WILLIAM B. CHANDLER III
CHANCELLOR

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: August 2, 2010
Decided: November 30, 2010

Michael P. Kelly
Christopher A. Selzer
Theodore W. Annos
McCarter & English, LLP
Renaissance Centre
405 North King Street, 8th Floor
Wilmington, DE 19801

James P. Dalle Pazze
Herdeg, Du Pont & Dalle Pazze, LLP
15 Center Meeting Road
Wilmington, DE 19808

Re: *In re Trust Under Will Dated August 14, 1997*
Created by Elizabeth Haskell Fleitas
Civil Action No. 4810-CC

Dear Counsel:

I have thoroughly reviewed the briefs on the parties' motions for summary judgment. For the following reasons, I grant summary judgment to beneficiaries Elizabeth Haskell Fleitas and Kaylee H. Fleitas and deny summary judgment to respondent beneficiaries Stephanie McGinley and Andrea Wiseman.

I. BACKGROUND[1]

Before the Court are cross-motions for summary judgment. The moving parties include Elizabeth Haskell Fleitas ("Elizabeth"), and her daughter Kaylee Fleitas ("Kaylee"). The other moving parties are Stephanie P. McGinley ("McGinley") and her sister Andrea S. Wiseman ("Wiseman"), Elizabeth's sister. McGinley and Wiseman are both daughters of Valerie Fleitas Johnson ("Valerie"). Valerie and Elizabeth are sisters; their mother was Elizabeth Haskell Fleitas ("Fleitas"), whose will and trust are at the heart of this dispute. Kaylee, McGinley and Wiseman are all granddaughters of Fleitas.

Fleitas acquired testamentary powers of appointment under a trust that her father, Harry G. Haskell, granted on December 7, 1931. On August 14, 1997, Fleitas executed her Will in which she exercised her testamentary power of appointment and created the Trust with Wilmington Trust Company ("Trustee"). The testamentary Trust language is at issue here. Fleitas died on July 12, 1999, bequeathing her estate by the distribution scheme prescribed in her Will. At the time of Fleitas's death, she had two living daughters, Elizabeth and Valerie, and four living adult grandchildren,

[1] The parties have filed cross-motions for summary judgment and have not presented an argument to the Court that there is any issue of material fact in dispute under Court of Chancery Rule 56. The facts therefore are taken from the parties' motions submitted to the Court.

all of whom were Valerie's children. Two of these four of Fleitas's grandchildren are respondents McGinley and Wiseman. Fleitas's other daughter, Elizabeth, had no children at the time of Fleitas's death. On May 5, 2009, almost ten years after Fleitas's death, Elizabeth adopted a seven-year-old daughter, Kaylee.

A. Procedural History

On August 14, 2009, the petitioner Wilmington Trust Company ("WTC") filed a verified petition for instructions asking this Court to interpret the Trust distribution language. WTC believes that the Will's language is ambiguous as to the generational level at which the per stirpital division of the beneficial Trust interest should first occur.

On June 9, 2010, Elizabeth and Kaylee filed a motion for summary judgment, seeking a judicial declaration that, as a matter of law, the initial per stirpes distribution of the Trust assets at issue begins with Elizabeth and Valerie, the testatrix's daughters. On the same day, respondents McGinley and Wiseman also filed a motion for summary judgment, seeking judicial determination that, as a matter of law, the initial per stirpes distribution of the Trust assets at issue begins with the testatrix's grandchildren, including Kaylee, McGinley, and Wiseman.

B. The Will Language Regarding the Trust

A few articles of the Will are relevant to my discussion, some being the actual testamentary Trust text for which the parties have diverging interpretations, and some being other parts of the Will that may indicate Fleitas's intent. I will examine each separately.

