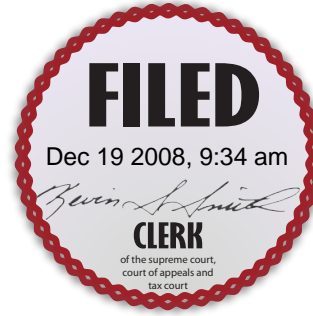


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE SUPERVISED,)
ADMINISTRATION OF THE ESTATE OF)
CLARENCE L. BROWN)

JACK R. ZIRKLE, *et al*)

Appellants-Petitioners,)

vs.)

No. 33A05-0805-CV-306

DELORES J. DEARING and)

RUTH E. STAGGS)

Appellees-Respondents.)

APPEAL FROM THE HENRY SUPERIOR COURT
The Honorable Michael D. Peyton, Judge
Cause No. 33D01-0604-ES-22

December 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Jack R. Zirkle, David A. Zirkle, Thomas A. Zirkle, Toby A. Zirkle, and Tracy E. Zirkle (referred to collectively as the Zirkles) appeal the trial court's construction of the Last Will and Testament of Clarence L. Brown (the Will). The Zirkles contend the trial court erroneously ordered them to pay \$117,870 to each Ruth E. Staggs and Delores Jean Dearing as a condition to the Zirkles receiving certain real estate under the Will.

We reverse and remand.

On February 29, 1988, Brown executed the Will, devising his estate to his wife, Violetmae Brown, and providing for disposition of his estate if Violetmae predeceased him. Violetmae died on June 28, 1994, and Brown died on April 7, 2006. The Will was probated, and Brown's nephew and nieces, Jack Zirkle, Dearing, and Staggs, were appointed and qualified as co-executors.

The Will provided in relevant part as follows:

ITEM IV

Wife Not Surviving

In the event my said Wife, Violetmae Brown, does not survive me, then and in that event I dispose of my property as follows:

A. Specific Bequests.

1. I give, devise and bequeath to my nephew, Jack R. Zirkel [sic], all of my farm real estate located in Fall Creek Township, Henry County, Indiana, consisting of approximately 118 acres, for the term of his natural life. I give, devise and bequeath the fee simple and remainder of said farm to his son, David A. Zirkle and his three grandchildren, Thomas A. Zirkle, Toby A. Zirkle and Tracy E. Zirkle, share and share alike, subject only to the life estate of the said Jack R. Zirkel [sic]. This bequest is made subject to the possible charge as hereinafter provided in subsection 4.

2. I give, devise and bequeath to my niece, Ruth E. Staggs, the sum of Sixty One Thousand Five Hundred Dollars (\$61,500.00), subject to the possible reduction as provided by subsection 4.

3. I give, devise and bequeath to my niece, Delores Jean Dearing, the sum of Sixty One Thousand Five Hundred Dollars (\$61,500.00), subject to the possible reduction as provided by subsection 4.

4. In the event there are insufficient assets to make the cash bequests to the said Ruth E. Staggs and Delores Jean Dearing in the amount of Sixty One Thousand Five Hundred Dollars (\$61,500), their said bequest shall be reduced to the remaining assets in the estate. However, the bequest to Jack R. Zirkel [sic], his son and grandchildren under Section A (1) of this Item of my Last Will and Testament, shall be charged in an amount that will make all of the bequests under subsection 1, 2 and 3 equal. If my total estate, considering the farm bequeathed under subsection A (1) at a value of Sixty One Thousand Five Hundred Dollars (\$61,500.00) is under a total sum of One Hundred Eighty Four Thousand and Five Hundred Dollars (\$184,500.00), the said devisees under subsection A (1) shall be chargeable to pay a sum in cash equal to one-third (1/3) of the deficiency to the beneficiary under subsection A (2), and another one-third (1/3) of a sum in cash to be paid to the beneficiary under subsection A (3).

