STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of LUSCINDA JANE STILLSON,
Deceased.

JOHN STILLSON and GARY STILLSON,

Petitioner -Appellants,

v

FLOYD H. FARMER, JR., Personal Representative of the Estate of LUSCINDA JANE STILLSON, VICTORIA BROOKS, a Minor MICHAEL BROOKS, a Minor, and LLOYD STILLSON,

Respondent-Appellees.

UNPUBLISHED
June 29, 2010

No. 286777
Ottawa Probate Court
LC No. 07-054852-DA

Before: MARKEY, P.J., and BANDSTRA and MURRAY, JJ.

PER CURIAM.

Appellants John and Gary Stillsons ("Stillsons") appeal as of right from the trial court's order construing the will of their mother, Luscinda Jane Stillson, and holding that extrinsic evidence proved that they were not devisees under the will. We reverse.

I. FACTS AND PROCEEDINGS

On April 9, 2001, Luscinda Jane Stillson, who was 91 years old, executed a will. At the time the will was executed, all three of Luscinda's sons, Floyd, John and Gary Stillson, were living. The will provided, in part:

> After the necessary payment of my debts and expenses, I will, devise, and bequeath all of my property, both real and personal, or whatever kind and wherever situated, of which I may die possessed, to my son Floyd Stillson, should he be living at the time of my death.
>
> In the event my son Floyd does not survive me, or if we die as a result of a common disaster, all my estate and property, real, personal or mixed, in

possession or in expectancy at the time of my death, I bequeath to my other heirs at law.

* * *

Although I bear no ill-will toward either of my other sons, Gary Stillson and John Stillson, nor toward [sic] any friend or relative, for reasons of my own it is my desire that distribution of my estate be limited to my son Floyd Stillson as previously specified in this my Last Will and Testament.

Floyd was named personal representative of Luscinda's estate and if Floyd predeceased Luscinda, Floyd Farmer, Luscinda's attorney, was to be the personal representative of Luscinda's estate. Floyd Stillson predeceased Luscinda, who passed away on April 15, 2007. Floyd Stillson had four children, Melissa Mergener, Leisha Richardson, another (unnamed) daughter, and appellee Lloyd Stillson. The unnamed daughter predeceased Floyd Stillson and left two children, appellees Michael and Victoria Brooks.

On November 26, 2007, the Stillsons filed a petition for supervision of estate, for construction of will, and to enjoin distribution of estate assets or sale of estate assets. On December 17, 2007, a hearing was held. The trial court indicated:

All right. This is a curious provision. The first paragraph as been pointed out indicates that all of the property of the estate goes to son Floyd in the event that he survives her. But in the event that that does not take place then-and if he is not surviving at the time of my death I bequeath to my other heirs at law. And then in paragraph three she indicates "for reasons of my own it is my desire that distribution of my estate be limited to my son Floyd as previously specified in this my Last Will and Testament. Referring again to paragraph one.

The question then is whether or not Gary Stillson and John Stillson are other heirs at law. If she had said just heirs at law without the word other Gary and John are heirs at law. I would be more inclined then to think to conclude that it was not ambiguous and that Gary and John were heirs. She adds the modifier other, other heirs at law. *So does that mean heirs other that John and Gary or is that just a reference to her other heirs, meaning other than Floyd?*

I think the will is ambiguous. In part because if the parties are here debating its meaning it would seem to support the proposition that there's an ambiguity. But I think that reasonable people may differ about its interpretation just looking at it from the four corners of the document. And for that reason on [sic] I believe extrinsic evidence should be permitted to assist in clarifying it.

* * *

I will make a finding that there is an ambiguity in the will. I think it's both patent and latent. If patent is on the-it's at least patent, *let's put it that way. Just from the words itself what the phrase "other heirs at law" means is ambiguous and that phrase in paragraph one in the context of paragraph two I*

> *really don't know what other heirs at law, what group of persons that applies to. And so I'm going to find it ambiguous and permit parol evidence.* [emphasis added.]

Farmer subsequently filed a petition for protective order, for determination of testamentary takers, and for lift of stay. On March 17, 2008, another hearing was held, after which the trial court entered an order which provided that "John Stillson and Gary Stillson shall be considered takers under the Last Will and Testament of the Decedent for the reasons stated on the record in open court on March 17, 2008." Because there was a malfunction with the recording equipment, a transcript was not made. The parties later acknowledged, however, that at the hearing they all agreed that the will was unambiguous, but they differed on the meaning of that unambiguous language.

On April 28, 2008, Farmer filed a petition for reconsideration of the trial court's ruling, which the trial court granted. The order provided that since there was no transcript for the March 17, 2008 hearing, a rehearing would take place on June 17, 2008. In addition, the order provided that the parties would be allowed to present extrinsic evidence as to the testator's intent concerning her will because a latent ambiguity existed with regard to the relevant language.

After the hearing on the motion for reconsideration was held, the trial court issued an opinion finding at least a patent ambiguity existed, and that the credible extrinsic evidence proved that Luscinda did not intend on devising any of her estate to the Stillsons:

> The Court concludes that John Stillson and Gary Stillson do not take under the Will, and that the phrase "other heirs at law" applies only to the children of Floyd Stillson. *The Court reaches this conclusion because it finds the Will to be ambiguous, and that based on the extrinsic evidence admitted by the Court, the Testator's intention was to not permit John and Gary Stillson to take under the Will under any circumstances and that the children of Floyd Stillson should receive her property if Floyd did not survive her*.
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> * * *
>
> In this case the Personal Representative, Floyd Farmer, was also the attorney who drafted the Will. He testified that the Testator told him that she in no way wanted her sons, John and Gary, to be takers under the Will. She wanted all her property to go to her son, Floyd, and that if Floyd did not survive her, she wanted it to go to Floyd's children. He further testified that he drafted the Will using the phrase "other heirs at law" to mean only Floyd's children, not John and Gary.
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> Other testimony was received from Tina Marie Barkai. She is a niece of Lucinda [sic] Stillson and spent time with her in the years prior to her death. She at first indicated that her aunt wanted the property to go to Floyd, but said nothing at all about what would happen to the property if Floyd predeceased her. Later, in rebuttal testimony she indicated that her aunt had told her that she wanted John and Gary to get the property if Floyd predeceased her. The Court found her

rebuttal testimony to be in direct conflict with her original testimony and seems to be modeled to conform to the testimony of John Stillson and Gary Stillson ,which was given between her earlier and later testimony. Therefore, the Court discounts her later testimony.

Both John and Gary Stillson also testified. They said that on at least two occasions after the execution of the Will (one in August 2001 and the other sometime in 2002) the Testator said to them that Floyd would receive the house, but that after he passed away it would be left to the two of them.

* * *

The Court finds the more convincing testimony was provided by Mr. Farmer. The Court finds that it was Lucinda [sic] Stillson's intention that her son Floyd receive her property, and that it go to Floyd's children in the event Floyd predeceased her. Therefore the Court determines the phrase "other heirs at law" to be the children of Floyd Stillson, and they are the only takers under the Last Will and Testament of Lucinda [sic] Stillson.

II. ANALYSIS

The Stillsons argue that the trial court erred in admitting extrinsic evidence to determine the meaning of the phrase "other heirs at law" when no ambiguity was present. "[A] probate court's construction of a will is a question of law subject to de novo review." *In re Raymond Estate*, 483 Mich 48, 53; 764 NW2d 1 (2009). Findings of fact made by a probate court sitting without a jury are upheld unless they are clearly erroneous. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003).

> The primary goal of the court in construing a will is to effectuate, to the extent consistent with the law, the intent of the testator. To accomplish this, a court gives effect to the drafter's intent as indicated in the plain language of the will. The will must be read as a whole and harmonized, if possible, with the intent expressed in the document. If there is no ambiguity, the court is to enforce the will as written. However, if the intent of the testator cannot be gleaned solely by reference to the will because there is an ambiguity, the court may discern the intent of the testator through extrinsic sources. [*In re Raymond Estate*, 483 Mich at 52 (citations and quotations omitted).]

In *In re Woodworth Trust*, 196 Mich App 326, 327-328; 492 NW2d 818 (1992), this Court observed:

> A patent ambiguity exists if an uncertainty concerning the meaning appears on the face of the instrument and arises from the use of defective, obscure, or insensible language. A latent ambiguity exists where the language and its meaning is clear, but some extrinsic fact creates the possibility of more than one meaning. [Citations omitted.]