I begin with Article 5, "Powers of Appointment," paragraphs C and D (collectively, the "Trust provisions" of Fleitas's Will). These two paragraphs are the source of the present dispute. Article 5, Paragraph C[2] provides that the Trust income shall be provided to Fleitas's beneficiaries in the following way: if both Elizabeth and Valerie are alive, then 40% income to Elizabeth, 40% income to Valerie, and 20% income "to such of my issue more remote than children as are living from time to time, *per stirpes*." When either Elizabeth or Valerie dies, then 50% goes to the survivor of the two sisters,

[2] Article 5, Paragraph C, states as follows with reference to Fleitas's Trust:

> For so long after my death as both of my daughters, VALERIE FLEITAS JOHNSON and ELIZABETH H. FLEITAS, are living, Trustee shall distribute forty percent (40%) of the net income to each daughter, and shall distribute the balance of the net income to such of my issue more remote than children as are living from time to time, *per stirpes*. On the death of the first of my daughters to die or, on my death, if only one daughter survives me, Trustee shall distribute fifty percent (50%) of the net income to such surviving daughter during the remainder of her life, and shall distribute the balance thereof to such of my issue more remote than children as are living from time to time, *per stirpes*. On the death of the survivor of my daughters and me, Trustee shall distribute the net income to such of my issue as are living from time to time, *per stirpes*.

and the other 50% of the Trust income goes "to such of my issue more remote than children as are living from time to time, *per stirpes*." The disagreement in interpreting Paragraph C is whether (1) the heads of the stirpital distribution begin with daughters Elizabeth and Valerie, which would provide Kaylee with half of the 20% balance of the Trust interest and would provide Valerie's four children with the other half of the 20% to be split since Elizabeth and Valerie are still alive, or (2) the heads of the stirpital distribution are the testatrix's five grandchildren, meaning that Kaylee, respondents McGinley and Wiseman, and the two other grandchildren each share one-fifth of the 20% beneficial Trust interest.

Paragraph D[3] in Article 5 uses similar language in dictating how the Trust assets should be distributed when the Trust period terminates.

[3] Article 5, Paragraph D, states as follows with reference to Fleitas's Trust:

> Upon the termination of the trust period . . . such property shall vest in interest in my then living issue more remote than children, *per stirpes*. . . Trustee shall continue to hold and administer the trust property as follows: If both my daughter, VALERIE FLEITAS JOHNSON, and my daughter ELIZABETH H. FLEITAS, are then living, Trustee shall distribute forty percent (40%) of the net income to each daughter, and Trustee shall distribute the balance of the net income to such of my issue more remote than children as are living from time to time, *per stirpes*. On the death of the first of my daughters to die or, upon the termination of the trust period if only one daughter is then living, Trustee shall distribute fifty percent (50%) of the net income to such surviving daughter and the balance thereof to such of my issue more remote than children as are living from time to time, *per stirpes* . . . If none of my issue more remote than children are living at the time of the termination of such trust period, such trust property shall be distributed, in equal shares, free from trust, to my then living children; or if no child of mine is then living, to the then living issue, *per stirpes*, of my deceased father, HARRY G. HASKELL.

Paragraph D states that the Trustee should distribute the Trust income in the following manner while Elizabeth and Valerie are both alive: 40% Trust income to Elizabeth for life, 40% Trust income to Valerie for life, and 20% Trust income to Fleitas's "then living issue more remote than children, *per stirpes*." Paragraph D also states that, following the termination of the Trust period and the deaths of Elizabeth and Valerie, the Trust corpus should vest free from trust "in my then living issue more remote than children, *per stirpes*."

The dispute regarding Paragraph D is like that regarding Paragraph C. One interpretation, which favors Kaylee, is that the initial division of the Trust property in the per stirpes scheme occurs at the generational level directly below the testatrix, namely with her daughters Elizabeth and Valerie. This would entitle Kaylee right now to one-half of the 20% balance of the Trust income reserved for Fleitas's "issue more remote than children" and Valerie's four children to the other one-half of the 20% balance. It would also entitle Kaylee's line of heirs to half of the vested interest in the Trust corpus after the Trust terminates.[4] Kaylee herself may be entitled to

[4] Under Article 5, Paragraph E, of the Will, the Trust terminates on the death of the last to die of Elizabeth, Valerie, Valerie's four children as of the date Fleitas created the Trust, or Kaylee or, alternatively, on the date twenty years and eleven months after the death of Harry G. Haskell's son, Harry G. Haskell Jr., who is now eighty-eight years old and the last survivor of Harry G. Haskell's issue that was living on December 6, 1931, whichever is earlier. It states:

that vested interest under this interpretation if Harry G. Haskell, Jr., brother of the testatrix, dies, twenty years and eleven months lapse, triggering the termination of the Trust, her mother Elizabeth and aunt Valerie die, and Kaylee is still alive. The second interpretation, which favors the respondent beneficiaries, is that the initial division of the Trust property in the per stirpes scheme occurs at the generational level of Fleitas's grandchildren, including Kaylee and the respondents. This interpretation provides each grandchild with one-fifth of the 20% beneficial Trust income while Elizabeth and Valerie are alive and one-fifth of the vested interest in the Trust principal once the Trust terminates and Fleitas's daughters die. It is unclear what the distribution would be if only one of Fleitas's daughters was alive; it is only clear that the survivor of the two sisters would get 50% of the Trust income.

> Notwithstanding the foregoing, unless sooner terminated in the manner previously provided, each trust held hereunder shall end immediately prior to the expiration of the first to occur of: (i) the death of the survivor of my daughters, VALERIE FLEITAS JOHNSON and ELIZABETH H. FLEITAS, and such of my grandchildren as are living on the date of my death, or (ii) the expiration of twenty (20) years and eleven (11) months after the death of the last survivor of the issue of my deceased father, HARRY G. HASKELL, who were living on December 6, 1931, and thereupon Trustee shall distribute the principal in the manner hereinbefore provided in paragraph D of this Article 5.

C. The Will Language in the Personal Property, Residuary, and Definitions Sections

In Article 1 of the Will ("Personal Property Provision"), concerning tangible personal property, the testatrix directs her personal property to be divided between Valerie and Elizabeth "in such manner as they agree in as nearly equal shares as practicable." Article 1 also provides that if either daughter predeceases Fleitas "but is represented by children who survive me [Fleitas], such children shall take, equally, the share which such deceased daughter would otherwise have taken had she survived me." Fleitas directs her personal property to be divided per capita among her grandchildren if both her daughters predecease her.

Article 5, Paragraph B ("Pecuniary Gifts Provision"), which is part of the Trust provisions, provides $1 million to Valerie and $1 million to Elizabeth, assuming they survive Testatrix Fleitas. Paragraph B also provides $100,000 to each living grandchild or to the living issue of a grandchild that predeceases Fleitas, per stirpes. Article 5, Paragraph D, provides that, if all of Fleitas's "issue more remote than children" predecease her, the Trust property "shall be distributed, in equal shares, free from trust, to my then living children; or, if no child of mine is then living, to the then living issue, *per stirpes*, of my deceased father, HARRY G. HASKELL."

Article 6 ("Residue Provision"), which concerns the residue of Fleitas's estate, divides the residue in equal shares between Elizabeth and Valerie "and to the issue, *per stirpes*, of either of them who predeceases me but is represented by issue who survive me." This Article divides the residue of Fleitas's estate equally between Elizabeth's line of heirs and Valerie's line of heirs.

Importantly, Article 17, the definitions section of the Will, defines "per stirpes" thusly: "In applying any provision of this my Will which refers to a person's issue, 'per stirpes,' the children of that person are the heads of their respective stocks of issue, whether or not any child is then living." The Will's definition of "issue, per stirpes" is consistent with Delaware's statute, 12 *Del. C.* § 3301(g)(3) (2008), which states that "'issue' shall denote a distribution per stirpes, such that the children of the person whose issue is referred to shall be taken to be the heads of the respective stock of issue" and that adopted persons such as Kaylee are considered issue of the adopting person. This means that in Delaware, children of a testator or testatrix are the heads of the stirpes, absent a different intent explicitly conveyed by the testator or testatrix. Therefore, under the Will's definitions section, a distribution to Fleitas's "issue, per stirpes" makes Fleitas's *children* the heads of the respective stock of issue.

II. ANALYSIS

The issue here is straightforward: in the Will, do the phrases "my issue more remote than children as are living from time to time, *per stirpes*,"[5] "my issue as are living from time to time, *per stirpes*,"[6] and "my then living issue more remote than children, *per stirpes*,"[7] make Elizabeth and Valerie the stirpital roots of the Trust distribution or alternatively make Fleitas's grandchildren, including respondents and Kaylee, the stirpital roots. Elizabeth and Kaylee argue that, under the clear language of the Will, Elizabeth and Valerie are the heads of the stirpes, regardless of their position as non-takers of the 20% Trust interest. Respondents McGinley and Wiseman argue that they and Fleitas's other grandchildren are the heads of the stirpes because they are the first possible takers of the 20% Trust balance, and testatrix Fleitas intended to treat all her grandchildren equally as a class, as evidenced in other paragraphs of the Will.

[5] Language used in Article 5, Paragraphs C and D, to describe the distribution of the Trust balance after Valerie and Elizabeth receive their 40% interest; also language used in Article 5, Paragraph D, to describe distribution of Trust assets if only one of Fleitas's daughters dies.

[6] Language used in Article 5, Paragraph C, to describe the Trust income distribution before the termination of the Trust period but after the deaths of Fleitas's daughters.

[7] Language used in Article 5, Paragraph D, to describe the distribution of vested Trust assets after both the termination of the Trust period and the deaths of Fleitas's daughters.

This dispute is governed by the plain and clear terms of the Will. I hold that, based on the testatrix's intent clearly reflected in the Will's explicit definition of "per stirpes" and based on 12 *Del. C.* § 3301(g)(3), the stirpital distribution begins with an initial, equal division between Elizabeth's and Valerie's lines. The Trust should be divided so that Kaylee receives half of the 20% Trust interest, and the remaining 10% Trust interest is divided between Valerie's four children, including the respondents. For the purposes of Trust distribution, Elizabeth and Valerie will be treated as if they predeceased the testatrix, and Kaylee will acquire 10% of the total Trust interest and the respondents will each acquire 2.5% of the Trust interest. Upon the death of either Valerie or Elizabeth, if the Trust has not terminated, 50% of the Trust interest will go to the survivor, and 50% of the Trust interest will go to the issue of the deceased sister. After the Trust terminates, Elizabeth and Valerie are the heads of stock for the purposes of distributing the Trust corpus.

A. Standard of Review and Standard for Evaluating Testatrix's Intent

This Court grants summary judgment to a moving party under Court of Chancery Rule 56(c) if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law.[8] When this Court considers a motion for summary judgment, the facts, inferences, and evidence are viewed in the light most favorable to the nonmoving party.[9] Summary judgment will be denied "where the proffered evidence provides 'a reasonable indication that a material fact is in dispute.'"[10] Because the parties have filed cross-motions for summary judgment and have not disagreed as to any issue of material fact, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[11] Therefore, I will treat the facts presented in the parties' briefs as undisputed.[12] Rule 56(h) provides authority for me to render a final decision based on the stipulated facts.[13]

In this Court's interpretation of the language of a will or trust, the testator's or settlor's intent controls, considering "his or her dominant

---

[8] *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007).
[9] *Id.*
[10] *Mickman v. Am. Int'l Processing, L.L.C.*, 2009 WL 891807, at *1 (Del. Ch. Apr. 1, 2009) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).
[11] Ct. Ch. R. 56(h).
[12] *See In re Lammot Du Pont Copeland Trust No. 5400*, 2009 WL 1220623, at *1, n.1 (Del. Ch. Apr. 20, 2009).
[13] *See Concord Real Estate v. Bank of Am. N.A.*, 996 A.2d 324, 325 (Del. Ch. 2010) ("The parties have cross-moved for summary judgment. Neither side points to a disputed issue of fact material to either motion. Accordingly, pursuant to Court of Chancery Rule 56(h), the case is deemed submitted for decision on the written record"); *see also Scottsdale Ins. Co. v. Lankford*, 2007 WL 4150212, at *3 (Del. Super. Ct. Nov. 21, 2007) ("Where the parties have filed cross[-]motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.")

purpose."[14] In determining a testator's intent in a trust instrument, this Court considers the language of the whole instrument, "read as an entirety, in light of circumstances surrounding its creation."[15] The Court of Chancery has adopted two principles in reviewing a will upon a petition for instructions: "1) where the language of a will is unambiguous, the court must enforce its terms as written" and "2) where the language used in a will is ambiguous, the court must give the language that meaning which will effectuate the intent of the testator."[16]

When language in a written instrument is potentially ambiguous regarding a per stirpes distribution, this Court applies the following test:

> [A] testator's intent, unless unlawful, shall prevail; that intent shall be ascertained from a consideration of (a) all the language contained in his will, and (b) his scheme of distribution, and (c) the circumstances surrounding him at the time he made his will, and (d) the existing facts, and (e) canons of construction will be resorted to only if the language of the will is ambiguous or conflicting or the testator's intent is for any reason uncertain.[17]

B. Whether the Will is Ambiguous

In deciding whether parol evidence should be considered, I must first determine if the language in the Will is ambiguous. "Ambiguity exists when