ITEM V

Residue

I will, devise and bequeath all the rest, residue and remainder of my estate to the said Jack R. Zirkel [sic], Ruth E. Staggs and Delores Jean Daring, share and share alike.

Appellants' Appendix at 12-13.

After the Will was probated, Dearing and Staggs filed a petition requesting instructions as to the construction of the Will and the disposition of estate assets. On January 15, 2007, an inventory of the estate was filed with the trial court, showing the total appraised value of the estate to be \$414,759.41. Of that value, the farm real estate was listed at a date-of-death fair market value of \$353,610. Thus, the remaining assets exclusive of the farm were clearly insufficient to make the cash bequests to Staggs and Dearing each in the amount

of \$61,500. As a result, a dispute arose between the parties regarding the amount the Zirkles should be charged to pay Staggs and Dearing under the Will. The Zirkles claimed that in calculating this amount, the value used for the farm should be \$61,500. On the other hand, Dearing and Staggs believed the fair market value of the farm at the time of Brown's death should be used in computing the charge.

Following a hearing on Dearing and Staggs's petition, the trial court entered an order on February 8, 2007, concluding that the Will is not ambiguous and construing the Will to "provide that the individual shares of [Dearing] and [Staggs] under Item IV, A, 2 and 3 shall each amount to one-third (1/3) of the value of the real estate being conveyed under Item IV, A, 1." *Id.* at 30-31. Moreover, the court appeared to agree with Dearing and Staggs that the value of the farm at the time of death applied when calculating the credit under the Will.

The Zirkles subsequently filed a motion to correct error, which was deemed denied by operation of law on April 23, 2007. The Zirkles then appealed to this court, but we dismissed the appeal as premature on August 13, 2007. The personal representatives returned to the trial court seeking a final appealable order. In this regard, on April 10, 2008, they filed their Final Account, Petition to Settle and Allow Account, and Petition for Authority to Distribute Assets Remaining and Close Estate (the Final Accounting). Among other things, the Final Accounting asked the court to "confirm or modify it's [sic] February 8, 2007 Order on construction of the Will, and, designate, determine, and confirm the persons to whom final distribution is to be made, and the portions or part of the estate, or the amounts to which each is entitled under [the Will]." *Id.* at 74.

On April 25, the Zirkles filed an objection to the Final Accounting claiming that the proposed distribution by Dearing and Staggs and the distribution called for under the February 8, 2007 order were clearly erroneous and contrary to the terms of the Will. The Zirkles' objections were heard by the trial court on May 21, 2008. The following day, the trial court issued an Order Approving Personal Representative's Final Account, Petition to Settle and Allow Account and Order Distributing Estate. In its order, the court acknowledged the dispute between the devisees regarding the interpretation of the Will, as well as the dispute as to the interpretation of the court's February 8, 2007 order. The court then "ratified and confirmed in its entirety" its previous order. *Id.* at 110. Accordingly, the court ordered as follows:

[T]he personal representatives of this estate shall convey, within thirty (30) days from the date of this Order, the [farm real estate] to Jack R. Zirkle (life estate), with remainder of said real estate to David A. Zirkle, Thomas A. Zirkle, Toby A. Zirkle and Tracy E. Zirkle Kennedy, as tenants in common; **conditioned upon** said grantees paying to Ruth E. Staggs and Delores J. Dearing each, the sum of One Hundred Seventeen Thousand Eight Hundred Seventy Dollars (\$117,870.00) which sum represents one-third (1/3) of the value of the [farm real estate], otherwise said joint personal representatives may petition the Court to sell said real estate in order to raise the funds necessary to comply with the distribution herein ordered.

Id. at 110-11 (emphasis in original). Finally, the court ordered the residue of the estate to be equally distributed between Jack Zirkle, Dearing, and Staggs.

