IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ELMERITA M. JOHNSON, et. al.	)	
Petitioners,	)	
v.	)	C.M. No. 2522-K-MG
CYNTHIA M. LEGRAND, et. al.	)	

MASTER'S FINAL REPORT

Date Submitted: September 24, 2008
Final Report: March 4, 2009

David N. Rutt, Esquire of Moore & Rutt, P.A., Georgetown, Delaware; Attorney for Petitioners.

David J. Ferry, Jr., Esquire and Lisa L. Coggins, Esquire of Ferry, Joseph & Pearce, P.A., Wilmington, Delaware; Attorneys for Respondent Harry H. Bell.

GLASSCOCK, Master

This is a partition action which requires a construction of the will of Eliza A. Bell. In 1945, Mrs. Bell was an elderly widow who owned a 60-acre farm near Lynch Heights in Kent County. She created a will[1] leaving her personal property in five shares, one to each of her four living children and one to be shared between her two grandchildren by a deceased child. She left a life estate in the farm to these same individuals: one share divided between her two grandchildren, and one share to each of her four middle-aged children. Rather improbably, one of these middle-aged children, Alonzo P. C. Bell, lived on the farm throughout the twentieth century and died in 2002 at the age of 99.

The death of Alonzo, as the last of the life tenants, was the triggering event for the distribution of the remainder interest in the farm to the remaindermen in fee simple. The petitioner here, Elmerita M. Johnson, a great-granddaughter of Mrs. Bell, asserts that she is a co-tenant of the farm by operation of the will, and seeks partition. The partition is opposed by respondent Harry H. Bell ("Harry"), Mrs. Bell's grandson, another co-tenant.[2] These parties, based upon their individual interpretations of the will, differ as to whether and to what extent they are co-owners of the farm.

The will provides at Item Second

> I give and devise all my real estate, whatsoever and wheresoever, unto my four (4) children, Catherine Johns, Blanche Bell Harris, Amos J. Bell,

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[1] The scrivener of the will was a lawyer named Hutton, who was admitted to the Bar in 1897.

[2] I refer to the descendants of Eliza Bell by their first names to avoid confusion in this report. No disrespect is intended.

> Alonzo P. C. Bell, and to my two (2) grandchildren, Edith Bell Jones and Melita Bell, children of my deceased daughter, Anne M. Jones, in equal shares and proportions except that my said grandchildren Edith Bell Jones and Melita Bell shall each take an undivided one-tenth (1/10) interest, for and during their natural lives of my said children and grandchildren, and for and during the lifetime of the survivor of them, and at and immediately upon the death of the survivor of my said children and grandchildren to my heirs then living, in equal shares and proportions and in fee simple.

In previous reports in this matter, I have determined that the intent of the testatrix, as set forth in the will, was that the remainder beneficiaries were the heirs of Eliza A. Bell living at the time of Alonzo's death in 2002, and that those heirs consist of Mrs. Bell's grandson, Harry, and the children of her deceased granddaughter, Ida Brewington: Cynthia M. Snipes, Richard A. Brewington, Sr., Gary M. Brewington and Elmerita M. Johnson.[3] Having determined the heirs, it is necessary to decide what interest they take in the Bell Farm. Under Mrs. Bell's will, the remaindermen are given the farm: "in equal shares and proportions and in fee simple." The remaining issue in determining the ownership interests of the remaindermen is whether the will provides that they take per stirpes, in which case Harry is entitled to 50% of the farm and the children of Ida Brewington are each entitled to a 1/4 part of their mother's half share, or 1/8 each; or per capita, in which case Harry Bell and the four Brewington children are each entitled to 20% of the farm.

[3] The remaining children and grandchildren of Eliza Bell died without issue.

Analysis

Mrs. Bell provided that upon the death of the last life tenant, the farm was to vest in her "heirs then living, in equal shares and proportions" and in fee simple. The question before me is simple: Does Mrs. Bell's gift to her "heirs then living, in equal shares and proportions" pass the property to the heirs per stirpes, or per capita? The touchstone of any exercise of construction of a will, of course, is to determine the intent of the testator as expressed therein. *E.g.*, In Re Barker, Del.Ch., No. 20455, Lamb, V.C. (June 13, 2007)(Mem. Op.) at 10.

