STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of ALICE J. RAYMOND, Deceased.

CLAIR MORSE,

Petitioner-Appellee,

v

VALERIE SHARKEY, GAIL THOMAS, GARY ZEIGLER, DEANNA CONANT, CARYN NUZHET, JAY CURRY, MARY JEAN MANDELA, JOHN PACKARD, FRANK PACKARD, LISA MORSE, ELLIOT GUILLORY, ROBERT McCLELLAND, BEVERLY CLEMENT, DAVID MORSE, JUDITH FROELICK, PHILLIP MORSE, JOAN SUMMERS, JANICE FELKEY, DONALD MORSE, MARVIN STULL, ERIC STULL, FRANK BRIGGS, JOANNE CARTER and MARILYN RIGEL,

Respondents-Appellants.

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No. 267364
Lenawee Probate Court
LC No. 05-044839-DE

Official Reported Version

Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

WHITBECK, C.J.

Respondents[1] appeal as of right the probate court's order denying their claim for a share in the residue of the estate of testator Alice J. Raymond. We affirm.

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[1] Although all the respondents are included in the claim of appeal, only respondents Valerie Sharkey, Gail Thomas, Gary Zeigler, Deanna Conant, Caryn Nuzhet, Jay Curry, Mary Jean (continued…)

I. Basic Facts and Procedural History

Testator and her husband, Claude C. Raymond (Raymond), prepared mirror-image wills in January 1979. Testator died on February 27, 2005. Testator and Raymond did not have any children; thus, testator's will provided that, after funeral expenses, administration costs, and taxes were paid, the residue of her estate should pass to Raymond. However, if Raymond predeceased her, which did in fact occur, testator's will stated that the residue and remainder of her estate should be divided as follows:

> A. Fifty (50%) per cent thereof to my brother [sic] and sisters that survive me share and share alike or to the survivor or survivors thereof.
>
> B. Fifty (50%) per cent thereof to the brothers and sisters of my husband that survive me, share and share alike or to the survivor or survivors thereof.

The record indicated that testator had five brothers and three sisters. When testator died, only two of her brothers and none of her sisters were still alive. Raymond had six sisters and two brothers. However, when testator died, only Raymond's two brothers and one of his sisters were still alive. Respondents are descendants of those siblings of testator and Raymond who predeceased testator. Although the lower court record does not contain any accounting of the estate, the inventory indicates that the estate's total assets were $796,796.31.

In June 2005, petitioner Clair A. Morse, testator's brother, filed a petition for probate. One month later, Morse filed a petition to construe testator's will. Morse requested that the probate court construe paragraph A of the residuary clause to mean that the brothers of testator who survived her should receive 50 percent of the residue, with no share going to the descendants of testator's predeceased brothers and sisters. Morse similarly requested that the probate court construe paragraph B of the residuary clause to mean that the brothers and sister of Raymond who survived testator should receive 50 percent of the residue, with no share going to the descendants of Raymond's predeceased sisters. Morse asserted that there was no ambiguity in the residuary clause and claimed that testator's use of survivorship language demonstrated an intent to avoid the antilapse statute.[2]

Respondents argued that the probate court should construe the residuary clause to mean that the descendants of the deceased siblings could take their deceased ancestors' shares by representation. Respondents asserted that a patent ambiguity resulted from the combination of the phrases "that survive me" and "or to the survivor or survivors thereof." They argued that, if the phrase "or to the survivor or survivors thereof" was simply ignored, the antilapse statute would apply, which would create a result contrary to testator's intent that each side of her and Raymond's family receive an equal one-half share of the estate. Respondents explained that this

(…continued)

Mandela, John Packard, Frank Packard, Lisa Morse, and Elliot Guillory filed a brief on appeal. Throughout this opinion, we refer to these individuals collectively as the respondents.

[2] MCL 700.2603.

intent would be defeated by Morse's suggested interpretation, under which one side of the family could take the entire residue if all the siblings on the other side of the family were dead.