On appeal, the Zirkles contest the trial court's construction of the Will. The Zirkles agree that their receipt and retention of the farm is subject to an equitable election or "charge" to satisfy the bequests to Dearing and Staggs because there are insufficient assets in the estate (exclusive of the farm real estate) to make the specific cash bequests. They

disagree, however, with the court's determination of the amount they are required to pay Dearing and Staggs. Initially, they argue that the court improperly used the fair market value of the farm real estate at the time of Brown's death when calculating the charge to be paid by the Zirkles to Dearing and Staggs. They assert the Will unambiguously provides that the farm shall be valued at \$61,500 for this purpose. Further, the Zirkles contend that the trial court disregarded the direction in the Will that the unsatisfied portion of the cash bequests were to be initially funded by the residuary estate with the Zirkles responsible only for any shortfall.

This appeal is from the construction of a will and involves no factual disputes. "The will speaks for itself, as well to us as to the trial court; hence, we review it *de novo*." *Merrill v. Wimmer*, 481 N.E.2d 1294, 1297 (Ind. 1985). "When examining a will, the primary purpose is to determine and carry out the intent of the testator." *Outlaw v. Danks*, 832 N.E.2d 1108, 1111 (Ind. Ct. App. 2005), *trans. denied*. Where possible, we must consider and give effect to every provision, clause, term, and word of the will to determine that intent. *Gladden v. Jolly*, 655 N.E.2d 590 (Ind. Ct. App. 1995). Resort may be had to rules of construction only when ambiguity exists and the testator's intent cannot be determined from the language of the will. *Merrill v. Wimmer*, 481 N.E.2d 1294.

Item IV of the Will makes specific bequests to the Zirkles, Dearing, and Staggs. The bequest of the farm real estate to the Zirkles is subject to a possible charge as provided in subsection 4 of Item IV. Further, the cash bequests to Dearing and Staggs are made subject to a possible reduction as provided in subsection 4. The parties do not dispute that all of the

specific bequests are subject to their respective charges or reductions because insufficient assets exist in the estate (exclusive of the farm real estate) to make the specific cash bequest to Dearing and Staggs. This, however, is where the parties' agreement on the interpretation of subsection 4 ends.

As set out above, subsection 4 of Item IV provides in relevant part:
In the event there are insufficient assets to make the cash bequests to the said Ruth E. Staggs and Delores Jean Dearing..., their said bequest shall be reduced to the remaining assets in the estate. However, the bequest to Jack R. Zirkel [sic], his son and grandchildren...shall be charged in an amount that will make all of the bequests under subsection 1, 2 and 3 equal. If my total estate, considering the farm bequeathed under subsection A (1) at a value of [\$61,500.00] is under a total sum of [\$184,500.00], the said devisees under subsection A (1) shall be chargeable to pay a sum in cash equal to one-third (1/3) of the deficiency to the beneficiary under subsection A (2), and another one-third (1/3) of a sum in cash to be paid to the beneficiary under subsection A (3).

Appellants' Appendix at 12-13. Interpreting this subsection, the trial court concluded that the Zirkles must pay to Dearing and Staggs a total of \$235,740, which represents two-thirds of the fair market value of the farm on the date of death, in order to inherit the farm. The court further ordered the residue of the estate to be equally distributed between Jack Zirkle, Dearing, and Staggs.

The trial court's interpretation of subsection 4 does not comport with a fair reading of the Will. We initially observe that subsection 4 plainly requires the unsatisfied cash bequests to be initially funded by the residue of the estate. To be sure, the Will provides that in the event there are insufficient assets to make the cash bequests (a fact not in dispute), the bequests "shall be reduced to the remaining assets in the estate." *Id.* at 13. Thus, the trial court improperly charged the Zirkles with funding the cash bequests in their entirety.

