

[J-92-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: ESTATE OF REGIS F. BURGER, : No. 16 WAP 2005
M.D. :
: Appeal from the Order of the Superior
: Court entered June 14, 2004 at No. 1035
: WDA 2003, affirming the Order of the
: Court of Common Pleas of Allegheny
: County entered May 28, 2003 at No. 7600
: of 2002.
:
APPEAL OF: JANICE B. LECKEY : ARGUED: September 12, 2005

CONCURRING OPINION

MR. JUSTICE EAKIN

DECIDED: MAY 25, 2006

I concur with the majority that appellant does not have standing to challenge this part of Dr. Burger's will, but write separately as my conclusion is based on Dr. Burger's intent, not the statutes cited.

The anti-lapse statutes only control "in the absence of a contrary intent discernable from [the] will." Majority Slip Op., at 3. That is, if we can discern the testator's intent, there is no lapse and the statutes do not come into play. The intent must appear with reasonable certainty. Estate of Kehler, 411 A.2d 748, 750 (Pa. 1980); see also 20 Pa.C.S. § 2514 ("In the absence of a contrary intent appearing therein, wills shall be construed as to real and personal estate in accordance with [the rules of interpretation]."). As I find Dr. Burger's intent is determinable with reasonable certainty, I find no need to delve into the legislature's

intent by interpreting § 2514. The intent of the testator here is at least as clear as the intent of the legislature in the clauses (10) and (11) of § 2514.¹

What would Burger have done, had he known this bequest would fail because of undue influence? That he did not provide for this contingency is certainly understandable, for no one writes their will believing they are under the undue influence of another; hence, there is no reason to believe Dr. Burger would specifically address a situation he could not have believed was of moment. His intent is discernable, however, in this will and in the prior wills. The observable conclusion is his intent to have a bequest that fails for other reasons inure to the benefit of the named objects of his munificence, the residuary beneficiaries.

Clarity of intent is not controlling if that intent was the product of the very factor allegedly rendering it uncontrolling, namely, undue influence. That is, if the actual intent is the result of undue influence, can we ever determine the unfettered intent of the testator? It is tempting to suggest that where the allegation is undue influence, intent cannot be determined without the opportunity to prove there was inappropriate influence; if proved, the testator's uninfluenced intent is unknowable, and hence the bequest must lapse, the argument goes.

However, the challenge here is only to the modifications which gave appellee an increased share. Appellant does not challenge her inclusion as a residuary beneficiary, nor Dr. Burger's capacity to provide for her in that way. Looking at the prior wills, where no undue influence was claimed, we see consistent inclusion of appellee, who was involved

¹ While the majority provides an appealing interpretation of these clauses, clause (11) begins with the qualifying statement that it applies to a residuary "devise or bequest as described in clause (10)." 20 Pa.C.S. § 2514(11). Whatever the legislature's intent, what it meant to do with this statute must give way to what it did do with it, and that was to limit clause (11)'s applicability to a situation not present here.

with decedent's care in his waning years. He consistently provided for appellee, and he consistently chose not to provide for appellant or other intestate heirs.

We see disposition of the bequest should it lapse for reason of predecease, a possibility within the expected contemplation of a testator. That disposition is not enumerated for lapse due to undue influence is unsurprising, and as the Superior Court astutely noted, there is no reason to think testator wished a different disposition should the bequest fail for reasons other than predecease. I agree with the Superior Court that "if a bequest fails ... and an alternative disposition is specified, we cannot presume that had the bequest failed for a different reason the testator's intent for the descent of the property to someone else would change." In re Estate of Burger, 852 A.2d 385, 390 (Pa. Super. 2004).

That is, Dr. Burger provided that if appellee predeceased him, the entire share would go to other residuary beneficiaries. If a portion of her share was denied her, what disposition would Dr. Burger have desired? Is there any reason to believe he would want anything inconsistent with the disposition he provided in the event of her predecease? I see none. In fact, any beneficiary could forfeit his or her right to a bequest by failing to attend Dr. Burger's funeral (Paragraph 16 of the will) -- the result of this forfeiture is that the bequest falls into the residuary. If he meant for this to happen upon someone's failure to attend his funeral, or upon their death, is it any stretch at all to believe he intended that result for any happenstance affecting the share of the predeceased or offending beneficiary?

I would hold it is reasonably certain that Dr. Burger intended his residuary bequest to appellee, or any portion of it, to pass to the other residuary beneficiaries in the event it failed because of any reason, including undue influence.

Madame Justice Newman joins this concurring opinion.