The probate court granted Morse's petition for probate and appointed a temporary personal representative. The probate court then conducted a hearing and stated the following with respect to the residuary clause of testator's will:

> [Paragraph A] may appear on its face to be confusing. In this court's eyes it does not appear to be confusing. It may be inarticulate meaning that there were words thrown in there that were not necessary to reach the result and desire, but, I think in reading the clause one has to look at the first phrase, "Fifty per cent thereof to my brother and sisters that survive me", then there is a coma [sic]. It would appear to this court that the group that Ms. Raymond was dealing with were to [sic] her brother and sisters. Then she qualified that group by "those that survive me". The remaining clause, in this court's eyes, would be descriptive of the earlier group, the earlier group being "my brothers and sisters that survive me". The remaining phrase, "to share and share alike or to the survivors thereof" would mean to my brothers and sisters, to those that predecease me, to those that are left, to share and share alike and to the survivors thereof. The court would so rule as this court reading the language that way. Likewise on paragraph 'B' the court's similar logic would be concerning "the brothers and sisters of my husband that survive me", and once again coma [sic], "and the balance share and share alike or to the survivors thereof" are descriptive of the benefit to be received by the class before it which would be to [sic] the brothers and sisters of my husband that have to survive, and, I'm using the term "have to". The term in the will was "survive me", and, to me that is a clarifying term and it narrows the class down. They have to survive him [sic] to share and share alike or to be a survivor thereof.

The probate court's order provided as follows:

> [T]he language used in paragraph "Second" [of the will] is to be construed to mean that the two surviving brothers of [testator] will receive fifty percent of the residue of the estate and that the two surviving brothers and one surviving sister of the husband of [testator], being [Raymond], shall receive fifty percent of the residue. The surviving descendants of the predeceased brothers and sisters of [testator] and the surviving descendants of the predeceased brothers and sisters of the husband of [testator], being [Raymond], are not entitled to any share in the residue.

Respondents now appeal.

II. Construing the Will

A. Standard of Review

Respondents argue that the probate court erred in construing testator's will. A probate court's construction of a will is a legal question that we review de novo.[3] "Findings of the probate court, sitting without a jury, are to be reversed by this Court *only* when clearly erroneous."[4]

B. Legal Standards

The probate court's role is to ascertain and give effect to a testator's intent, which it gleans solely from the plain language of the will unless there is an ambiguity.[5] If possible, each word of a will should be given meaning.[6] "A patent ambiguity exists if an uncertainty concerning the meaning appears on the face of the instrument and arises from the use of defective, obscure, or insensible language."[7]

C. Applying the Standards

1. The Residuary Clause

As stated, testator's will provides that the residue of the estate should be divided as follows:

> A. Fifty (50%) per cent thereof to my brother[s] and sisters that survive me share and share alike or to the survivor or survivors thereof.
>
> B. Fifty (50%) per cent thereof to the brothers and sisters of my husband that survive me, share and share alike or to the survivor or survivors thereof.

Respondents argue that the probate court erred in construing the will so that testator's surviving siblings received 50 percent of the residue, Raymond's surviving siblings received 50 percent, and respondents received nothing. Respondents contend that the inclusion of the phrase "or to the survivor or survivors thereof" meant that testator intended for the "survivors"—that is, descendants—of the predeceased siblings to inherit. Conversely, Morse contends that the probate court properly concluded that the phrase "or to the survivor or survivors thereof" refers solely to testator's and Raymond's surviving siblings.

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[3] *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005).

[4] *In re Burruss Estate*, 152 Mich App 660, 663-664; 394 NW2d 466 (1986) (emphasis added).

[5] *Reisman, supra* at 527.

[6] *Id.*

[7] *In re Woodworth Trust*, 196 Mich App 326, 327-328; 492 NW2d 818 (1992).

As the parties have presented it, the dispute here hinges on reconciling two important clauses of the residuary clause: (1) "to my brother[s] and sisters that survive me share and share alike"[8] and (2) "or to the survivor or survivors thereof."

a. The First Clause

It is undeniable that the language of the first clause expressly qualifies the class of "brothers and sisters" with the phrase "that survive me." Indeed, respondents concede that "the first part of the disputed clause established a 'qualified group' of 'those that survive me.'" Thus, the plain language of this half of the first clause, taken alone, clearly limits the class of devisees to the siblings still alive at testator's death. As the probate court put it, the siblings first have to survive testator to be considered among the class of devisees. Therefore, this language alone indicates that testator intended that any predeceased siblings be excluded from the class because they did not survive her.

Although overlooked by both Morse and respondents, the second half of the first clause—"share and share alike"—bolsters an interpretation limiting the class solely to the surviving siblings. The Michigan Supreme Court has held that a class gift that directs that a devise be divided "share and share alike" indicates the testator's intent to create an equal division among the members of the class, whose members are usually related to the testator in equal degrees, using a per capita distribution.[9] Further, Black's Law Dictionary specifically defines the phrase "share and share alike" as: "To divide (assets, etc.) in equal shares or proportions; to engage in per capita division."[10] Black's Law Dictionary defines "per capita" as: "[Latin 'by the head'] 1. Divided equally among all individuals, [usually] in the same class <the court will distribute the property to the descendants on a per capita basis>."[11] Therefore, by stating that she wished the residue of her estate to pass to the siblings who survived her "share and share alike," testator indicated that she desired a per capita distribution, under which the court must distribute the devise among the surviving heads on the generational line—the surviving brothers and sisters of Raymond and testator—thereby shutting out any claims by the descedants of any predeceased siblings.

