STATE OF MICHIGAN

COURT OF APPEALS

ROBERT D. SAROW, Personal Representative of the Estate of BARBARA F. NICHOLSON, Deceased,

Petitioner-Appellee,

v

CHESTER WAWRZYNSKI,

Respondent-Appellant.

UNPUBLISHED
March 5, 1999

No. 207600
Bay County Probate Court
LC No. 97-040792 TI

Before: Jansen, P.J. and Sawyer and Markman, JJ.

PER CURIAM.

In this matter of trust interpretation, respondent appeals as of right from the trial court's order determining that the testator intended to include an unnamed niece on a list of residuary beneficiaries that was an addendum to her trust. The trial court considered extrinsic evidence to determine the testator's intent. Because we find the words of the trust to be clear and unambiguous, we reverse.

The findings of a probate court sitting without a jury will be reversed only upon a showing of clear error. *In re Woodward Trust*, 196 Mich App 326; 492 NW2d 818 (1992). "A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible." *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985). This rule applies to trusts as well, *id*., and this Court has emphasized that "[i]n resolving a dispute concerning the meaning of a will or trust, the court's sole objective is to ascertain and give effect to the intent of the testator or settlor." *In re Nowels Estate*, 128 Mich App 174, 177; 339 NW2d 861 (1983). However, the testator's intent must be gleaned from the four corners of the instrument unless there is an ambiguity. *In re Maloney Trust*, *supra* at 639; *In re Woodworth Trust*, 196 Mich App 326, 327; 492 NW2d 818 (1992). "[W]hen there is no patent or latent ambiguity in the provisions of a will, the intention to be ascribed to the testator is that intention demonstrated in the will's plain language." *In re Dodge Trust*, 121 Mich App 527, 542; 330 NW2d 72 (1982), citing *In re Willey Estate*, 9 Mich App 245, 249; 156 NW2d 631 (1967). In other words, "[a] court may not construe a clear and

unambiguous will [or trust] in such a way as to rewrite it." *In re Allen Estate*, 150 Mich App 413, 417; 388 NW2d 705 (1986). The rationale for this rule is that "[t]he law is loath to supplement the language of such documents with extrinsic information. This is especially so in the case of testamentary documents because the maker is not available to provide additional facts or insight." *In re Maloney Trust*, *supra* at 639.

Whether the words of a particular instrument are ambiguous is a question of law, whereas the actual interpretation of the ambiguity is a question of fact. *UAW-GM Human Resource Center*, *supra* at 491, citing *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). In addition, facts extrinsic to the instrument may be relied on to prove a latent ambiguity. *In re McPeak Estate*, 210 Mich App 410, 412; 534 NW2d 140 (1995); see also *In re Kremlick*, 417 Mich 237, 241; 331 NW2d 228 (1983).

Respondent here argues that the words of the trust agreement are clear and unambiguous, and therefore, that Barbara Nicholson's intent should have been determined by reference only to the trust language and not by resort to any extrinsic evidence. We agree that the trial court erred in considering the testimony of Karl Roth to determine Nicholson's intent and that petitioner's reliance on *Kremlick*, *supra*, is misplaced.

The addendum to the Barbara Nicholson Trust specifically enumerated the individuals who were the intended residuary beneficiaries. Smith was not among them. As in *In re Woodworth*, *supra* at 328, the "language employed suggests but a single meaning . . . ." Whereas in *Kremlick* the extrinsic evidence shed light on the inherent ambiguity of the name "Michigan Cancer Society" and thereby necessitated the court's further inquiry into the testator's intent, in the instant case there was no possibility of ambiguity. The extrinsic evidence presented did not allow for the conclusion that the language used in the trust might have had more than one meaning. Rather, the extrinsic evidence showed only that the testator may well have made a mistake in listing the residual beneficiaries. No latent or patent ambiguity in the actual words of the trust addendum was revealed, and therefore, it was inappropriate for the probate court to consider other evidence of the testator's intent. While we understand the impulse to look to extrinsic evidence in an effort to rectify alleged mistakes on the part of a testator (and we do not quarrel with petitioner that a mstake on Barbara Nicholson's part may well have occurred here), we are equally cognizant that such a practice would allow the language of virtually any will or trust document to be called into question on the basis of extrinsic evidence and involve the judicial system in an increasingly broad range of purely speculative decisionmaking.

The probate court also relied on the pretermitted heir statute, MCL 700.127(1),(2); MSA 27.5127(1)(2), to support its interpretation of the Barbara Nicholson Trust addendum. The pretermitted heir statute provides in part:

> If a testator fails to provide in the testator's will for any of his or her *children* . . . and . . . it appears that the omission was not intentional but was made by mistake or accident, the *child*, or the issue of the child, shall have the same share in the estate of the testator as if the testator had died intestate. The share shall be assigned as provided [by law in case of intestate estates, unless it is apparent from the will that it was the

testator's intention not to make a provision for the child. [MCL 700.127(1), (2); MSA 27.5127(1), (2) (emphasis added).]

Whether the pretermitted heir statute applies to particular heirs is a question of law. This Court reviews questions of law de novo. *Welch Foods, Inc v Attorney General,* 213 Mich App 459, 461; 540 NW2d 693 (1995). We note that when interpreting statutory language, "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 83a; MSA 2.212(1). The statute defines "child" as "a person entitled to take as a child under this act by intestate succession from the parent whose relationship is in question and excludes a stepchild, a foster child, a grandchild, or *any more remote descendant who is not so entitled to inherit*." MCL 700.3; MSA 27.5003 (emphasis added). Drawing on the plain meaning of these statutory provisions, we find that the Legislature did not intend the pretermitted heir statute to be applied to nieces and nephews.

Reversed and remanded for proceedings consistent with this question. This Court does not retain jurisdiction.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Stephen J. Markman