---

[14] *Chinn v. Downs*, 421 A.2d 915, 917 (Del. Ch. 1980).
[15] *Dutra de Amorim v. Norment*, 460 A.2d 511, 514 (Del. 1983).
[16] *In re Estate of Skwarlo*, 2001 WL 312451, at *1 (Del. Ch. Mar. 12, 2001).
[17] *In re Lammot Du Pont Copeland Trust No. 5400*, 2009 WL 1220623, at *4 (Del. Ch. Apr. 20, 2009) (quoting *Mendenhall v. Daum*, 1978 WL 4978, at *2 (Del. Ch. Oct. 11, 1978)).

the terms in question 'are reasonable or fairly susceptible of different interpretations or may have two or more different meanings.'"[18] Ambiguity does not exist merely because parties disagree on proper construction of the words in a written instrument.[19] Absent a double meaning in the Will language, I must take the Will to mean what it says, not what I suppose it was meant to say.[20] Furthermore, "[i]f a mistake was made in the writing of the [will] . . . this court has no power to correct a mistake, and it cannot, by introduction of parol evidence, rewrite the [will]."[21] "Extrinsic evidence can do no more than explain language and show intent, but cannot furnish an intent itself which the language does not do."[22]

Both parties argue that the Will is clear and unambiguous, but both argue for different interpretations of the phrases containing the "per stirpes" language. The dispute between the parties is one over the interpretation of the words regarding which generation represents the heads of stock in the stirpital distribution of the Trust assets, not over any double meaning. In

[18] *In re Estate of Gallion*, 1996 WL 422338, at *2 (Del. Ch. June 27, 1996) (citing *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists, Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)).
[19] *Rhone-Poulenc*, 616 A.2d at 1196.
[20] *Gallion*, 1996 WL 422338, at *2; *see also In re Estate of Gedling*, 2000 WL 567879, at *6 (Del. Ch. Feb. 29, 2000) (stating that this Court "may not construe unambiguous language to mean anything other than what it says").
[21] *Gallion*, 1996 WL 422338, at *2 (citing *Miller v. Equitable Trust Co.*, 32 A.2d 431, 436 (Del. 1943)).
[22] *Bird v. Wilm. Soc'y of Fine Arts*, 43 A.2d 476, 485 (Del. 1945).

light of the Will's definitions section, which explicitly designates the heads of stock to be the testatrix's daughters, the only reasonable interpretation of the Will read in its entirety is that Elizabeth and Valerie are the stirpital roots. Furthermore, the meaning of the phrases at issue, considering Fleitas's equal distribution between Elizabeth's and Valerie's lines of heirs in various articles of the Will and canons of construction under 12 *Del. C.* § 3301, is clear and unambiguous. Since no ambiguity exists in the language, I need not resort to extrinsic evidence.

C. The Plain Language of Article 5 and the Will's Definition of "Issue, Per Stirpes"

Having determined that no ambiguity exists in the Will, I now must interpret the Will's terms as written.[23] It is undisputed that the first generation that qualifies as "issue more remote than children" or "then living issue more remote than children" are Fleitas's grandchildren. The Will's definitions section, Article 17, aids the Court in understanding Article 5's plain language. It states that when determining a person's issue per stirpes, "the children of that person are the heads of their respective stocks of issue."

The distinction between an equal distribution among heirs under a Will and a per stirpes distribution is clear. "'[E]qual shares' denotes per

[23] *See In re Estate of Skwarlo*, 2001 WL 312451, at *1.

capita distribution."[24] On the other hand, "those who take per stirpes are substituted heirs who collectively take the share of the deceased ancestor."[25] Therefore, a per stirpes distribution indicates that descendants take the share that their parent would have taken, had the parent been alive. Looking only within the four corners of the Will, I conclude that the testatrix, by her inclusion of the definitions section, understood that her daughters would be the heads of the stock. Had Fleitas clearly indicated that she wanted a per capita distribution of the Trust income and corpus, then I would conform my analysis to that intention.

Respondents' argument does not comport with the Will's definition of what "issue, per stirpes" means. As a preliminary matter, an equal division among the grandchildren is essentially a "per capita" distribution for the purposes of that generation. The Will mandates a per stirpes distribution in the definitions section, which states that in a per stirpes distribution, "the children [Elizabeth and Valerie] of that person [Fleitas] are the heads of their respective stocks of issue." The existence of this definitions section makes it

[24] *Johnson v. Legrand*, 2009 WL 691924, at *2 (Del. Ch. Mar. 4, 2009); *see also* Black's Law Dictionary 1136 (6th Ed. 1990) (stating that "per capita" denotes a method of dividing an estate "by which an *equal share* is given to each of a number of persons, all of whom, stand in *equal degree* to the decedent") (emphasis added).