In this case, although the trial court was not clear as to the type of ambiguity it found, a review of it's opinion clearly shows that it found there to be a patent ambiguity in the phrase "other heirs at law", and thus looked to extrinsic evidence to determine the meaning of that phrase.[1] On de novo review of the relevant language, we hold that no ambiguity exists in the will, and that the trial court erred in ruling to the contrary.

For two reasons, we reject the trial court's holding. First, the fact that the parties disagree about the meaning of the relevant language does not, and cannot, create an ambiguity. *Detroit Wabeek Bank & Trust Co v City of Adrian*, 349 Mich 136, 143; 84 NW2d 441 (1957). The meaning of language used in a will or contract is a judicial function that cannot be influenced by after-the-fact speculation and innuendo as to the "true" meaning of the document. *Id*.

Second, as we noted earlier a fundamental concept involved in interpreting a will is that "[a] court may not construe a clear and unambiguous will in such a way as to rewrite it[,]" *In re Allen Estate*, 150 Mich App 413, 417; 388 NW2d 705 (1986), and each word should be given meaning, when possible, *The Detroit Bank and Trust Co v Grout*, 95 Mich App 253, 268-269; 289 NW2d 898 (1980). Because an unambiguous will must be enforced as written, the "[t]estimony of the scrivener of a mistake in drafting a will or of an intention of testator different from that expressed in the will is not admissible, in the absence of ambiguity or mistake appearing upon the face of the will." *Burke v Central Trust Co*, 258 Mich 588, 592; 242 NW 760 (1932).

In this case, there was no ambiguity on the face of the document that would have necessitated "going beyond the four corners of the document to determine intent." *In re Burruss Estate*, 152 Mich App at 667-668. The language states that if Floyd predeceased Luscinda, which he did, then the estate is bequeathed "to my other heirs at law." The only reasonable construction of this language is that "other" refers to those heirs other than Floyd, since it was Floyd who was originally to take the entire estate had he survived Luscinda. Additionally, the

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[1] The trial court relied on *In re Kremlick Estate*, 417 Mich 237, 241; 331 NW2d 228 (1983), where the Supreme Court held that extrinsic evidence may be used to demonstrate that an ambiguity exists and to establish intent. *Kremlick* involved a latent ambiguity because there were two possible interpretations for what the decedent meant when he devised his property to the Michigan Cancer Society. *Id*. at 239. Our case does not involve a latent ambiguity, and in any event *Kremlick's* holding has been viewed as limited. In *In re Burruss Estate*, 152 Mich App 660, 667-668; 394 NW2d 466 (1986), this Court noted:

> Surely, *Kremlick* cannot be read to imply that a probate court must look at extrinsic evidence to interpret clear legal language every time there is a potential beneficiary who is displeased with the disposition of property by a will. If we were to adopt appellants' interpretation of *Kremlick*, no will, no matter how clear the language used, would be safe from the possibility of attack through the introduction of extrinsic "evidence." Consequently, we decline appellants' invitation to impair the certainty of testamentary dispositions.

explanatory paragraph that Luscinda intended to leave the entire estate to Floyd clearly stated that it was to be given "to my son Floyd as previously specified" thus making clear that her intention was to leave the estate to Floyd, but if he did not survive her, for her "other heirs at law." Accordingly, the extrinsic evidence in this case contradicted the express written language of the document, and parol evidence should not have been admitted. *Union Oil Company v Newton*, 397 Mich 486, 488; 245 NW2d 11 (1976); *Michigan Nat'l Bank v Holland-Dozier-Holland Sound Studios*, 73 Mich App 12, 14-17; 250 NW2d 532 (1976). Without the extrinsic evidence, appellants were clearly the "other heirs at law," pursuant to MCL 700.1104(m), MCL 700.2720, MCL 700.2103(a), and MCL 700.2106(1), and the trial court erred in not finding them to be devisees under the will. *In re Bennett Estate*, 255 Mich App at 549.

Reversed.

Appellants may tax costs having prevailed in full. MCR 7.219(A)

/s/ Richard A. Bandstra
/s/ Christopher M. Murray