



## OPINION ON REHEARING

ATTORNEY FOR APPELLANT

Joseph Leon Payne  
Payne Law Office, LLC.  
Austin, Indiana

ATTORNEY FOR APPELLEE

Kerry Thompson  
Houston, Thompson and  
Lewis, PC  
Scottsburg, Indiana

## IN THE COURT OF APPEALS OF INDIANA

Ashley Victoriano, individually  
and as Administrator of the  
Estate of Patrick Barnes

*Appellant-Respondent,*

v.

Estate of Barbara J. Smith,  
*Appellee-Petitioner.*

November 16, 2021

Court of Appeals Case No.  
21A-ES-407

Appeal from the Scott Superior  
Court

The Honorable Jason Mount,  
Judge

Trial Court Cause No.  
72C01-2001-ES-1

**Bradford, Chief Judge.**

- [1] On September 15, 2021, we issued an unpublished opinion in the case of *Ashley Victoriano, individually and as Administrator of the Estate of Patrick Barnes v. Estate of Barbara J. Smith*, affirming the decision of the trial court. In that case, which concerned the last will and testament of Cecil A. Smith and Barbara J. Smith

(“Bobbi”), we mistakenly omitted the italicized portion of the following part of the will:

BEQUESTS:

We direct that after payment of all our just debts, our property *be bequeathed in the manner following:*

*In the event that we pass on at the same time we request that our property be divided as follows: Cecil’s half to be divided between Toby A. and Shannon Smith.. [sic]*

Bobbi’s half to be divided between Toby A. Smith, Shannon M. Smith, Patrick Barnes and Tammy Montana. In the event that one of us precedes the other in death, we both wish that in the event the remaining spouse should remarry that the new spouse would not be benefited [sic] any of the property; all properties should still be divided only as above mentioned when the remaining partner expires.

Appellant’s App. Vol. II p. 15 (italics added).

- [2] Barnes’s estate argues that, because we misquoted the will, we failed to understand the will’s terms and properly follow the rules of construction in determining Bobbi’s intent, and therefore we should reverse and remand with orders to award each of Bobbi’s children a 1/4 share. This omission does not alter our analysis. “[W]hen examining a will, the primary purpose is to determine and carry out the intent of the testator.” *In re Estate of Cashen*, 715 N.E.2d 922, 924 (Ind. Ct. App. 1999). Despite the omitted language, the will specifically states the intent that “[i]n the event that one of us precedes the other in death” Bobbi and Cecil wanted all properties to “still be divided only as above mentioned when the remaining partner expires[,]” even if a surviving

spouse were to remarry. Appellant's App. Vol. II p. 15. If anything, the omitted language underscores that, regardless of whether Bobbi and Cecil died at the same time or one predeceased the other, they wanted their estate distributed among the children unequally so that Bobbi and Cecil's children received  $\frac{3}{8}$  shares while Bobbi's children from a previous marriage only received  $\frac{1}{8}$  shares.

[3] We grant rehearing for the limited purpose of correction our omission, and we reaffirm our original disposition in all other respects.

Robb, J., and Altice, J., concur.