[25] *In re Estate of Wright*, 1997 WL 124149, at *3 (Del. Ch. Mar. 10, 1997); *see also* Black's Law Dictionary 1144 (6th Ed. 1990) (stating that "per stirpes" distribution of an estate denotes a method of dividing an estate "where a class or group of distributes take the share which their deceased would have been entitled to, had he or she lived, taking thus by their right of representing such ancestor").

unequivocally clear that Fleitas understood what "per stirpes" meant and that she did not intend for an equal distribution among the first generation qualifying as her "issue more remote than [her] children."

D. Testatrix Fleitas's Intent

Four separate provisions in the Will indicate Fleitas's intent to treat her daughters and her daughters' lines of descendants equally: Article 1 (the Personal Property Provision), Article 6 (the Residue Provision), Article 5, Paragraph B (the Pecuniary Gifts Provision), and Article 5, Paragraph D (containing Fleitas's devise when one or both of her daughters die).

1. Personal Property Provision

In Article 1, the Will provides that the testatrix's personal property should be divided between Valerie and Elizabeth in "as nearly equal shares as practicable." That paragraph provides that if one daughter predeceases Fleitas but the deceased daughter has living children, those children (i.e., Fleitas's grandchildren) "shall take, equally, the share which such deceased daughter would otherwise have taken had she survived me [Fleitas]." This indicates that Fleitas understood the difference between equitable divisions of her personal property, for which she willed equally between her two daughters, versus taking by representation, for which she willed among her grandchildren.

It is also evident that Fleitas knew the difference between a per capita and per stirpes distribution based on her use of the term "issue" versus "children" or "grandchildren" in the different clauses of her Will. Article 1 states that if *both* Elizabeth and Valerie predecease her, Fleitas's personal property should be divided among "such of my grandchildren who survive me, *per capita*." This statement indicates that Fleitas understood that "per capita" means equally, and she specifically wanted her personal belongings to be divided equally among her grandchildren who could bequeath those items as they pleased in their respective wills. Had Fleitas wanted the 20% Trust balance to be likewise distributed to her grandchildren equally, she would have provided that her grandchildren take equal shares and that the issue of any deceased grandchild take per stirpes the share that that deceased grandchild would have taken if he or she were alive. The Will does not state this, and I cannot now redraft the Will to implement something that was not Fleitas's intent. Therefore, the Personal Property Provision serves as additional evidence that the Will, taken as an entirety, was intended to divide Fleitas's assets equally between her two daughters' lines of heirs, unless otherwise stated. This provision also demonstrates Fleitas's understanding of the distinction between "per capita" and "per stirpes" and demonstrates

that she did not intend to treat her grandchildren as a class concerning the Trust distribution.

2. Residue Provision

Article 6 of the will provides for "equal shares to such of my children [Fleitas's daughters] . . . who survive me, and to the issue, *per stirpes*, of either of them who predeceases me but is represented by issue who survive me." I agree that Article 6 provides an equal distribution of Fleitas's residue assets to her two daughters. Under this language, Valerie and Elizabeth are clearly the heads of their respective stocks of issue and will each receive 50% of the residue. Upon the deaths of Elizabeth and Valerie, their children will then receive a fractional portion of their mothers' interest in the residue.

Assuming, for the sake of argument, that Valerie had predeceased the testatrix but Elizabeth had survived her, under the Residuary Provision, Elizabeth would receive 50% of the residue, and Valerie, having died, would pass her 50% interest in the residue to her issue, per stirpes, that is, to her four children. Kaylee would get none of the residue until Elizabeth died. Under the Respondents' argument that the heads of the stirpes should be the grandchildren, however, Elizabeth would get 50% of the interest in the residue and the five grandchildren, including Kaylee, would evenly divide up the other half of the residue. This scheme does not make sense,

considering Kaylee is a "substituted heir" and should not take until Elizabeth can no longer take. Contrary to respondents' argument, the Residue Provision further supports the reading that "issue, per stirpes" throughout the Will means that the stirpital roots lie with Elizabeth and Valerie, *not* with Fleitas's grandchildren.

