STATE OF MICHIGAN

COURT OF APPEALS

In re ESTHER WIGGINS BERTLING TRUST.

ESTHER WIGGINS BERTLING TRUST,

Petitioner-Appellee,

v

THERESA CAULEY, JAMES M. BERTLING, and LEE BERTLING, III,

Respondents-Appellants.

UNPUBLISHED
October 21, 2004

No. 250555
Cheboygan Probate Court
LC No. 02-012215-TV

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Respondents appeal by right the probate court's opinion and order distributing the proceeds of a living trust established by Ester Bertling (settlor). Respondents are settlor's grandchildren, the children of Lee Bertling, Jr., who predeceased his mother. The probate court concluded that the settlor intended to avoid the applicable anti-lapse statute, MCL 700.2714, in distributing the residuary of the trust. We affirm.

When the probate court sits without a jury, its findings are reviewed for clear error. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake had been made, even if there is evidence to support the finding." *Id.*

The general rules that apply to interpretation of wills also apply to the interpretation of trust documents. *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985). "'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.'" *Id.*, quoting *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983). To determine a settlor's intent, the court must first look to the language of the trust. Unless the language is ambiguous, the court must determine the trustor's intent from the language of the document. *Id.*; *In re Burruss Estate*, 152 Mich App 660, 665-666; 394 NW2d 466 (1986).

The residuary clause in issue had been amended several times since the trust was first created in April 1959. The final amendment came in April 2002 and read as follows:

> The remainder of the trust property and all accrued income shall be divided into as many equal shares as there are living children of the Trustor and the Trustees shall assign, transfer, convey and pay over one such equal share, free from any trust, to each of Trustor's children who survive the Trustor.

The probate court held that this provision evidences that the settlor intended to avoid MCL 700.2714. This meant that a substitute gift was not created in respondents as the descendants of their father, who died in 1974. We agree.

MCL 700.2714(1) states in pertinent part:

> . . . a future interest under the terms of a trust is contingent on the beneficiary surviving the distribution date. If a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, the following apply:
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> (b) Except as provided in subdivision (d), if the future interest is in the form of a class gift, . . . a substitute gift is created in the surviving descendants of a deceased beneficiary. The property to which the beneficiaries would have been entitled had all of them survived the distribution date passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. . . . For the purposes of this subdivision, "deceased beneficiary" means a class member who fails to survive the distribution date and leaves 1 or more surviving descendants.
>
> (c) For the purposes of section 2701, words of survivorship attached to a future interest are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. Words of survivorship include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed in condition-precedent, condition-subsequent, or another form.

The language of MCL 700.2714 mirrors that of Uniform Probate Code (UPC) § 2-707. The commentary to UPC § 2-707 notes the rationale for reversing the common law rule that conditions of survivorship are not implied with respect to future interests "is to prevent cumbersome and costly distributions to and through the estates of deceased beneficiaries of future interests." UPC § 2-707, comment, p 197.

MCL 700.2714(1)(c) provides that "words of survivorship attached to a future interest are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section." The statute itself uses the survivorship language to deal with the often-litigated issue of whether survival language attached to future interests refers to survival of the settlor or of the beneficiary. The statute provides that "[i]f a beneficiary of a future interest

under the terms of a trust fails to survive the distribution date," and "if the future interest in the form of a class gift, . . . a substitute gift is created in the surviving descendants of a deceased beneficiary." MCL 700.2714(1)(b). "Distribution date" is defined to be, "with respect to a future interest, the time when the future interest takes effect in possession or enjoyment." MCL 700.2713(d). A "surviving descendant" is a descendant who does not predecease the distribution date. MCL 700.2713(g). Thus, the statutory scheme uses the concept of survival in relationship to the distribution date of the future interest. In terms of a class gift, if the beneficiary fails to survive the distribution date, then a substitute gift is created in the beneficiary's descendants who survive the distribution date.

While MCL 700.2713 provides definitions for § 2714, it does not provide a definition of the phrase "words of survivorship." But, the repeated use of the term "surviving" throughout § 2714 implies that the reference is to the actual use in a trust of the word "survive" or any variation thereof attached to a future interest (e.g., surviving, survivorship, survivor, etc). The language of the anti-lapse provision applicable to wills supports this interpretation. MCL 700.2603(1)(c) defines the term by exemplar: "[W]ords of survivorship, such as in a devise to an individual 'if he survives me' or in a devise to 'my surviving children', are not in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section."

In this case, the residuary clause contains language that goes beyond such "words of survivorship." Again, the clause reads:

> The remainder of the trust property and all accrued income shall be divided into as many equal shares as there are living children of the Trustor and the Trustee shall assign, transfer, convey and pay over one such equal share, free from any trust, to each of Trustor's children who survive the Trustor. A partial distribution shall be assigned and paid to such beneficiaries as soon as possible after the death of the Trustor.

The first sentence of the two-sentence clause references two events: (1) division of the remainder, and (2) distribution of the remainder. In context, the term "living children" is not used to identify the date of distribution, but to signify the beneficiaries intended as of the drafting of the document. The clause speaks of dividing the remainder "into as many equal shares as *there are* living children." The "there are" language could indicate two time frames: (1) those living at the drafting of the document, and (2) those living as of the death of Ester Bertling. The second half of the sentence, however, refers to distributing the remainder shares to the children "who survive the Trustor" (Ester's Bertling's death being the date of distribution). If "there are living children" is read to mean as of Ester's Bertling's death, the first and second halves of the sentence are redundant.

We conclude that the sentence is better read as establishing that the number of equal shares is to be determined as the number of Ester's Bertling's children living on April 26, 2002, with the shares then distributed to the children then surviving. Because respondents' father died in 1974, he was not included in the division of the residuary as he was not then one of Ester Bertling's "living children," i.e., he was not a beneficiary under the trust. Accordingly,

respondents could not take as his descendants, even though they survived the distribution date of the trust.

Additionally, the finding of the probate court that the original trust and the subsequent amendments supported the conclusion that the settlor did not intend for the anti-lapse statute to apply was not clear error. Looking at the evolution of changes made to the trust, it is reasonable to conclude that when the final amendment was drafted, the settlor intended for only her then living children to divide the remainder of the trust. The settlor's attorney at the time unequivocally supported this conclusion as he testified that he spoke with her about avoiding the anti-lapse statute and that she clearly indicated that this was her intent.

We affirm.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey