

TRUSTS AND ESTATES UPDATE

Expert Analysis

A Matter of Interpretation: Construction of Wills

The construction of a testamentary instrument can play an important role in ascertaining the disposition of an estate, the interests of its beneficiaries, and the duties and responsibilities of its fiduciary. The intent of the testator, the meaning of the words used, and extrinsic evidence all may affect the interpretation of the document. Consider the following:

Decedent's Intent

Before the Surrogate's Court, Richmond County, in *In re Thompson*, was a motion and cross-motion for summary judgment requesting the construction of the decedent's will. The petitioner, the decedent's niece, and executor of her estate, sought a construction that would result in a gift to her by implication of the decedent's entire residuary estate. The decedent's sister opposed the application, and requested a determination that the residuary estate be distributed, in equal shares, to her and the petitioner, as the decedent's sole intestate distributees.

The record revealed that the decedent executed her will simultaneously with her husband, who predeceased her. Both instruments were identical and provided that their respective estates would pass to the survivor of

them, and nominated the petitioner as executor. Further, in the event that the decedent and her husband perished in a common disaster, the instruments provided that their estates would pass to their niece. Nevertheless, despite her provision for a common disaster, the decedent's will failed to make any provision for the distribution of her estate under the circumstances presented; that is, in the event that her husband predeceased her.

The court opined that the intent of the testator must be the overriding consideration in determining the import of a will, and must be gleaned from a sympathetic reading of the instrument in its entirety, based upon the facts and circumstances under which the provisions of the will were framed. Further, the court noted that there is a strong presumption against intestacy, particularly where the disposition of the decedent's residuary estate is in issue.

With the foregoing in mind, the court concluded that where the express language of a will reveals an intention or purpose of the testator, that intention or purpose is to be respected even if it

results in the disposition of property by implication rather than by explicit language in the instrument. Thus, the court observed, when the entire will unquestionably reveals an intent to provide for the complete disposition of a decedent's estate, but the decedent inadvertently neglected to foresee every contingency, the presumption against intestacy may be applied, and a gift by implication found. On the other hand, the court recognized that a gift by implication will not be found unless the dominant purpose of the decedent's dispositive plan is clear.

Accordingly, based upon a review of the record, the court found conflicting issues of fact as to the intent of the decedent regarding the disposition of her estate, and denied the motion and cross-motion for summary judgment.

In re Thompson, NYLJ, Jan. 15, 2014, at 26 (Sur. Ct. Richmond County).

Intestacy

Despite the presumption against intestacy, the surrogate's courts of Erie and New York counties recently found that intestate distribution of the decedent's estate was required.

In *In re Borowiak*, 2014 N.Y. Slip Op 50444 (Sur. Ct. Erie County), the Surrogate's Court, Erie County, found that the decedent's will failed to make provision for the disposition of his estate and, therefore, directed that it pass pursuant to the laws of intestacy.

The decedent died survived by his wife and an adult daughter. Following

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the admission of his will to probate, his wife, who was the executor, petitioned the court for a construction that would leave his entire estate to her. The record revealed that the instrument, which had not been drafted by an attorney, simply nominated the decedent's wife to be the executor of his estate and directed that in the event of any "accidents, health failures or otherwise" he not be resuscitated. The decedent's wife maintained that because the will had not been prepared by an attorney, her nomination as executor should be construed to entitle her to his whole estate.

The court denied the application, finding that a reading of the will in its entirety did not justify the result requested by the petitioner. Specifically, the court noted that the decedent's will contained only two substantive provisions: the nomination of his wife to serve as the executor of his estate, and the direction that he not be resuscitated. To this extent, the court found the instrument to be a hybrid between a testamentary document, operative upon the decedent's death, and a living will, operative during his lifetime.

By contrast, the court observed that a will is defined as a written instrument that nominates a fiduciary or makes provision for the administration of the decedent's estate, and is designed only to take effect upon death. Within this context, the court concluded that it was possible for a will to be intended for the sole purpose of nominating an executor.