3. Pecuniary Gifts Provision of Article 5

Article 5, Paragraph B, provides $1 million to each of Fleitas's children and $100,000 to each of her grandchildren, "and if any one or more of my [Fleitas's] grandchildren is then deceased with issue then living, to the then living issue, *per stirpes*, of each such deceased grandchild of mine." This bequest again indicates Fleitas's understanding of the distinction between an equal distribution and a per stirpes distribution. For this particular provision only, Fleitas bequeaths $100,000 per capita to each of her grandchildren.

This provision also indicates Fleitas's intent to treat her two daughters equally, giving them both $1 million. The equal bequests to her grandchildren, which are substantially smaller than those to her daughters, only suggest that Fleitas intended to treat all of Valerie's children, the only grandchildren who existed at the time of Fleitas's death, equally; it has no bearing on what the testatrix might have bequeathed had she known

Elizabeth would have a child.[26] The Pecuniary Gifts Provision treats Fleitas's grandchildren equally and their issue, per stirpes, taking what their parents have by representation; the Trust language in Paragraphs C and D treat Elizabeth and Valerie equally and their issue, per stirpes, taking by representation of what their mothers would have *if they could take* (which they cannot). The Pecuniary Gifts Provision therefore reinforces the argument that Fleitas intended for the heads of the stirpital distribution of the Trust to be her daughters and that she understood the meaning of per stirpes.

4. Article 5, Paragraph D

Finally, Article 5, Paragraph D itself provides an indication of how Fleitas intended to divide her Trust assets. Paragraph D provides that when one of Fleitas's daughters dies or at the termination of the Trust period, if only one of Fleitas's daughters is alive, the surviving daughter will get 50% of the Trust income, and the other 50% goes to Fleitas's "issue more remote than children as are living from time to time, *per stirpes*." Paragraph D also says that, if no issue more remote than her children are alive at the termination of the Trust period, the Trust property goes equally to Elizabeth

[26] Respondent Beneficiaries argue that this equal distribution of pecuniary gifts among grandchildren indicate Fleitas's intent to treat her grandchildren equally. There are many equally plausible reasons, however, why Fleitas would have wanted a per stirpes distribution to begin with her daughters, one being that the testatrix possibly thought that a grandchild without siblings would have less financial support. I will not delve into these possible reasons because I do not think it is necessary; the plain words of the Will speak for themselves.

and Valerie if they are alive. Under Paragraph D, if Valerie had predeceased Fleitas, Elizabeth would take 50% of the Trust income, and Valerie's children would evenly divide the other 50%. This provision indicates that Fleitas intended to divide the Trust interest between her two daughters' lines of heirs equally, whether they were both alive or one died; the daughter that died first would pass her 50% share by dividing that share evenly among her children. Therefore, Article 5, the actual Trust provision, also indicates Fleitas's intent to treat both her daughters' lines of heirs equally.

Under the Will's clear terms, the initial division of the 20% net balance of the Trust income occurs with Elizabeth and Valerie, daughters of the testatrix.[27]

III. CONCLUSION

Based on the definitions section in Fleitas's Will and Delaware statutory law, I conclude that Elizabeth and Valerie, as daughters of the testatrix, are the heads of the stirpital distribution of Fleitas's Trust. In applying a per stirpes distribution with Elizabeth and Valerie as the heads of the stirpes, I treat Elizabeth and Valerie as having predeceased the testatrix

[27] The parties expend significant effort and time sparring over whether the heads of the stirpes must be first takers of the property. Both parties cite a number of decisions from Delaware and from other states, as well as provisions of the Restatement (First) of Property, on each side of the question. It is unnecessary for me to join the fray, however, as the clearly expressed intent of the testatrix in the definitions section of the Will (and in related provisions) controls this dispute.

for purposes of the 20% balance of the Trust interest because they are not entitled to that 20%. Therefore, Kaylee Fleitas will receive one-half of the 20% Trust income balance, or 10% of the total Trust income presently and her line of heirs will receive 50% of the Trust corpus once the Trust period terminates and Elizabeth and Valerie die. Valerie's four children, including the respondents, will share the other one-half of the 20% Trust income balance, each receiving 2.5% of the total Trust income presently and each receiving 12.5% of the Trust corpus following the termination of the Trust period and both Elizabeth's and Valerie's deaths.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:vmk