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[8] We use the language here from paragraph A as representative of the similar language also found in paragraph B.

[9] *Rendle v Wiemeyer*, 374 Mich 30, 44; 131 NW2d 45 (1964); *Van Gallow v Brandt*, 168 Mich 642, 649-650; 134 NW 1018 (1912); see also *Granger v Duryea*, 218 Mich 616, 619; 188 NW 372 (1922).

[10] Black's Law Dictionary (8th ed).

[11] *Id.*

b. The Second Clause

Despite two important indicators in the first clause that testator desired to limit the class gift to the surviving brothers and sisters, respondents contend that the second clause—"or to the survivor or survivors thereof"—must be given effect, whereby they are also entitled to take a portion of the residue. Although disagreeing on their significance, in interpreting this second clause both parties direct us to consider the language used in two Michigan cases: *In re Burruss Estate* and *In re Holtforth's Estate*.[12]

In *In re Burruss Estate*, the decedent's will provided as follows:

> In the event my said husband . . . should predecease me, or in the event that my husband and I should meet our deaths simultaneously, as in some common catastrophe, then in either of such cases, I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, wheresoever situated, in equal amounts, *share and share alike, to my daughters, Anna Mary Vollick of Redford Township, Wayne County, Michigan, Jeanne Glaeser of Detroit, Michigan and Audrey Larson of Detroit, Michigan, or to the survivor or survivors of them.*[13]

The decedent's husband and Audrey Larson both predeceased the decedent. Upon the decedent's death, Audrey Larson's three children claimed that they were entitled to Audrey Larson's one-third share of the estate. Anna Mary Vollick and Jeanne Glaeser claimed that they alone were entitled to the residue. The pivotal issue was interpretation of the language "share and share alike, to my daughters . . . or to the survivor or survivors of them." Quoting the probate court's opinion, this Court concluded: "'"Them" refers to decedent's three daughters, Anna, Jeanne and Audrey. The survisor(s) [sic] of "them" are Anna and Jeanne because they survived Audrey's death.'"[14] Citing use of the term "rights of survivorship" in the context of joint tenancies, this Court found it significant that the will drafter specifically used the word "survivor." This Court explained that, if the will drafter had wanted to effectuate the grandchildren's interpretation, then he could have used language like "their children," "their issue," or "their heirs." Therefore, this Court held that the clear language in the will showed the decedent's intent that only her children, not their descendants, inherit under her will.[15]

In reaching its resolution in *Burruss*, this Court relied in part on the Michigan Supreme Court's opinion in *Holtforth*. There, the Court considered a similar will that devised property

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[12] *In re Holtforth's Estate*, 298 Mich 708; 299 NW 776 (1941).

[13] *Burruss*, *supra* at 662 (emphasis added).

[14] *Id.* at 663.

[15] *Id.* at 664-665.

"[t]o the seven children of [the decedent's brother], and the survivor of them . . . ."[16] The Court held the language to mean that only the surviving children were entitled to inherit.[17]

Respondents nevertheless contend that "the word 'survivors,' except where it has a specific legal meaning resulting from a legal precedent, is a generic term that includes descendants." We, however, conclude that *Burruss* and *Holtforth* are in fact significant legal precedents that provide a specific legal meaning to the word "survivor" in this context. Moreover, it may be true that a layperson might interpret that term "survivor" to be synonymous with "descendant." But in a legal context, "survivor" is defined as "[o]ne who outlives another,"[18] as, for example, when one person out of two or more remains alive after the others die.[19]