Accordingly, the court rejected the construction posited by the decedent's wife, found that the decedent's will consisted only of the paragraph which nominated his wife as the executor of his estate, and directed that the estate be distributed pursuant to the laws of intestacy.

In *In re Ruee, Cantin*, NYLJ, July 18, 2014, at 24, in Surrogate's Court, New York County (Mella, S.), the parties, in an otherwise uncontested probate proceeding, requested a determination as to the disposition of the decedent's residuary estate.

her, did not cause the residuary estate to fail entirely. Rather, the court found that when the beneficiary of a life estate does not survive the decedent, the remainder interest is not destroyed but accelerates. Therefore, the court held, under the circumstances, the pecuniary interests of the decedent's niece and grandchildren did not lapse and were effective dispositions of a part of the decedent's residuary estate following the death of her mother.

The record revealed that on Jan. 1, 1947, the decedent gave birth to a son who was adopted by strangers several weeks later in a private adoption proceeding. She had no other children. Prior to the decedent's death, her adopted son sought out and found the decedent, and he and his two children developed a close relationship with her until her demise on March 5, 2013.

The decedent died with an estate of approximately \$600,000, and in her will acknowledged that she had one son. The decedent was also survived by a niece and nephew. Pursuant to the terms of her will, the decedent directed that her entire residuary estate be held in trust for the benefit of her mother. The decedent further directed that upon her mother's death her grandchildren (children of her adopted-out son), and her niece each be given \$20,000, and the balance of the trust estate be paid over to her aunt. The decedent's mother and her aunt predeceased her.

Despite the presumption against intestacy, the surrogate's courts of Erie and New York counties found that intestate distribution of the decedent's estate was required.

As a consequence of the foregoing, the decedent's niece argued that the residuary estate lapsed, and passed to her pursuant to the laws of intestacy. The decedent's son and grandchildren agreed that the residuary estate lapsed but maintained instead that it passed either to her son or her grandchildren, or alternatively, that it should be divided between her niece and grandchildren.

The court first addressed the issue of whether there was a complete or partial lapse of the residuary estate. Upon reviewing the terms of the instrument, the court observed that the fact the decedent's mother predeceased

her, did not cause the residuary estate to fail entirely. Rather, the court found that when the beneficiary of a life estate does not survive the decedent, the remainder interest is not destroyed but accelerates. Therefore, the court held, under the circumstances, the pecuniary interests of the decedent's niece and grandchildren did not lapse and were effective dispositions of a part of the decedent's residuary estate following the death of her mother.

On the other hand, the court concluded that since the decedent did not make an alternative disposition of the balance of her estate in the event her aunt predeceased her, that portion of the residue lapsed. Noting that there is a presumption against intestacy, particularly where a decedent took the requisite steps to execute a will, the court stated that it would be inclined to hold that the ineffective residuary be saved by directing a distribution, ratably, to the remaining residuary beneficiaries. However, the court found this result inoperative since the only beneficiaries of the residue—the decedent's niece and grandchildren—were pecuniary legatees, and not residuary heirs.

Accordingly, the court held that the remainder of the decedent's estate lapsed and passed to her intestate distributees. In assessing whether the decedent's son and grandchildren were included within that class, the court referred to the provisions of Domestic Relations Law (DRL) §117(2)(a) and noted that adopted children are to be considered strangers to their biological relatives unless the instrument evinces a contrary intention by naming the child specifically or defining the class so as to include adopted-out children. Further, the court observed that DRL §117(1)(b) clearly states that where a decedent's estate or a portion thereof passes by intestacy, an adopted-out child has no right to inherit as a distributee of his or her biological parent. Therefore, the court held that neither the decedent's adopted-out

son, nor his children, qualified as her intestate distributees, and directed that the ineffective remainder interest of her estate be distributed to her niece and nephew.