Moreover, we cannot agree with the trial court's calculation of the amount due Dearing and Staggs. In calculating said amount, the trial court, as do Dearing and Staggs on appeal, appears to have focused entirely on the sentence indicating that the Zirkles shall be charged in an amount that will make all of the specific bequests equal. If subsection 4 ended with this provision, we would tend to agree with the trial court. The subsequent sentence, however, makes clear that the farm shall be valued at \$61,500 (not fair market value at death) when determining the amount chargeable to the Zirkles. This provision of the Will states:

If my total estate, *considering the farm bequeathed under subsection A (1) at a value of [\$61,500.00]* is under a total sum of [\$184,500.00], the said devisees under subsection A (1) shall be chargeable to pay a sum in cash equal to one-third (1/3) of the deficiency to [Staggs], and another one-third (1/3) of a sum in cash to be paid to [Dearing].

Id. (emphasis supplied).

The trial court's interpretation of the Will wholly disregards the highlighted portion above. In fact, the trial court found the entire provision inapplicable, explaining:

Counsel for the Zirkels [sic] wants the Court to look to the third sentence of subsection 4 for additional guidance. The Court, however, finds that the first phrase of that sentence takes it out of play because it begins stating that "(i)f my total estate...is under a total sum of One Hundred Eighty Four Thousand and Five Hundred Dollars (\$184,500.00)...." Clearly the Decedent's total estate exceeds that amount. Unfortunately, for the Court and all involved there was no example set out by the Decedent to illustrate the situation which we have at present. The Decedent did not offer any explanation to cover the situation where the "real property" asset appreciated greatly in value prior to his death. It would have been a simple matter for the Decedent to have added language to cover that alternative.

Id. at 30 (omissions in original). On the contrary, the example illustrates what should happen under the circumstances before us where the farm real estate has appreciated in value (as one

would generally expect) and there are not enough remaining assets in the estate to satisfy the specific bequests to Dearing and Staggs. In this instance, the Will unambiguously sets the value of the farm at \$61,500. Thus, while the Will speaks of equality, this is with a caveat that the farm is valued at \$61,500. This interpretation is the only one that harmonizes and gives effect to each provision, clause, term, and word of the Will and, specifically, Item IV. Further, it carries out Brown's clear intent that the bequests to Dearing and Staggs be fulfilled (even in the event there are insufficient assets in the estate) and that the farm stays in the family via the Zirkles.¹

In summary, we conclude that the trial court improperly ordered the Zirkles to pay the sum of \$117,870 each to Dearing and Staggs, representing two-thirds of the fair market value of the farm at Brown's death, without contribution by the estate to fund the bequests. On remand, the trial court shall enter a judgment that provides: 1) Dearing and Staggs are each entitled to specific cash bequests in the amount of \$61,500; 2) said bequests shall be funded by the estate assets, exclusive of the farm; and, 3) to the extent there are insufficient assets in the estate to fully fund the bequests to Dearing and Staggs, the Zirkles shall be charged to make up the shortfall² in order to retain the farm.³

¹ The trial court's interpretation would have the Zirkles paying Dearing and Staggs a combined \$235,740, which is nearly 92% more than the specific cash bequests provided in the Will. We find nothing in the Will to indicate that this was Brown's intent.

² We observe that there is some ambiguity in subsection 4 of Item IV regarding whether the Zirkles must fund the entire shortfall or just two-thirds of it. This ambiguity arises from the last sentence, which provides that the Zirkles shall be charged to pay "a sum in cash equal to one-third (1/3) of the deficiency to [Staggs], and another one-third (1/3) of a sum in cash to be paid to [Dearing]". *Id.* at 13. This is in contrast to the immediately preceding sentence indicating that the Zirkles shall be charged in an amount to make all bequests equal. In any event, the Zirkles concede that they should be charged the entire shortfall.

Judgment reversed and remanded.

DARDEN, J., and BARNES, J., concur

³ It seems apparent that there will be no residue remaining after the specific bequests are satisfied, as the estate assets must be exhausted before the Zirkles are charged. In the unlikely event assets remain in the estate, the residue shall be divided equally between Jack Zirkle, Dearing, and Staggs, as provided in Item V of the Will.