The phrase "in equal shares and proportions" is little used by modern will scriveners. At my request, counsel briefed the issued of what meaning courts have given the phrase in the past. Their diligent research indicates that this is a question of first impression in Delaware; however, the phrase "equal shares and proportions" did enjoy some vogue around the turn of the last century. Generally, a gift in a will to more than one individual in "equal shares" denotes per capita distribution, as does a gift to such individuals "share and share alike." *See* A.B. v. Wilmington Trust Co., Del.Ch. 191 A.2d 98, 103 (1963). Some authorities indicate that the word "proportions" in the phrase "equal shares and proportions" is simply a redundant expression of intent to distribute per capita, other authorities find that it indicates an intended stirpetal distribution. *Compare* In re Brundage's Estate, Pa. Super, 36 Pa. Super 211 (1908)(holding that gift "in equal proportions share and share alike" creates gift per capita, where class created is all of

equal consanguinity to testator) *with* Metropolitan Trust Co. v. Harris, 177 N.Y.S. 257, 258 (1919)(finding that testator leaving property in "equal shares and proportions" used the word "proportions" to express the idea of a varying quantum of beneficence distributed per stirpes, in light of other indication in will indicating stirpetal distribution). Obviously, then, the direction by the testatrix to distribute "in equal shares and proportions" is of limited value in determining whether the testatrix intended a distribution per capita or per stirpes. In any case, I must determine the intent of the testator from a consideration of the will as a whole. *See, e.g,* Barker (Mem. Op.) at 10.

Fortunately, Mrs. Bell's intent becomes clearer in light of the fact that the remainder interest passes to her "heirs." That word designates as her beneficiaries those "persons appointed by law to succeed to the estate in case of intestacy." In re Adkin's Estate, Del. Orph., 55 A.2d 145, 146-147 (1947). In Adkin's Estate, the Court was faced with an ambiguity in the will: decedent's property was devised to her sons and "the heirs" of her daughter, "equally to be divided." The Court noted that "equally to be divided" tended to imply an intent that the property pass per capita, while the designation of the gift to her sons, and her daughter's "heirs," created a class which could contain individuals of differing levels of consanguinity to the testator, implying stirpetal distribution. The Court found that in this situation, the implication in favor of stirpetal distribution must prevail. The Court adopted the rationale of authorities pointing out "that the words 'to be divided equally' can mean an equal division among classes as well

as among individuals," and opined that "it is not lightly to be assumed that [the testator] intended a more remote relative to share equally with a nearer relative." Adkin's Estate, 55 A.2d at 146-48. *Accord*, Mendenhall v. Daum, Del. Ch., No. 5339, Hartnett, V.C. (October 11, 1978)(Letter Op.)(holding that devise to "issue of [my grandchildren] share and share alike to be distributed per stirpes" connotes stirpetal distribution); Wilmington Trust Co. v. Pantzer, Del. Ch., No. 5686, Brown, V.C. (December 21, 1978)(Mem. Op.)(holding gift "equally unto her issue" indicates stirpetal distribution); Wilmington Trust Co. v. Chapman, Del. Ch., 171 A.2d 222, 224 (1934)(holding that absent a contrary intent shown in the will, gift "to issue" implies intent to distribute per stirpes). The Adkins court, noting that language such as "to the heirs, divided equally" created an ambiguity, held that such an ambiguity must be resolved in favor of stirpetal distribution. Adkin's Estate, 55A.2d at 147.

The logic of Adkin's Estate is applicable here. Mrs. Bell left life estates in the farm to her children and grandchildren, per stirpes. *See* Chapman, 171 A. at 225 (holding that a primary division of property by representation implies that remainder dispositions are intended to pass per stirpes as well). The life estates were in the nature of a tontine; upon the death of any life tenant, the interest of that life tenant devolved upon the remaining tenants, until finally a single life tenant, Alonzo P. C. Bell, alone survived. Alonzo's death terminated the series of life estates, and the farm passed to Mrs. Bell's

heirs living at the time Alonzo passed.[4] This created a class of beneficiaries both foreseeably and in fact composed of individuals at different levels of consanguinity to Mrs. Bell. *See* Mendenhall (Letter Op.); Adkin's Estate, 55 A.2d at 147-48 (stating that gift to class composed of individuals at various levels of consanguinity to testator implies stirpetal distribution). While the class is to take by "equal shares and proportions," that language can as easily refer to proportionality by stock, as to equality among heirs overall. *See* Adkin's Estate, 55 A.2d at 146-47; Metropolitan Trust Co., 177 N.Y.S. at 258. Mrs Bell's devise to her "heirs" imported into the will the statutes of descent, which embody a stirpetal distribution scheme. Adkin's Estate, 55 A.2d at 146-47; *see* 12 Del. C. § 501 *et seq*. In other words, the use of "heirs" as a word of purchase implies that the gift is to pass by representation, per stirpes. *See* Chapman, 171 A. at 224. I find that Mrs. Bell's intent, as expressed by the will, was that the farm pass to her heirs as of Alonzo's death, per stirpes.

Conclusion

Each of the five heirs of Mrs. Bell living at the time of the death of Alonzo P. C. Bell takes the farm as co-tenant in fee simple, per stirpes. That is, Harry H. Bell owns an undivided one-half share of the farm, and the four children of Ida Brewington each own a one-eighth share.

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[4]The creation of a series of life estates tends to show an intent that the remainder pass per stirpes. Mendenhall (Letter Op.) at 2.

The parties should confer and indicate to me whether the property may be partitioned in kind.

/s/ *Sam Glasscock, III*
Master in Chancery