Hall*, 740 N.W.2d 200, 202 (Iowa Ct. App. 2007) (noting a party "may not allege error on an issue to which he acquiesced").

D. Cawiezell's will provided, "Terry Brooks has been leasing the farm from me under a share crop agreement and I would request that the Coronelli family continue leasing to Terry under favorable terms for his benefit." The executors first repeat their argument that the Coronellis are restricted from selling or transferring the farmland for a period of twenty years. They claim a lease is considered to be a conveyance, and conclude the Coronellis may not lease the property to anyone other than Brooks for a period of twenty years.

We have already determined the provision stating the Coronellis should not sell or transfer the property for twenty years is invalid. *See Guenther*, 29 N.W.2d at 223. As the predicate for the executors' argument is not legally viable, we do not accept their conclusion. In addition, we have determined the term "request" as used here is precatory, not mandatory. *See Johnson*, 30 N.W.2d at 166.

V. Legal Description of Residence

The executors contend the district court should have adopted their proposed legal description for the residence, which was bequeathed to Ales.[3] They point out the will provides the "executors are further authorized and empowered to determine the boundary lines for the survey of the farm residence." The provision applies to Cawiezell's "residence house and buildings close to home which are a part of [her] farm residence."

Where executors are vested with a discretionary power to determine disputes arising under a will, they must exercise this power in good faith. *Talladega Coll. v. Callanan*, 197 N.W. 635, 637 (Iowa 1924). The executors' actions may not be arbitrary or contradict the provisions of the will. *Id.* "In other words, the power may not be abused." *Id.*

In the ruling on January 11, 2019, the district court stated,

> In no way is the Court doubting the integrity and honor of the Co-Executors, but a conflict certainly exists regarding all actions they are taking. Terry and Jill Brooks are farm tenants and are using the garage. This could certainly impact their determination that the garage does not constitute "a building close to the home."

Due to this conflict of interest, the court appointed a temporary executor pursuant to Iowa Code section 633.343. This section provides:

> At any time during the administration of an estate, the court, for good cause shown, may appoint a temporary administrator to carry out such orders of the court as may be necessary for the proper administration of such estate. No appeal from such appointment shall prevent the temporary administrator from proceeding in the discharge of the administrator's duties.

[3] Ales has not made an appearance in this appeal. The Coronellis filed an appellate brief but take no position on this issue.

Iowa Code § 633.343; *see also In re Trust of No. T-1 of Trimble*, 826 N.W.2d 474, 486 (Iowa 2013) (noting a court may appoint a temporary administrator "for good cause shown").

The executors did not contest the appointment of the temporary executor, although they disagreed with his recommendations. They presented no challenge on the issue of whether there was "good cause" to appoint the temporary executor. *See In re Estate of Jarvis*, 185 N.W.2d 753, 756 (Iowa 1971) (finding a party could not contest the appointment of a temporary administrator when the party did not challenge the appointment of the temporary administrator and assisted in the temporary administrator's investigation).

"We note that in appropriate cases administration by an executor appointed under a previously admitted will may be terminated or interrupted by application of section . . . 633.343." *In re Estate of Franzkowiak*, 290 N.W.2d 1, 4 (Iowa 1980). The court directed the temporary executor to "[d]etermine a reasonable and fair survey of the home to include buildings close to the home to include at a minimum the garage and use of the current entrance to the property." The executors' duty to determine the boundary lines of the residence were terminated or interrupted by the court's direction to the temporary executor to perform this duty. *See id.* At that point, the issue was no longer within the discretion of the executors.

We determine the district court properly set the boundary lines for the residence to include the garage. The garage was closer to the house than some other outbuildings, such as a machine shed and corn crib, which were not included in the residence property. There were some small farm tools in the garage, but primarily Cawiezell used the garage to park her personal vehicle. There was a

path from the garage to the house. We conclude the legal description approved by the district court properly includes Cawiezell's "residence house and buildings close to home which are a part of [her] farm residence."

We affirm the decision of the district court.

AFFIRMED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
19-1214	In re Estate of Cawiezell

Electronically signed on 2020-11-04 08:32:04