Respondents also argue that *Burruss* and *Holtforth* are distinguishable because the wills in those cases stated "to the survivor or survivors of *them*" and "the survivor of *them*," respectively, rather than "or to the survivor or survivors *thereof*," as used here. Although not an exact match, we conclude that the second clause parallels the language used in *Burruss* and *Holtforth*. While the clause here employs the word "thereof" rather than "them," we do not find it unreasonable to construe the phrase used here, "or to the survivor or survivors *thereof*," as referring back to the brothers and sisters who survived testator. We therefore conclude that the phrase "or to the survivor or survivors thereof" in paragraph A modifies the phrase "my brother[s] and sisters that survive me," thereby referring to those of testators' siblings who survived testator, and indicates that testator intended only for her surviving siblings, i.e., not the descendants of any of her deceased siblings, to inherit. Similarly, the phrase "or to the survivor or survivors thereof" in paragraph B modifies the phrase "the brothers and sisters of my husband that survive me"; therefore, it refers to those of Raymond's siblings who survived testator and indicates that testator intended for only the siblings of Raymond who survived her, i.e., not the descendants of any of his deceased siblings, to inherit. Stated differently, under the plain language of the will, respondents are not entitled to inherit because they are not the "survivors thereof," where "thereof" refers to the surviving siblings.

Respondents further argue that the phrase "brother[s] and sisters that survive me" and the phrase "to the survivor or survivors thereof" are redundant and that our interpretation renders the clause "to the survivor or survivors thereof" surplusage, which goes against the tenet of will construction that, if possible, each word of a will should be given meaning.[20] Respondents contend that, if testator had wanted to give a class gift solely to her brothers and sisters who were

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[16] *Holtforth, supra* at 709.

[17] *Id.* at 711.

[18] Black's Law Dictionary (8th ed).

[19] *Id.* (defining "survivorship").

[20] *Reisman, supra* at 527.

alive at her death, then she would have simply stopped at the end of the first clause. They contend that the second clause must be given some meaning and insist that the meaning given inure to their benefit. We acknowledge that the first and second clauses are seemingly redundant; however, we find it nonsensical to conclude that the will drafter intentionally constructed the residuary clause in such a way as to indicate contradictory intents within a single sentence. Indeed, were we to agree with respondents, we would have to rewrite the will to instead state: "Fifty (50%) per cent thereof to my brother[s] and sisters or to the descendants thereof." This we cannot do.[21] Rather than reading the two clauses as competing with each other, we find that the better course of action is to read the clauses together as reinforcing testator's intent to equally divide the residue among the surviving siblings.

Finally, respondents argue that our interpretation violates testator and Raymond's apparent intent that each side of the family receive an equal one-half share of the estate. To support this argument, they point out that *if*, for example, all of Raymond's siblings had been deceased at the time of testator's death, then testator's family would end up taking the whole residue under the laws of intestate succession. However, we believe that the specific terms of art used by the will drafter are more indicative of testator's intent than an interpretation based on speculation. In *In re Bruin Estate*, the Michigan Supreme Court was urged to construe certain language in a will to avoid partial intestacy.[22] The Court, however, concluded that the intent demonstrated by the specific language used in the will was controlling.[23]

> "The rule that such a construction should be given as will, if possible, avoid intestacy, is invoked; also, the rule that the will speaks from the time of the death of the testator; and undoubtedly the intention should be sought with both rules in mind, but neither rule should be so applied as to extend the force of terms which are obviously restricted."[24]

Thus, because there were surviving siblings on each side of the family at the time of testator's death, we decline to engage in speculative application of the rule of avoiding intestacy because it would unnecessarily extend the force of the specific terms of art used in the will.

2. The Antilapse Statute

Under the current antilapse statute, "words 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

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[21] See *In re Allen Estate*, 150 Mich App 413, 417; 388 NW2d 705 (1986).

[22] *In re Bruin Estate*, 370 Mich 34, 39; 120 NW2d 752 (1963).

[23] *Id.* at 38-39 (concluding that use of the specific term "any cash" indicated that the testator did not intend to include bonds).

[24] *Id.* at 39, quoting *Williams v McKeand*, 119 Mich 507, 510; 78 NW 553 (1899).

section."[25] However, we conclude that the language of the residuary clause taken as a whole—specially taking into account the use of the three separate statements: "that survive me," "share and share alike," and "the survivor or survivors thereof"—expresses an intent to make a provision for the death of the beneficiaries in a manner contrary to that provided for in the antilapse statute.[26]

D. Conclusion

The probate court correctly construed testator's will to mean that her surviving siblings receive 50 percent of the residue, Raymond's surviving siblings receive 50 percent, and the descendants of their predeceased siblings receive nothing. Accordingly, we affirm the probate court's order.

Affirmed.

Cooper, J., concurred.

/s/ William C. Whitbeck
/s/ Jessica R. Cooper

[25] MCL 700.2603(1)(c).

[26] See *Burruss, supra* at 665 (stating that the "survivorship language in the instant case indicates" an intent contrary to the statute); see also *Holtforth, supra* at 710-711.