Meaning of the Term 'Issue'

In a miscellaneous proceeding before the Surrogate's Court, Kings County, the executor petitioned for a construction of Article Third of the decedent's will to permit distribution of the estate to the decedent's three step-daughters, one of whom was the petitioner. Objections to the application were filed by the executor of the estate of the decedent's post-deceased father, who claimed that, pursuant to the unambiguous terms of the decedent's will, distribution of her estate passed to her next of kin.

Article Second and Article Third of the decedent's will bequeathed her residuary estate to her husband (the father of her step-daughters), and directed that, in the event he predeceased the decedent, her residuary estate was to be distributed to her "living issue, per stirpes." In Article Sixth of the instrument, the decedent nominated her husband as the executor of her estate, and her "daughter," the petitioner, as the successor executor.

In support of her application, the petitioner alleged that the decedent's use of the term "issue" in Article Third of the will, coupled with her use of the term "daughter" to refer to her in Article Sixth, created a latent ambiguity regarding the identity of her contingent beneficiaries, particularly in view of the fact that the decedent neither adopted her step-daughters, nor had any biological children of her own. As a result, the petitioner asserted that extrinsic evidence could be referred to in order to ascertain the decedent's intent.

On the other hand, the objectant maintained that the use of the term "issue" in the will was unambiguous, and required no construction, since the term was defined by statute to mean the natural or adopted descen-

dants of a decedent. As a result, the objectant argued that the decedent's estate passed in accordance with the laws of intestacy. Further, the objectant alleged that the result urged by the petitioner would operate to create a gift by implication, a theory rarely invoked in construction proceedings. Alternatively, the objectant claimed that if the court found the will to be ambiguous, a presumption existed in favor of a construction that would result in a distribution of the estate to the decedent's next of kin rather than to strangers.

The court in 'Thompson' concluded that where the express language of a will reveals an intention or purpose of the testator, that intention or purpose is to be respected even if it results in the disposition of property by implication rather than by explicit language in the instrument.

The court opined that a latent ambiguity arises when the language employed in a will, though on its face susceptible of a single interpretation, requires reference to some extrinsic fact or circumstance for interpretation. Applying this principle to the subject will, the court found that the decedent's use of the term "daughter" in reference to the petitioner, and her use of the term "issue" in Article Third, while not ostensibly in conflict, created a latent ambiguity in the instrument, requiring consideration of extrinsic facts to clarify the decedent's intent, since she had no biological children, and that the petitioner and her siblings were actually her step-children.

Upon review of the external evidence, the court found no indication that the decedent had any intention other than the complete disposition of her estate by will. Indeed, the court

concluded that the evidence demonstrated that the decedent and her husband created a coherent and unified estate plan designed to benefit the surviving members of the family in the event of their death. The intent of the decedent to include her step-daughters as part of her testamentary plan was apparent in the attorney-drafter's notes as well as in the reciprocal provisions of their wills.

The court rejected the objectant's claims that the estate should pass by intestacy, since the use of the term "issue" in its strictest sense did not include the decedent's step-daughters. Rather, the court held that the presumption in favor of a technical or statutory meaning may be overcome where it "appears...from extraneous facts...that the testator used the words in their popular or common sense." *Lawton v. Corlies*, 127 N.Y. 100, 105 (1891).

The court stated that the process of interpretation should not be so rigid, and should not be limited by "undue and obstructive requirements that would confine the court's investigation to a mere reading of the language before it." The court found equally unpersuasive the objectant's contentions that blood relatives should be favored over strangers in the construction of testamentary language. Indeed, the court noted that nothing in the extrinsic evidence supported a finding that the decedent intended to exclude her step-daughters from her estate plan.

Accordingly, the court granted the petitioner's application for construction, and directed that the decedent's estate be distributed to her three step-daughters.

In re Sponholz, NYLJ, June 16, 2014, at 28 (Sur. Ct. Kings County).